FARM TRANSITIONS

Chapter 4
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4.1. The Role of Estate Planning in Transition Planning

If you recall from the introduction to this handbook, there are three primary reasons farm businesses fail to successfully transition from one generation to the next:

- Inadequate estate planning
- Insufficient capitalization
- Failure to prepare the next generation properly

As discussed earlier, all three of these causes are linked, but many of the problems of a generational transfer start with the estate plan, or more frequently, the lack of one. The lack of a carefully considered and well-drafted estate plan can cause a number of problems that can either deplete much-needed farm resources or result in its complete breakup at the death of one of the founding members. If no estate plan is in place, the intestate succession rules can result in the division of farm assets among family members whose economic incentives are to simply sell them (and the best price may be offered to someone other than a farm heir). If there is a plan but it has not been discussed with the family and some members wish to contest it, the ensuing litigation can drain resources from the estate and “freeze” assets that could be put to profitable use otherwise. The list of problems potentially caused by the lack of an estate plan could go on and on, but for the purposes of this workbook, some of these considerations are included in the introduction.

At this point, it is enough to say that a sound estate plan is critical to the overall transition plan. Remember – the business succession plan will work to gradually transfer control of the overall business to the next generation. That transfer will obviously require the transfer of the ownership interest held by the founding generation, and this is where the estate plan enters the picture. The estate plan provides the procedure by which the ownership interests held by the founding generation will be transferred either while its members are alive (through lifetime gifts) or after they have passed away (through the estate). Thus, depending on the amount of ownership retained by the founders, the estate plan can be a tremendously important element of the overall farm transition plan.

The following subsections will discuss several of the tools important to every estate plan.

4.2. Essential Estate Planning Tools

When estate plans are discussed, almost everyone’s minds jump instantly to the will. While the will is unquestionably a tremendously important estate planning tool, there are a number of other tools that are vital to managing a number of business and health matters that can arise with the estate.

4.2.1. Guardian Nominations

Young people often think estate planning is not a concern for them. However, anyone with children under the age of 18 should consider how to provide for the care of those children until they achieve the age of 18 or older.

One of the most critical pieces for parents to have is a guardian nomination for minor children. This document specifies who the parents would like to have guardianship of their children in the event both parents die. Courts pay a great deal of deference to this instrument when the time comes to grant legal custody of the
children. In Oklahoma, as well as several other states, the court must approve the guardian’s appointment and transfer custody of the child to the guardian. The guardianship nomination may be a separate document, but it can also be incorporated into the wills of the parents (and often is).

Selecting a guardian for one’s children (commonly called a “godparent”) is obviously a tremendously important decision. Parents should discuss the matter thoroughly, considering a number of factors. If grandparents are considered, will they be able to handle the challenges of caring for a young child as they themselves continue to age? What is to happen if the grandparents should pass away before the child is 18 years old? If other family members or non-family members are considered, will they raise the child in accordance with the parent’s values, child-raising philosophy and religious beliefs? Will they be close enough geographically to allow other family members to visit for holidays and other special events in the child’s life? Should the nominee be married or single? Does the nominee already have children, and what if they eventually have more? Is the nominee capable of caring for the number of children you have?

It is critical to discuss the potential guardianship nomination with the nominee(s). While being nominated as a guardian may be a wonderful honor for the nominee, they may also feel they are not comfortable with the nomination. It is far better to learn this prior to enacting the nomination than after custody as already been transferred. Also, consider nominating successor guardians – someone who will be nominated as guardian in case something should happen to the first nominee.

Another important consideration is whether the estate plan will provide any resources to the guardian for the care of the child. While it is common for the child to receive property from the parents’ estates, this property is often held for distribution to the child when he or she turns 18. Additionally, there is no legal requirement for the guardian to support the child out of his or her own pocket. Finally, what about providing funds for college or other educational costs of the child? Parents should consider granting some property of the estate to the guardians or the creation of a “minor maintenance trust” to provide financial resources for the care of the child. There are a number of ways this can be achieved, ranging from a direct gift to the guardian to the creation of a maintenance or special needs trust for the child that makes payments to the guardian. You may also wish to consider whether there should be any compensation directly to the guardian for their efforts.

Lastly, it is important that guardianship nominations be kept somewhere they are readily accessible to the nominee and to the parents’ attorney. While many such important documents are kept in a safe deposit box, access to the box will be restricted in the event of the parents’ death. This can cause problems in getting children into the care of the guardian as quickly as possible. Consider sharing copies of the guardianship nomination with the nominee and with your attorney.

### 4.2.2. Beneficiary Designations

Many investment accounts and employee benefit programs include a provision in their contracts allowing you to designate a beneficiary to receive the value of the investment or other instrument if you should pass away. A “payable on death” (“POD”) provision on a bank account is another example. These provisions, called

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**Factors to consider in a guardianship nomination**

- The guardian or guardians
  - Age of the guardian
  - Martial status
  - Current number of children (both yours and theirs)
  - Child raising philosophy
  - Values
  - Religious beliefs
  - Location / proximity to other family

- Who could be a successor guardian

- Financial support
  - Funds for care of child
  - Funds for educational expenses
  - Compensation to the guardian

- Arrangements for access to guardian nomination documents

- Discuss guardian nomination with nominees
“beneficiary designations” are inexpensive, convenient, and effective estate planning tools that are frequently overlooked. Because the beneficiary designations are legally binding contractual obligations, the items they transfer at death do not have to go through the probate process.

If you hold any investment accounts, bank accounts, or benefit plans, ask the institution managing the asset if it has a beneficiary designation. If so, you can use the beneficiary designations to specify a recipient of the asset upon your death. Some designations also allow for “contingent beneficiaries” to be designated. For example, a spouse could be named as a primary beneficiary, and a child named as a contingent beneficiary. In this case, if your spouse dies before you, the child then becomes the primary beneficiary.

Consider what is the best use of the asset. To best achieve the overall goals of your estate plan, who (or what) should receive the asset? If you are trying to arrive at an equitable treatment of off-farm and on-farm heirs, would it be better to designate the asset to an off-farm heir in favor of granting more farm-related assets to the on-farm heir. Since investment accounts may be more liquid (that is, quickly converted to cash with little or no loss in value), would it be better to use them for the payment of estate debts or to give them directly to a specific recipient? There is no right or wrong answer to this question – it is simply one consideration in your overall estate plan.

It is important that you keep records of your beneficiary designations and update them if there are changes in your life. For example, if you execute a beneficiary designation while single and then marry, you may want to update the designation. Any significant change such as marriage, divorce, and the birth or death of a family member means a review of beneficiary designations is wise. Also, if your investment or benefit plan is provided by an employer and you change jobs or retire, you should determine what if any benefits of the asset are still available and adjust both the beneficiary designations and your overall estate plan accordingly.

Since beneficiary designations affect the distribution of property at death, your beneficiary designations need to be carefully coordinated with your overall estate plan to make sure the same asset is not dealt with twice, such as attempting to distribute the asset through both a beneficiary designation and a will or trust.

**4.2.3. Power of Attorney**

Many people have heard of a “power of attorney” but few understand what it is or how it works. Think about a power of attorney in this way: If you need someone to represent your legal rights in court, you hire an “attorney at law” and give them the power to act on your behalf; in the legal matter, they act as you and with your authority. In a similar way, if you need someone to represent you in some other capacity, you can appoint an “attorney in fact” – a person who can act as you and with your authority outside the courtroom.

The power of attorney is, as the name implies, an important power. Essentially, someone who holds your power of attorney is treated as if they were indeed you. This means that, depending on the document that granted them the power, they can execute contracts, buy or sell property, or make payments in your name. Because this is such a significant amount of power for someone to have over the affairs of someone else, you must always carefully monitor whoever you have given this power to make sure they are using it in accordance with your wishes. For this reason, the law automatically revokes the power if the person that granted it becomes

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<th>Factors to consider in beneficiary designations</th>
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<td>Does the investment / benefit plan asset offer beneficiary designations?</td>
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<td>Are primary and contingent beneficiary designations available?</td>
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<td>Where does this asset fit in my estate plan?</td>
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<td>- Funds for care of child</td>
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<td>- Death of a family member</td>
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<td>- Change of job (in the event of employer-provided benefit)</td>
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mentally incompetent (that is, the person is deemed mentally incompetent by a physician or is in some other way incapable of understanding what is going on around them).

If a person is deemed mentally incompetent, they are legally incapable of forming contracts or engaging in other business transactions, which frequently means the person’s family must to the court and ask for a guardian to be appointed\(^1\) for the incapacitated person. This process can take time, requires the testimony of physician, and may result in the appointment of a guardian other than the one the person would have chosen for themselves. As an alternative, a “durable” power of attorney can be used. Unlike ordinary powers of attorney, a durable power of attorney remains valid even if the person granting it is deemed mentally incompetent. If the power of attorney is comprehensive enough, it may eliminate the need to go through the guardianship procedure. Some people choose to create a power of attorney that is also “springing” which means that it is only activated (“springing” into existence) when the person is deemed mentally incompetent. This means that the power does not exist while the maker is competent, reducing the opportunity for the person receiving the power to do anything against the wishes of the person granting it.

Powers of attorney can be tailored to give the recipient very specific or very broad powers. For example, if you are traveling out of the country but need someone to sign a real estate contract in your absence, you could create a power of attorney giving the recipient only the power to sign that specific contract. Alternatively, if you want to avoid the need for a guardianship in the event you are deemed mentally incompetent, you could grant a durable power of attorney granting the recipient the power to take care of any and all of your business affairs.

Oklahoma and several other states also recognize a health care power of attorney (sometimes called a health care proxy). This power of attorney gives the recipient the power to make health care decisions for the person granting the power if they are deemed mentally incompetent or cannot communicate. This type of power of attorney is discussed in section 4.2.4.1. below regarding advance directives for healthcare.

Clearly, a power of attorney is a significant tool, and you should consider carefully who you would give such a power. Can you trust the person to act in accordance with your wishes? Are they under any financial or emotional stress that could influence their actions? Do they understand your affairs sufficiently to allow them to make quick decisions in your best interest?

As with all the other tools we have discussed, if you grant a power of attorney, you should also consider having contingent powers of attorney should the primary recipient of the power be unable or unwilling to carry out their duties. Additionally, as discussed below, a durable power of attorney may need to reference an advance directive for healthcare or other healthcare documents if they have also been executed.

### 4.2.4. Advanced Directive for Health Care

As advancements in medicine allow us to live longer and longer lives, we also see an increased number of cases where patients may not have the mental capacity or communications ability to make and communicate decisions regarding their healthcare. Though it is a difficult topic, it is important to consider what you would like to be done with respect to your healthcare options and even what kind of life-sustaining measures you would, or would not, like to have provided in certain medical situations.

Oklahoma recognizes a document called the Advance Directive for Health Care (“advance directive”) as a legal tool for people to make their wishes for a number of healthcare situations known. The advance directive can be drafted a number of different ways. One form provided by the Oklahoma Bar Association, incorporates three parts; a health care proxy (sometimes also called a “health care power of attorney”), a living will, and an organ donation directive.

### 4.2.4.1. Health Care Proxy

A health care proxy is the legal designation of someone to make health care decisions for you if you are
diagnosed as incapable of making decisions regarding your medical treatment. This means that physicians can communicate information regarding diagnoses, possible treatments, and the risks of those treatments to the person holding the power of attorney, and that the person can choose a course of treatment as if they were the patient themselves.

Importantly, health care powers of attorney need to be compliant with the Health Insurance Portability and Accountability Act ("HIPAA," which contains provisions about privacy of patient information) so physicians can share patient information with the person holding the healthcare power of attorney.

In many cases, people may choose a close family member such as a spouse or child to serve as their health care proxy. There are many reasons a family member can be a good choice for a proxy – a family member is likely to be familiar with your values and desires with regard to health care issues, they are often in frequent communication with you, and they may live nearby, making it easier to reach them in an emergency. However, also consider that your health care proxy may have to make some extremely difficult decisions with literally life-and-death implications. Will your family member be able to make those decisions, potentially quickly, and understanding that their duty is to carry out your wishes rather than their own?

Another consideration that often arises with health care proxies is the desire not to show “favoritism” toward one child, resulting in two or more children being appointed as “co-proxies.” Physicians and attorneys have agreed that the appointment of co-proxies can be extremely problematic. First, if co-proxies have been appointed, the attending physician must contact all the co-proxies every time a medical decision must be made. Second, if the co-proxies disagree on how to proceed, medical decisions are delayed with potentially devastating results; at the very least, the physician may have to seek a court order to settle the dispute.

Before contacting the person you wish to serve as your health care proxy, think carefully about your feelings, values, and beliefs about the type of medical care you would like to receive in a broad range of circumstances. Once you have an idea about these concepts, consider who you would want to represent you in making medical decisions should you be unable to make them for yourself. Communicate those feelings, values, and beliefs about a broad range of medical situations with your potential proxy. It may be useful to write a statement of these ideas to provide to your health care proxy.
When it comes time to select a proxy, are you confident the proxy will act in accordance with those feelings, values, and beliefs, even if they conflict with their own? Is there someone you would like to serve as health care proxy if your first choice is unable or unwilling to carry out their duties?

4.2.4.2. Living Will

A “living will” expresses your wishes as to whether you want to receive life-sustaining treatment⁴ in the event of a “terminal condition,”⁴⁴ if you become “persistently unconscious”⁵⁵ or have an “end-stage condition.”⁶⁶ In addition to these three conditions, you can also specify other conditions in which the living will should apply.

Clearly, thinking about when you do and do not want life-sustaining treatment is difficult, and many people do not execute living wills simply because they do not wish to contemplate what they must contemplate in order to do so. However, failing to execute a living will creates a risk your family will have to make such decisions for you, placing an immense burden on them.

As with the health care proxy, the first step in preparing the living will is to think about your values, feelings, and beliefs with regard to when you would want to receive life-sustaining treatment, and when you would not. Additionally, are there certain types of life-sustaining treatment you would want to receive, but others that you would not? It is important to note that whatever treatments

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**Considerations for selecting a health care proxy**

Your values, feelings and beliefs regarding health care issues

- How does your faith impact decisions for certain treatments?
- How do your values impact decisions for certain treatments?
- How do you feel about certain treatments?
- What are your feelings about how to balance the risk of certain treatments (including death) with the potential benefits?
- Would you be willing to receive certain treatments given the risks of potential long-term effects such as loss of mobility, loss or impairment of use of a limb, loss or impairment of a sense (sight, hearing, etc.), continuous use of medical support such as kidney dialysis or oxygen, etc.?
- Have you prepared a written statement of values, feelings, and beliefs and provided the statement to the person you wish to be your proxy?

Choosing your healthcare proxy

- Have you fully and carefully communicated your values, feelings, and beliefs to the person serving as your proxy?
- Is the person willing to accept the responsibility of serving as health care proxy?
- Are you confident the proxy will act in accordance with your feelings, values, and beliefs, even if they conflict with their own?
- Is the person able to make critical decisions quickly?
- Will the person be readily accessible in an emergency?
- Can they travel quickly to be present with you if necessary?
- Have you provided a copy of the advance directive to the proxy?

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**Considerations for Your Living Will**

Would you want life-sustaining treatments if suffering from the following conditions?

- A terminal condition
- A persistently unconscious condition
- An end-stage condition

What life-sustaining measures would you want and which life-sustaining measures would you not want?

- Cardiac or respiratory resuscitation
- Artificially administered hydration and nutrition (i.e. food and water provided through a feeding tube when you are unable to take them on your own orally)
- Kidney dialysis
- Antibiotics
- Curative procedures
- Diagnostic procedures and surgeries
you do or do not want, the presumption is to give patients palliative (pain management) care to make them as comfortable as possible.

As with all other documents discussed in this section, it is important to discuss your living will with your family so they are aware of it and of the wishes it expresses. Physicians are required by law to follow the directions given in a properly-executed living will, and if they are unwilling or unable to do so, they must transfer the patient to the care of another physician or health care provider willing to comply with the living will. Nevertheless, it is still important that your family understand your wishes to avoid unnecessary conflict or potential delays in implementing those wishes.

4.2.4.3. Organ Donation

Your choice to be an organ donor can be designated on your Oklahoma driver’s license; however, you can make a more detailed designation as to specific uses of your organs or specific organs that you wish to donate in your advance directive in a section for “anatomical gifts.”

4.2.4.4. Executing and Filing the Advance Directive

Executing an advance directive is obviously a tremendously important legal action. Much as with a will, advance directives have numerous execution requirements to be made legally valid. This serves to both reduce the opportunity for mistake or fraud, and to remind the person executing the advance directive of how important their act is. To have legal effect, the advance directive must be signed by the person making it (the “declarant”). The signature and the advance directive must be witnessed by two people eighteen years of age or older who are not related to the declarant.

Copies of the advance directive should be provided to the person who will be serving as the health care proxy (and any successor proxies) and to your primary care physician. If there is a hospital to which you would likely be taken in a medical emergency, provide the hospital with a copy of the advance directive. Many hospitals will ask if you have an advance directive as part of your admission procedures; be sure to have a copy of the directive with you in such circumstances. It is also a good idea to keep a record of who holds copies of your advance directive; in the event you wish to make changes, you will need to collect the copies of the old directive so they can be destroyed (this minimizes the risk of conflicting copies of your advance directive).

4.3. Land Titles

Land titles are often used as an estate planning tool, since they can (in some instances), serve to transfer an ownership right in real property to someone else at death. In this subsection, we will discuss four title forms and their impacts on estate planning: the joint tenancy with right of survivorship, tenancy in common, life estate, and the transfer on death deed.
4.3.1. Joint Tenancy with Right of Survivorship

Joint tenancy with right of survivorship (sometimes called simply “joint tenancy” or abbreviated JTWROS) is a form of real property ownership between two or more people. Though the joint tenants do not have to be a husband and wife, spouses often choose this form of property ownership. Parents may also place land into a joint tenancy with a child. Joint tenants do not have to be related, though.

The unique aspect of joint tenancy that makes it appealing for some people as an estate planning tool is its “survivorship” function. Whenever one joint tenant dies, his or her share of the property is redistributed among the surviving joint tenants. For example, if a husband and wife own property in joint tenancy (meaning each currently owns a 1/2 interest in the property), and the husband dies, his share is distributed to the wife as the surviving joint tenant. The wife now owns the entire interest in the property by herself. Consider another example with three siblings – meaning each sibling holds a 1/3 interest in the property. Upon the death of one sibling, their interest would be redistributed to the surviving joint tenants, meaning each now has a ½ interest. Upon the death of a second sibling, the remaining sibling would hold the entire interest in the property alone.

Since the law applying to land titles operates to transfer ownership of the decedent’s (person who passed away) property, land in joint tenancy does not have to pass through probate. When one joint tenant has passed away, the survivor(s) must file a certified copy of the death certificate and an affidavit with the county clerk in the county where the real property is located. The affidavit must be notarized and must include the legal description of the real property, the book and page of the joint tenancy deed in the clerk’s records, the date of death of the deceased joint tenant, and a statement that the deceased tenant is the same person identified by the death certificate.

Joint tenancy can be a quick and inexpensive tool to transfer ownership of property at death. There are potential consequences to sharing property ownership in joint tenancy, however. First, a joint tenant can sell or mortgage their portion of the property, which means the other joint tenant can suddenly find themselves with a new fellow tenant. Second, property held in joint tenancy cannot be transferred by will; the survivorship feature of the property already defines who will receive the property when a joint tenant dies. This means that care must be taken not to create conflicts between the provisions of your will and the joint tenancy regarding who is to receive property. Finally, care must be taken not to unintentionally disinherit a family member through the use of joint tenancy. Consider the following example. Ricky and Lucy, husband and wife, have a child, Junior. Ricky then dies, leaving Lucy with ownership of the entire interest in the property. Lucy then remarries to Oscar, and they place ownership of the property in joint tenancy among themselves. This means that Junior is effectively barred from inheriting the property.

4.3.2 Tenancy in Common

Tenancy in common is like joint tenancy with right of survivorship in that it is a way that multiple parties can own the same piece of property simultaneously. However, it is unlike joint tenancy in a crucial way – it does not have a survivorship feature. In other words, when one tenant in common dies, the other tenants do not automatically receive a share of his or her interest. Each share of a tenancy in common is somewhat separate in that each tenant is free to sell, mortgage, or will their share as they choose.

Since there is no survivorship feature to a tenancy in common, it does not really serve as an estate planning tool itself. However, it is mentioned in this section because many people create a tenancy in common by their will, often perhaps unintentionally. Any time property is granted to multiple parties simultaneously, with no other specifications, the law presumes a tenancy in common is created. For example, if Mike dies and leaves a piece of real property “to Greg, Peter, and Bobby” then Greg, Peter, and Bobby have, by default, become tenants in common and each hold a 1/3 share of the property. This may be a perfectly acceptable arrangement, but it should be noted that each of the tenants could sell their interest to a non-related party. Alternatively, if the tenants in common remain together, they must jointly manage the property and handle its revenues and
expenses in proportion to their ownership shares. This can be problematic if the tenants have different views or economic incentives.

### 4.3.3 Life Estate

In a life estate, ownership of real property is given to one person who has the right to possess and use the property for as long as a “measuring life” is alive. Once that measuring life ends, title to the property is then transferred to another party, who receives what is called a “remainder” interest (the person receiving the remainder interest is often called a “remainderman”). For example, Tom could create a life estate in a piece of property for himself and make himself the measuring life, and then create a remainder in Anna. The result of this life estate would be that Tom can possess and use the property for as long as he is alive, and when he dies, the property would then belong to Anna. Note that the measuring life could be someone else; Tom could have created a transfer with a third party as the measuring life. In that case, Tom would get the possession and use of the property for as long as the third party was alive, and upon the death of that third party, Anna would receive the property.

As with a joint tenancy, the title itself creates a transfer of property at death, meaning the property does not have to pass through probate. However, some people chose not to use the life estate as an estate planning tool itself, but rather use it through a will. For example, Tom could execute a will stating that Anna receives a life estate in the real property and that Anna is the measuring life, while giving a remainder to Rob. In this case, Tom’s will would have to go through probate to create the life estate and remainder.

Some people choose the life estate as an alternative to the joint tenancy to avoid creating a form of co-tenancy while they are alive. If Tom creates a life estate in himself and a remainder in Anna, he would not have to share possession and use of the property while he is alive, as would be the case in a joint tenancy with right of survivorship.

Others chose to use a life estate in their will (rather than in life) to give property to one party and then to have that property transferred to another property at the death of the first party. While some people choosing this strategy may think that this restricts the property for at least one generation (that is, they assume the property cannot be transferred until the life estate and remainderman are both deceased), this is not the case – both the life estate holder and the remainderman can sell or otherwise transfer their interests in the property if they choose.

Whenever a life estate is created, it creates a number of rights in the holder of the remainder. If the holder of the remainder sees that the person with the life estate is damaging the property in such a way that it will significantly diminish the value of the property (this is called “waste”) when the remainderman receives it, he or she can sue the life estate holder to stop the waste.

Holding property in a life estate can also add some complexity to the management of the property. Since the life estate holder’s interest goes away upon the death of the measuring life, executing a mortgage, lease, or other transaction with respect to the life estate property will often mean the lender or lessee will want to secure the consent of both the life estate holder and the remainderman.

In order to complete the transfer of title upon the death of the measuring life, the remainderman must file a certified copy of the death certificate and an affidavit with the county clerk in the county where the real property is located. The affidavit must be notarized and must include the legal description of the real property, the book and page of the joint tenancy deed in the clerk’s records, the date of death of the deceased joint tenant, and a statement that the deceased tenant is the same person identified by the death certificate.

### 4.3.4. Transfer on Death Deeds

The “Transfer on Death Deed” (or “TODD”) is a relatively new instrument in Oklahoma, authorized by
a 2008 statute. The TODD was meant to deal with a problem commonly referred to as a “desk drawer deed,” in which the owner of property would execute a deed to another party but would not record it in the county clerk’s office; they would instead store the will somewhere (such as a desk drawer) and instruct the intended recipient to retrieve the deed and record it upon their death. This was intended to keep complete control of the property with the owner until death, and to avoid probate. The problem with this scenario is that the transfer carried out in this fashion would be invalid. With a TODD, however, complete control of the property can be retained by the owner until death, and the property can still be transferred without having to pass through probate.

In many ways, a TODD is much like any other deed in that it must specify the current owner of the property, the transfer on death recipient, and a legal description of the property. Importantly, the deed must be recorded in the office of the county clerk for the county in which the property is located before the death of the owner. Once the owner has died, the person named in the TODD must follow basically the same procedure as used for joint tenancies and life estates: they must file a certified copy of the death certificate and an affidavit with the county clerk in the county where the real property is located. The affidavit must be notarized and must include the legal description of the real property, the book and page of the joint tenancy deed in the clerk’s records, the date of death of the deceased joint tenant, and a statement that the deceased tenant is the same person identified by the death certificate. The affidavit used for the TODD must also state whether the person claiming the interest in the property was married to the person issuing the deed at the time of death.

The TODD has a number of advantages, primarily that it leaves complete ownership of the property with the owner until his or her death. If the owner of the property changes his or her mind and wants to change the recipient of the property under the TODD, or to simply revoke it entirely, he or she only has to file a revocation in the county clerk’s office where the TODD was recorded. Another important advantage is that the property transferred by the TODD need not go through the probate process. At the same time, though, there are other considerations to be weighed before choosing a TODD to transfer title to real property. Since the TODD is a relatively new instrument, the law surrounding it continues to evolve. In fact, the statute creating itself was significantly modified in 2011. Similarly, title lawyers, abstract companies, and title insurance companies are still working to build standards around the TODD-based transfer. Also, property transferred by a TODD comes with “all strings attached,” meaning the person receiving the property takes it with all mortgages, liens, easements, and other encumbrances still attached to the property. Lastly, as with all other estate planning tools, a TODD must be carefully coordinated with other tools to make sure duplicate or conflicting transfers of the property in question are not made.

4.4. Wills

A will may be the first thing that comes to mind when a person thinks about “estate planning.” Wills are probably the best-known estate planning tool, and most people understand at least in part what it is and how it works.

A will is a set of instructions for how to distribute a person’s property upon their death. While this sounds rather simple, it is also immensely important. Given this importance, the law imposes a number of requirements that must be followed for a will to have any legal effect when its maker – called the “testator” – dies.

4.4.1. Requirements for Executing a Will

To make a will, the testator must be of legal age (18 years or older), must be mentally competent, and must be free from fraud, duress, or undue influence which might affect will provisions.

Mental competence is somewhat difficult to define. Generally, courts consider factors such as whether the testator recognizes the existence of individuals who would normally be named as heirs (such as a spouse and
children), whether the testator has a reasonable understanding of what property he or she owns, and whether the testator is capable of formulating some plan as to how the estate property should be distributed. There is no requirement that the plan take any particular form or that typical heirs be included as long as it appears that there was some plan and that these family members were not accidently excluded. Odd behavior and even some mental illnesses may not necessarily invalidate a will if the individual was lucid when the will was written or if the mental problems did not affect the distribution in the will. If there is doubt about the mental competence of an individual who wants to make a will, it may be desirable to obtain a court determination of the individual’s competency. Further, this is why many attorneys will make a video recording of the execution of the will that includes a brief examination of the testator to confirm he or she demonstrates the mental clarity necessary to show competence to execute the will.

Even if a person is mentally competent, he or she might still be subject to other factors impairing their ability to execute a valid will. These factors are frequently categorized as undue influence, fraud, and mistake. Undue influence exists when someone exerts influence on the testator causing them to make a provision in the will (or an entire will) they would not have made were it not for the influence. Fraud occurs when someone causes the testator to execute a will by telling them it is some other document, or when someone lies to the testator, causing them to make a different provision in the will (or an entire will) different than they would have made had they known the truth. Mistake occurs when the testator accidentally executes the wrong document or makes an error with respect to the description of a piece of property or a person.

Assuming the testator is mentally competent and not subject to undue influence, fraud, or mistake, he or she can then execute a will. Under Oklahoma law, there are five requirements for a will to be validly executed. The will (1) must be written, (2) signed at the bottom (“subscribed”), (3) the testator has to “acknowledge” or “publish” the will in the presence of the witnesses, (4) the signing must be in the presence of two witnesses who receive nothing under the will, and (5) the witnesses must sign the will.

First, a will must be in writing; oral instructions for how to distribute property will have no legal effect when a person dies. Television and movies have popularized the idea of a video being played at the reading of the will. While such videos are perfectly fine, it must be remembered that the video has no legal effect – only the written document can provide any legally-binding instructions on how to distribute the property of the testator.

Second, the will must be signed by the testator at the bottom. If the testator is physically incapable of signing the will, another person can sign for them so long as they do so at the instruction of the testator. To prevent fraud in the form of someone adding language to the will, the signature must appear at the very end of the will; no provision that affects the distribution of property can appear after the signature, or it will be invalidated.

Third, the testator must “acknowledge” (sometimes called “publish”) the will in the presence of two witnesses. This simply means the testator states to the witnesses the document he or she executed was his will. This demonstrates the testator understands his or her actions.

Fourth, two witnesses are required to witness the signature and acknowledgement of the will. The witnesses must be over the age of 18 and legally competent to testify in a court of law. These witnesses must be “disinterested” in the will, which means they do not receive any property in the will. If the witnesses are mentioned in the will, they run the risk of losing anything they would otherwise receive under it. The purpose of this requirement is to ensure the witnesses are unbiased and are not affected by the terms of

**Requirements for will execution:**

1. The will must be written
2. The will must be signed at the bottom (“subscribed”),
3. The testator must to “acknowledge” or “publish” the will in the presence of the witnesses,
4. The signing must be in the presence of two witnesses who receive nothing under the will, and
5. The witnesses must sign the will.
the will itself. Incidentally, this requirement is also one of the hazards of fill-in-the-blank or form wills; often, someone using such a form will be doing so at home and will ask those nearby – frequently family members – to serve as witnesses. If they do so, the most the family member could inherit under the will is what they would receive under the intestate succession statutes.

Fifth, the testator must request the witnesses to sign the will. This is called “attesting” to the will, meaning that the witnesses are testifying by their signatures as to observing the fulfillment of the will execution requirements.

Many times, a sixth step will be added to make a will “self-proving.” The self-proving clause is a statement, signed by the witnesses and then notarized, which indicates that the will was properly executed and signed. The use of this clause at the end of the will avoids the necessity of having the witnesses appear in court when the will is probated as long as the will is not contested.

It is possible to execute a will without witnesses, if the will is written, dated and signed entirely in the testator’s own handwriting. Such wills, called “holographic wills,” are valid because the handwriting helps to ensure that the document represents the will of the testator. However, the law is very strict concerning how such wills are created. The will may be invalidated if any portion of the will is typed or not written in the testator’s handwriting. Generally, a formally signed and witnessed will, drafted by an attorney, is recommended. Because oral and holographic wills are subject to strict scrutiny by courts, they create risks which should be avoided. Additionally, since they generally do not involve consultation with an attorney, problems of interpretation and failure to understand the legal consequences of will provisions may result.

4.4.2. The Probate Process

Making a legally-valid will is only one step in the process. For a will to have any legal effect on the distribution of the testator’s property, it has to go through the probate process once the testator is deceased. The probate process is a legal proceeding in which the court validates the will and empowers the executor to carry out the will’s instructions.

The first step in the probate process is the filing of a probate case in the district court for the county in which the testator’s permanent home was located. Oklahoma law requires individuals who have possession of a will to deliver the will to the probate court or to the executor named in the will within 30 days after they learn the testator is dead. Once the will has been presented to the court, it will validate the will by confirming the testator had the necessary mental capacity to execute the will and that the requirements for the will’s execution were satisfied. This step underscores the importance of self-proving wills, as such wills do not require the witnesses to the will to appear before the court. It is also at this point that those contesting the will may bring their objections (will contests are discussed below).

Next, the court will appoint an executor for the probate. The executor is the person who will act as the representative for the probate estate (that is, all the property handled by the will). The executor’s first task is to create an inventory of all the property owned by the testator at the time he or she died. They must also determine all the debtors of the estate (those that owed money to the testator) and the creditors of the estate (those to whom the testator owed money). Finally, the executor must also preserve and protect the property of the estate until the probate is concluded.

Once the inventory and identification of creditors and debtors is made, the claims of the creditors against the estate and the claims of the estate against the debtors must be settled. Notice of the probate must be mailed to all creditors, and notice must also be posted in the county’s newspaper of record for two consecutive weeks. Any creditors having claims against the property of the estate must make those claims to the court, which will either validate or invalidate those claims. If a creditor’s claim is invalidated, it is essentially void. Also, if a creditor fails to bring their claim to the court for validation, their claim is also invalidated. It should be noted
the validation process is an important advantage of the probate process in that it can clear some liabilities of the estate that could hang over it otherwise. Conversely, if the will were not probated, any heirs who took assets would receive such assets subject to any liens or other encumbrances caused by the debts of the decedent.

Once the creditors of the estate have been handled, the executor submits a final inventory of the estate to the court, along with an accounting. The accounting is essentially a record of all the transactions made between the initial inventory and final inventory. Its purpose is to demonstrate to the court and to those receiving property under the will that all transactions and property have been accounted for, and that there has been no wrongdoing by the executor. Upon approval of the final inventory and accounting, the court will issue a probate decree that allocates the property in accordance with the instructions of the will. This decree is a crucial product of the probate process as it empowers the parties receiving property under the will to have title to that property transferred to them. For example, if someone receives real property under the will, they must present the decree to the county clerk in which the property is located in order to have the property re-titled in their name.

The probate process is the subject of much discussion in estate planning and is often cited by attorneys as one of the reasons people should choose estate planning tools other than wills. Before discussing the potential consequences of the probate process, it is important to underscore that it is not optional if a testator has executed a will—the will cannot have any legal effect without the probate process. In many cases, family members wanting to avoid probate will simply act as though they have title to the property given to them under the will, but in fact no title can be transferred without the probate process. This can create title problems for years or even decades after the death of the decedent.

To be sure, the probate process involves time and expense. It requires certain windows of time to be held open for matters such as allowing creditors to file their claims. This means that the probate process must take several months at best to conclude. Since there are a number of legal filings required by the probate process, it will also require significant services from a licensed attorney. The time involved also requires the executor to preserve and maintain the estate, which may involve additional expenses that must be deducted from the estate.

As a court proceeding, the filings made in a probate case are open records, meaning that anyone can access the filings such as the inventory and accountings. Some people may not be comfortable with the public having access to such information.

Another potential complication of the probate process is the limitation of the probate court’s jurisdiction. An Oklahoma court only has jurisdiction over property located within the physical borders of the state of Oklahoma. Thus, if a testator owned property in Oklahoma and another state, the will must be probated both in Oklahoma and in the other state.

While most people would regard the previous considerations as disadvantages to the probate process, there are also protections created by the probate process that could be regarded as important advantages. First, as mentioned above, probate cuts off the claims of creditors if they are not filed within a limited time or are invalidated. This can eliminate some liabilities of the testator, and can also be an important protection if the testator was engaged in business or professional activities that might have created potential future liabilities. Second, the probate process can allow for the authorization of a family allowance for the support of the testator’s surviving spouse and minor children while the probate is ongoing. This may be useful if estate debts are approximately equal to the total value of the estate. Third, clear title to assets owned by the decedent alone or in some forms of co-tenancy (such as tenancy in common) may not be obtained unless some sort of estate administration is conducted. This is particularly important in the case of real property, bank accounts, and vehicles with title registrations.
**4.4.3. Will Contests**

If someone is unhappy with what he or she has received under a will, they may contest the will. Note, though, that “I’m unhappy with what I got under the will” is not a grounds in and of itself to contest a will – testators generally have the right to grant whatever property they want to whomever they want. Rather, someone contesting a will must successfully prove that there was some sort of flaw in the process of enacting the will. Generally, this will come down to proving that there was something that interfered with the testator’s ability to prepare the will (such as lack of mental capacity, undue influence, duress, or fraud, as discussed above) or the will was improperly executed (for example, the witnesses received something under the will, the will was not properly attested, etc.).

The effect of successfully contesting the will is that either a portion of the will or the entire will is invalidated, which means either part or all of the testator’s estate will pass to his or her heirs according to the intestate succession laws. This means the only people who have legal standing to contest a will are those who would be entitled to receive something from the testator’s estate under the intestate succession laws, such as a surviving spouse, children, siblings, parents, etc.

To discourage anyone from pursuing a will contest, some testators will include a “no-contest” clause in the will. This clause states that anyone who contests the will is automatically disinherited. Thus, if anyone initiates an unsuccessful will contest, they will receive nothing under the testator’s will. It should be noted, though, that if the will contest is successful, it negates not only the will but also its no contest clause. Additionally, the no-contest clause cannot defeat certain statutory protections for family members like surviving spouses.\(^\text{13}\)

While no-contest clauses can discourage heirs from contesting the will, experience suggests the better course simply may be to communicate with your family about the goals and objectives you seek to accomplish with your will. Human nature leads people to react negatively to some surprises; if your family members understand your intentions and have had a chance to express themselves (as discussed in Section 2 of this workbook), they may be much less likely to protest when it is time for your estate plan to be implemented.

**4.4.4. Considerations in Drafting Your Will**

A whole workbook could be written about the considerations you should weigh in writing your will. This discussion will cover some of the most important points. Remember to always talk through all considerations with an experienced estate planning attorney.

**4.4.4.1. Inventory**

The importance of an inventory has already been covered several times in this workbook, but it is a point worth repeating here. Obviously, a very thorough inventory of all your property is a critical starting point for crafting your will, as you need to carefully coordinate your will with all of your other transition planning tools in distributing all your property. However, you also need to consider other elements in this inventory, such as people. It may seem odd to inventory people, but you need to create a list of everyone in your family to make sure no one is unintentionally omitted.

One mistake sometimes made is to fail to include one’s child in the will. This can arise in two situations: first, when someone makes a will and then has a child afterward, or when someone apparently unintentionally leaves a child out of the will. If the child was born after the execution of the will, Oklahoma law provides the child with the share of the testator’s estate they would have received under the intestate succession statutes. If it appears the child was unintentionally omitted (that is, there is simply no reference anywhere within the will as to the child), the same provisions hold as for a child born after the will.
If someone wants to disinherit a child, they must explicitly mention the child in the will and state they are to receive nothing. Otherwise, the executor and the probate court are left to determine whether the testator intentionally or unintentionally omitted the child.

You should also include anyone or any entity who is not a family member that will receive property under the will.

Lastly, you will also need to create an inventory of important documents to make it easier for your family to locate those documents in the event of your passing.

4.4.4.2. Executor

As discussed above in subsection 4.4. regarding the probate process, the executor is the person who represents the estate in the probate process and is responsible for preserving the value of the estate until it is distributed.

Since the executor has to maintain the estate until the probate is completed – and the process may take a considerable amount of time – it is important that the executor have the knowledge needed to properly maintain the assets of the estate. If the bulk of the estate consists of farm assets, the executor needs to have sufficient knowledge and/or experience to successfully manage a farm operation. He or she should also be familiar with your particular operation. It may be advisable to spend some time “training” your executor to make sure they can successfully manage not only any farm operation, but your particular farm operation.

Since the executor is charged with protecting the interests of everyone who will receive property under the will, the law considers the executor a “fiduciary,” which means they are held to the highest standard of care in their actions and must protect the interests of the people receiving property under the will even if that means placing their own interests after them. As a result, those who will receive property under the will watch the actions of the executor with extreme scrutiny. The actions of the executor may be challenged if a potential heir feels he or she has not acted in the heir’s best interest. These challenges can be stressful for the executor and can drain resources from the estate.

Since the executor is a fiduciary and is, at least for some time, entrusted with managing property that will eventually be given to others, the default under Oklahoma law is to require the executor to post a bond with the probate court to ensure they properly fulfill their duties. While this bond can provide additional protection for the potential heirs, it can also increase the costs of the probate. As a result, many people include a provision in the will to waive the executor’s bond requirement.

Because of the challenges faced by the executor, you may want to compensate the executor with a fee. If so, the fee needs to be carefully described in the will, as the fee itself may be challenged by heirs.

What if the person you have selected as an executor is unable or unwilling to fulfill their duties, or even dies before the testator? For example, many people name their spouse as an executor, but what would happen if both spouses die at the same time, as in an automobile accident? This means there is no executor unless a “successor executor” is named in the will. A successor executor may be wise, as this provides increases the odds that someone chosen by the testator will be available to carry out their wishes.

While successor executors may be a prudent will practice, there can be challenges with naming co-executors. Frequently, a parent – not wanting to show “favoritism” to any one child – will name all of his or her children as co-executors of the will. If there will be more than one executor at a time, extraordinary caution must be taken to both spell out the specific responsibilities of each co-executor, and also to provide for what will happen if the executors cannot agree to a decision in any areas where they share responsibility. Co-executor arrangements frequently cause delay in the probate process. Consider whether it would be more prudent to have one executor with a line of successor executors. As the proverb states, “there is a reason ships only have one captain.”
As you can see from these factors, an executor faces many demands. While many testators select a family member to be an executor, there may not be a family member possessing all the qualifications to be a successful executor. The testator may also anticipate the probate process to be charged with emotion, and may worry selecting a family member could strain family relationships or be unduly stressful to the family member chosen as executor. In such cases, the testator may want to consider selecting someone outside the family as an executor, such as an attorney or accountant. This can provide an executor who is “above the fray” and may reduce the opportunity for family conflicts. If a non-family executor is chosen, some form of compensation will be likely, and the bonding requirements for the executor should also be examined.

4.4.4.3. Care of Minor Children

Subsection 4.2.1. above discussed many of the factors to consider in selecting a guardian for minor children, and all of those factors hold true if the guardianship nomination is included in the will rather than in a stand-alone document. If both you and your spouse include a guardian nomination provision in your wills, it is extremely important that the wills mirror each other in that regard to avoid potential conflicts if both of you should die at the same time.

Also as mentioned in subsection 4.2.1., you may want to make a number of provisions for your children in your will. If you want to create a fund to provide the guardian with resources for the care of your child, or if you want to place restrictions on when your child can receive the property (such as an age over 18), you may need a trust. If the trust is created in your will, it is a “testamentary trust” and there are several varieties of such trusts. The considerations surrounding your testamentary trust are discussed in more detail in subsection 4.5. below.

4.4.4.4. Handling Real Property

For many farm families, real estate makes up the largest proportion of assets, and thus the bulk of the property handled by the will may be in the form of land. While an inventory of property is hugely important, it is absolutely critical in the case of land. This is because how the land is owned dictates not only how it is handled in the will, but also if it can be handled in the will. For example, a will cannot transfer an interest in property owned in joint tenancy with right of survivorship, owned in a life estate, or subject to a transfer on death deed; the title to the land itself already dictates what happens when any of the joint tenants dies. Conversely, a tenant in common is free to will their interest in the property. In short, it is critical to know the title status of any property to be distributed by the will.

Another critical piece of information to consider is the importance of the property to the farm operation. Clearly, it is important to coordinate the distribution of property under your will with your overall farm transition plan to make sure the farm business has access to the property it needs for its operations.

Once you have gathered the necessary information about your real property, you should consider whether the will should give the property to one person or entity, or whether multiple parties will share it in some form of co-tenancy. For the factors to weigh in determining the form of co-tenancy to choose, see subsection 4.3. above.

Another factor to weigh is how long you want the recipient to hold the property. If you wish them to have it forever, they can simply receive the property outright (a title called “fee simple absolute”). If, however, you want to place restrictions on the length of ownership, a number of other title forms can be used. For example, if you want someone to receive the right to possess and use the property for as long as they are alive, but you then want to dictate who receives the property after them, you could use a life estate (discussed above). You could also place the property into a testamentary trust that gives the recipient the benefit of the property while they are alive, and then instruct the trust to distribute the property to someone else after their death.

Some testators want to attach conditions to the property, such as prohibiting the sale of the property to
someone outside the family or requiring the land only be used for farming. There are land title uses that can be created by the will (such as “fee simple determinable” or “fee simple subject to a condition subsequent”) to carry out these objectives, but it should be noted that these titles are frequently contested by heirs, and that courts examine restrictions on the transfer of property with great scrutiny. The better means of accomplishing these goals may be to place the property in some form of trust. Remember, as previously discussed, wills generally “do their job” of distributing property and then go away. Since wills are given legal force by the probate process, there is little they can do to enforce restrictions once that process is concluded.

Finally, your will should include provisions for how the executor needs to handle the scenario in which the will gives a specific piece of property to a specific person or entity, but that piece of property is either no longer in the estate (i.e. it was transferred by the testator before he or she died) or has to be used to handle a debt of the estate.

4.4.4.5. Handling Personal Property

As with land, some personal property such as vehicles and equipment may be vital to the operation of the farm operation, and the handling of these items in your will should be carefully coordinated with your overall farm transition plan. Also, remember that the probate process will be vital to the transfer of legal title to the intended recipient, since the probate decree must be presented to the appropriate state agency to accomplish the title transfer.

There may be significant assets that are equally important to the farm operation that do not have titles, such as livestock, stored crops, etc. With these items, careful descriptions and information about where they are kept should be included in the will and in the inventory documents kept for your family.

Experience has shown the value of personal property is not necessarily tied to the importance of the property in the eyes of some family members. Frequently, larger disputes arise out of who receives a family heirloom such as Grandma’s engagement ring or Grandpa’s antique tractor than financial assets of much greater monetary value. It may seem counter-intuitive, but managing disputes over personal property may “head off” much greater problems that could cause family members to challenge the overall estate plan. Thus, a discussion over what objects hold importance for which family members should be part of your family conversation, as outlined in Section 2.

If you plan to give specific items to specific people, those instructions must be included in your will; simply telling a child or grandchild that an item “is yours when I die” will not suffice, and can lead to exactly the kind of family disputes discussed above. In these cases, you may want to include a specific list of items and their recipients as an appendix to your will. If this list needs to be updated, such an update can be accomplished by executing a will amendment or “codicil” without the need to execute an entirely new will.

If you intend to allow parties to select what items of personal property you want, the procedure for how they make these selections must be specified. Some people establish an order of selection (i.e. Person 1 selects the items he or she wants, then Person 2 can chose from what remains, and so on). Others create an auction within the estate, whereby eligible persons bid on the objects they want and the funds from the auction go back into the estate for distribution in accordance to the will. In any case, establishing rules for selection can help minimize conflicts among family members.

Regardless of the value of the objects, remember that, for a number of reasons, the distribution of those objects must be handled in writing as part of the will.

Lastly, as with real property, the will should include instructions for the executor in the event that a specific gift of personal property to a specific person or entity cannot be accomplished because the item is not part of the estate or because it must be used to satisfy the debts of the estate.
4.4.4.6. Handling Debts of the Estate

One of the items people often overlook as they prepare their inventories prior to crafting their estate plan is debt. Under Oklahoma law, and the law of most other states, the debt of a testator does not go away at death. As noted above in the discussion of the probate process, creditors that do not properly present and validate their claims risk being dismissed, but those claims that are validated must be handled by the estate. If the assets of the estate are insufficient to pay off all of the validated debts, the assets distributed by the will remain burdened by the debts even in the hands of their respective recipients.

To avoid passing burdened assets to those receiving them under the will, your will should contain a plan for paying off any claims against the estate. Some people purchase life insurance specifically for this use. If this is the approach you choose, work carefully with your insurance provider and attorney to make sure the “owner” and beneficiary of the policy are properly selected to accomplish this goal, and include provisions in the will specifically identifying the policy to be used for debt payment. Also include provisions for how excess proceeds (if any) from the policy should be allocated. Other people may identify financial assets such as investment accounts, bank accounts, certificates of deposit, or other such accounts as assets to be used for the payment of debts.

You should also consider provisions for what assets should be liquidated by the executor in the event that the assets specifically identified for debt payment are not enough. These provisions need to include plans for what should happen if the executor has to sell property that has been specifically given to someone.

4.4.4.7. Wills for Married Couples

Often, married couples want wills that “mirror” each other. There is certainly nothing inherently wrong with this goal. Challenges can arise, though, when the spouse wants to include provisions in the will altering its provisions (frequently drastically reducing the amount of property given to the spouse) if they alter their will without the consent of the other spouse.

First, remember that Oklahoma law requires a surviving spouse must receive at least half of the joint industry property acquired by the couple during marriage, unless the spouse agreed to waive that right in an enforceable prenuptial agreement.

Second, each spouse has a completely independent legal right to dispose of their separate property through a will as they see fit. Put another way, spouses are free to have completely separate wills and do not have to obtain any form of consent from the other spouse to dispose of their separate property. Since there is no law that automatically connects the wills of spouses, if they want to “link” their wills, they must generally form a separate legal agreement to do so. This results in what are sometimes called “contractual wills.” Such an agreement frequently specifies what changes (if any) to one spouse’s will require the consent of the other spouse, along with the changes that will be made to the wills if such a change is made without consent. The agreement may also restrict what the surviving spouse may do with the property.

Although such contractual wills can work, they are also frequently subject to attack after the death of one spouse, and courts view such contracts with great scrutiny. A trust may be a better means of accomplishing the same goals. Further, a contractual will requires a very clear agreement with the attorney drafting it, as it requires the attorney to simultaneously engage two clients (both spouses). This means a new set of ethical guidelines are imposed on the attorney.

4.4.4.8. Dealing with Contingencies

As you have gathered from this lengthy discussion of wills, there are many issues to be considered in crafting your will. One of the biggest challenges in drafting a will lies not in deciding what you want to happen if everything goes as planned, but rather what should happen if things do not go as planned. Your will should contain provisions for how the executor should handle the distribution of your property under a number of
contingencies.

One of the most emotionally difficult contingencies to consider is what should happen if someone in your will dies before you. Unfortunately, it is also one of the most critical contingencies to address. How should the distribution of property in your will be changed if a spouse, child, or other heir passes away before you?

What should happen if someone is unintentionally left out of the will? For example, what happens if a child is born after the will is made? The birth of a child will prompt many people to amend their will, but should your will include automatic changes in the event a child is born and the will is not amended? Also, grandparents should consider provisions for what happens when a new grandchild is born. Though it may sound odd, grandparents should also consider defining who is considered a “grandchild.” For example, in handling intestate succession and the interpretation of wills, adopted children are considered indistinguishable from biological descendants, but would the grandparent want the same consideration? What about step-grandchildren?

Should the will's provisions be altered if the testator is divorced? Oklahoma law automatically deletes gifts in favor of a divorced spouse, but the testator may want to handle some of these changes differently than specified in the statute. What if someone receiving property under the will gets divorced, especially if they divorce one of the testator’s heirs?

What if a piece of real or personal property to be given to a specific person or entity is no longer part of the estate? Should an alternative gift of some kind be made to that person or entity?

It is important to spend time working through as many contingencies as possible with your estate planning attorney. Since it is almost impossible to address every potential scenario, it is important to include some flexibility in the will to allow the executor to achieve the intent of the testator in the event the unforeseen comes to pass.

4.4.4.9. Making Changes to the Will

Wills should be periodically reviewed to determine if any changes should be made. As mentioned above, it is particularly important to consider making changes to a will when significant family changes occur such as births, deaths, divorce or marriage. Other gradual changes in circumstances, such as children reaching the age of 18, the advancing age of guardians, changes in the property owned by the testator, or changing needs of heirs may also create a need for adjustments in the will.

One method of changing a will is to write a new will that includes a statement revoking all prior wills. If the new will does not include such a statement, the court may try to implement both wills to the extent the provisions are not totally inconsistent. This can lead to considerable confusion, and potentially costly court conflicts that may reach a different result than the decedent intended.

If only a few changes are desired, another alternative is to draft a will amendment, or “codicil” to the original will which states the desired changes. The codicil must be signed and witnessed with the same formalities as required for a will. Additional codicils may be added as additional changes are required. Use of codicils is a fairly common method of modifying a will, but if quite a few changes are made over time, it may eventually be desirable to draft a new will.

Generally, it is not advisable to make changes on the face of an existing will by crossing out old terms or writing in new terms. Attempts to make such changes may actually invalidate the will and probably not accomplish what the testator intended.

Finally, remember that any codicil to a will must follow the same execution requirements as the will itself.

4.4.4.10. Limitations of Wills

Though this section of the workbook has covered several limitations of wills, some bear repeating here.
First, remember wills only control distribution of property that is included in the estate. Property held under certain types of ownership is not included in the estate and thus is not affected by will provisions. For example, property owned in joint tenancy with right of survivorship automatically passes to the surviving joint tenant at death and is not distributed under the will. Similarly, a life estate interest in property automatically terminates at death. If property is owned as tenancy in common, the decedent's share is transferred by will and the other owners continue to own their respective shares.

Life insurance proceeds may or may not be transferred by will depending on who is named in the policy as beneficiary. Generally, life insurance proceeds will not be affected by will provisions unless the estate is named as beneficiary in the policy or all the named beneficiaries are no longer living.

Wills may not take precedence over a prenuptial agreement which promised the surviving spouse a certain share of the estate. Wills also may not be used to exclude a spouse from inheriting at least as much property as the spouse would inherit under state statutes if there was no will (see previous discussions of the spousal election). If the will leaves less than the designated spousal share, the spouse may choose to accept the share designated in the will or may instead demand an intestate share specified under state statutes. There is no similar requirement that children receive anything under the will.

4.5. Trusts

4.5.1. What is a trust?

In its simplest terms, a trust is an arrangement whereby one party holds legal title to property and another party has the right to the benefits from that property. In the context of estate planning, a trust is almost always established with a separate legal entity as the party holding the property along with a trust document containing instructions for how that property is to be managed.

For example, Jane Smith wants to create a trust to help her achieve her estate planning goals. She establishes a separate legal entity – the Jane Smith Living Trust – and transfers ownership of some of her property to the Jane Smith Living Trust. At the same time, she prepares a set of instructions regarding how the trust is to manage the property it now owns. That set of instructions binds the trustee (discussed in the next subsection) as to how he or she can manage the property and how they are to distribute income or property from the trust.

One important factor to remember with trusts is that once property is transferred to them, the trust is the owner of the property. The separate ownership of the property by the trust is critical to many of the estate planning benefits of trusts, but it can also add some complexity to managing the property.

4.5.2. Parties involved in the trust

Every trust must involve at least three parties: a trustor, a trustee, and a beneficiary. It must also involve trust property.

The trustor is the person who creates the trust and transfers the ownership of property to the trust. In the example above, Jane Smith was the person who created the Jane Smith Living Trust and transferred property to it. Thus, Jane is the trustor of this trust.

The trustee is the person who represents the trust, manages the property owned by the trust, and makes distributions of income or property from the trust. Since the trustee is charged with managing property for the benefit of others, they are also called a fiduciary. Serving as a fiduciary carries a number of responsibilities as discussed below.
The beneficiary or beneficiaries is the person or people who receive benefits from the trust property. Most often these benefits are distributions of income from the trust property or gifts of the trust property itself. However, other trust benefits may also be given, such as the use of the trust’s property.

Trust property is the property given to the trust, and may also be called the trust’s corpus, or principal. If this property is capable of generating revenue such as rents, dividends, or other payments, such revenue is usually called trust income. The tax basis of property transferred to a revocable trust remains the same as the trustor’s basis since the assets are still under the control of the trustor (since the trust is revocable). Consult your tax professional to discuss any potential tax effects of transferring property into a trust.

Quite frequently, one person may simultaneously hold all three roles. If Jane creates the trust and contributes property to it, she is the trustor. If she puts herself in charge of managing the property, she is the trustee. And if she provides income from the trust property to herself, she is a beneficiary. Many people using the trust as an estate planning tool use this arrangement. As discussed below, though, there may be several reasons for selecting other trustees and beneficiaries.

4.5.3. Types of trusts

By some estimates, there are over 40 different kinds of trusts in use today. Why so many? Numerous very specific trusts have been designed over the years to achieve very specific objectives, usually with respect to minimizing estate taxes while achieving some other goal such as the care of a spouse or the education of a child. Selecting the specific kind of trust is a tremendously important decision that should be made with the help of a tax professional and attorney.

For the purposes of this discussion, though, we will simply focus on two very broad categories of trusts: trusts enacted while the trustor is alive, called living or inter vivos trusts, and trusts established after death through the decedent’s will, called testamentary trusts.

Living trusts have two main subcategories: revocable and irrevocable. A revocable trust, as the name implies, can be revoked (abolished) by the trustor. Many people choose to use a revocable trust because of the flexibility it provides; if the trustor decides he or she no longer wants the trust to hold the property, they simply revoke the trust and bring the property back to themselves. Revocable trusts can also be modified without being abolished as well.

An irrevocable trust cannot be revoked or abolished by the trustor – once created, it must stand until the terms of the trust document dictate it is dissolved. The trust document will also contain restrictions on what input, if any, the trustor can have on the management of trust property and distributions from the trust. Generally, the terms of an irrevocable trust cannot be modified. Irrevocable trusts are frequently used to manage estate tax liability for individuals who own more property than the federal estate tax exemption amount; placing property into irrevocable trusts can reduce the amount of the person’s estate. Other people use irrevocable trusts for Medicare planning, and still others use them to protect assets from potential creditors of beneficiaries (called spendthrift trusts). It should be noted that if someone creates a revocable living trust and the terms of the trust provide that the trust can survive their death, the revocable trust becomes irrevocable at their death.

A testamentary trust is a trust established by the will of a testator. There are many reasons a testamentary trust may be chosen: to provide for the care of a spouse and/or children, to hold property for minor children until they are legally capable of owning the property themselves, to restrict the transfer of property for a length of time, for example. Importantly, though, testamentary trusts require that the decedent’s will go through the probate process in order for the trust to be created.

The potential consequences of choosing among these types of trusts are discussed later in this subsection.
4.5.4. Considerations in drafting the trust

As with many of the topics in this workbook, entire books have been written about how to create a trust and all of the considerations involved. Thus, this discussion will be limited to six major areas of concern: who will be the trustee, who will be the beneficiaries, how long will the trust last, what are the rights and responsibilities of the trustee, how beneficiaries can use trust income and principal, and the timing and amount of distributions to beneficiaries.

4.5.4.1. Selecting a trustee

Careful thought must be given to every aspect of creating a trust, but there may be no more important consideration than selecting a trustee. As discussed above, many people creating living trusts make themselves the trustee for as long as they live. In such situations, it is safe to say the trustee has the full faith and confidence of the trustor. However, selecting oneself as trustee may not always be the obvious choice. Further, if the trust is to serve an estate planning role after the trustee has died, another trustee will have to take control. Thus, in almost every situation, at least some consideration must be given to having someone other than the trustor serve as the trustee.

First, should the trustor also be the trustee while he or she is alive? The appropriate choice of trustee will vary, depending upon the purpose of the trust and the goals, interests and management skills of the trustor. If the purpose of the trust is to achieve certain tax avoidance advantages, it may be necessary to give control of the trust to another party. The trustor may also want to secure a trustee who is interested and experienced in management of the particular assets that make up the trust (such as someone adept at managing real property or stock investments if either of those types of assets make up much of the trust property). In short, trustors should be aware that they have the option to select another trustee other than themselves, even while they are alive.

Second, what does the job of trustee involve? As mentioned above, the first job of the trustee is to manage the trust property. That requires someone with the knowledge, experience, and ability to handle the types of assets that make up the trust. If the majority of the trust assets are farm assets, a trustee must be able to competently manage agricultural operations. Beyond the basic competence to manage the assets, though, as fiduciaries, trustees are held to the same standard of care in investing trust assets as a prudent, intelligent person would use in managing his or her own affairs. They must consider both the probable safety and the probable income of the decisions they make. They are not permitted to speculate with trust assets. Unless the trust instrument permits it, the trustee may not buy trust property or sell property to the trust or lend trust funds to himself or commingle trust funds with his own individual funds. When selecting a trustee, consider whether he or she would be capable of satisfying all of these requirements. Also, be aware that any beneficiaries of the trust will watch the actions of the trustee with great scrutiny, since their financial interests are directly affected by the decisions of the trustee. In some family situations, this may mean a trustee outside the family or an institutional trustee may be desirable to avoid emotional entanglements for the trustee’s decisions.

Third, if a trustee outside the family is named, should an institutional trustee be selected? Many banks and other financial institutions have trust departments and offer trust management services. A fee is generally charged for those services. One advantage of using a corporate trustee, such as a bank, is that the bank probably employs individuals who are experienced in trust management, with access to professionals that may specialize in managing different types of assets such as farm operations or investments. A disadvantage of using a corporate trustee is that the trustee fees may significantly diminish trust income or principal depending on how they are structured.

Fourth, who should be chosen as a successor trustee? A successor trustee is a person or institution who steps into the role of trustee when the initial trustee can no longer perform their duties. If the trust is a living trust that the trustor wishes to use for estate planning purposes and the trustor also serves as trustee, a successor trustee is absolutely critical, since the trust must have someone available to manage it after the death
of the trustor. In virtually every trust scenario, it is a good idea to select a successor trustee in the event that the primary trustee is unwilling or unable to fulfill their duties. It may also be desirable to name a secondary trustee if an institutional trustee is named since the bank or other institutional trustee may eventually cease to exist. Further, regardless of whether an institution or individual is named as the successor trustee, consider having an additional successor, just in case the original successor is also incapable of fulfilling their duties.

Fifth, should co-trustees be named? Many times, parents naming their children as trustees or successor trustees do not wish to treat their family members any differently. Thus, they name all of their children or siblings as co-trustees and give them equal powers (with some parents going even further to require that all of the co-trustees must agree on a decision before it is implemented). While trustor’s intentions may be good, this arrangement can frequently cause problems for the management of the trust. First, do all of the co-trustees have the management capability needed to successfully manage the trust property? Second, are the management styles (which are often dictated by personality styles) of the co-trustees compatible? Third, does the trust contain provisions about what is to be done when the co-trustees cannot agree (i.e. “tiebreaker” provisions)? Experience indicates that the appointment of co-trustees frequently causes more problems than it solves.

As a final consideration, always discuss the appointment of the trustee with the person selected. The job of trustee is a difficult and demanding one, and you should feel confident that the trustee is willing and able to fulfill their duties when needed.

4.5.4.2. Naming beneficiaries

Every trust must have at least one beneficiary. With living trusts, the trustor frequently makes himself or herself one of the beneficiaries so long as he or she is alive. However, when the living trust is intended as an...
estate planning tool or when a testamentary trust is used, the trustor may need to take additional considerations into account.

One such situation would be a trust that continues to hold property after the trustor’s death, with instructions to distribute income to the trustor’s grandchildren. Should “grandchildren” only mean grandchildren that were alive at the time of the trustor’s death, or should it include grandchildren born after that point? What must a “grandchild” do to prove their status to the trustee?

Another consideration is whether someone should “step into” the position of a beneficiary should they die. If, say, a son or daughter dies, should their shares of distributions from the trust then go to his or her children?

Yet another situation when the beneficiaries may not be certain comes when the trustor retains – or gives to a trustee – the right to designate the beneficiaries who will receive the benefits of the trust. This right is called a power of appointment and may be exercised after the trust is created. Retention of a power of appointment provides flexibility by permitting the grantor to postpone decisions regarding distribution until some point in the future when he or she may have more information about the needs of potential beneficiaries.

In the end, it is important to think through who you would like to receive income and/or property from the trust, as well as to think through all of the possible contingencies that might come into play with respect to those beneficiaries.

4.5.4.3. Duration of the trust

Trusts can have a wide range of durations before they must be terminated. If someone is using a trust solely to avoid probate, they may define the trust to last only until shortly after their death, with the trust to be terminated as soon as it distributes its property to the beneficiaries. On the other hand, someone may want their trust to last for multiple generations. In Oklahoma and several other states, a law called the “Rule Against Perpetuities” states that a trust cannot last forever, but must instead be terminated within a period defined as any life in being at the time the trust was established plus an additional 21 years. For example, if Jane had a grandchild alive at the time she established her living trust, and she chose to make that grandchild a beneficiary of that trust (even if the grandchild was not initially a beneficiary, but rather became a beneficiary only upon some later event such as the death of his her parents), the trust could remain in effect for 21 years after the death of that grandchild.

The duration set for the trust is largely a function of the objectives of the trustor. If, as mentioned, the objective is simply the avoidance of probate, the trust need only last long enough to make the distribution of trust property after the trustor dies. On the other hand, if the objective is to provide income to the trustor’s family for as long as possible, the trust duration would likely be set to the maximum length allowed by the Rule Against Perpetuities. When creating a trust, consider both the objectives and the needs of the beneficiaries; in certain circumstances, it may be wise to define the duration of the trust by the lives of some beneficiaries, with provisions in the trust providing instructions in case beneficiaries do not die in the order anticipated by the trustor.

4.5.4.4. Rights, powers, and responsibilities of the trustee

Certain rights, powers, and responsibilities are implied to all trustees, and a well-drafted trust will often explicitly include these in the trust document. However, the trustor may desire the trustee to have additional powers the law will not imply.

One common issue is what types of investments the trustee can make with trust property. As mentioned above, the trustee is generally held to the standard of a prudent, intelligent person would use in managing his or her own affairs. Some investments may be riskier but provide much higher returns – should the trustee be allowed to pursue such investments? Can the trustee invest only in savings bonds and certificates of deposit,
or can they invest in international growth stock funds? There are broad range of investments, and the trustor should consider how much risk the trustee may seek in managing the trust assets.

Another power that must be made explicit is the power to buy or sell trust property. The general assumption is the trustee is to deal with the property placed in the trust by the trustor. Should the trustee have the power to sell some trust property to generate additional funds in certain circumstances, such as to pay for the medical expenses of a beneficiary who has had a significant illness? Conversely, if the trust is managing farm assets and a piece of land that would enhance the productivity of the farm becomes available, can the trustee purchase the property to add it to the trust? Can the trustee mortgage trust assets to make such a purchase? Can the trustee lease or sell mineral interests associated with trust lands? These are all questions, and any other extraordinary transactions or other contingencies that must be addressed by the trustee should be addressed in the trust document.

The trustor may specify in the document creating the trust that the trustee will not be held to some or all of the duties, restrictions and liabilities which would otherwise be imposed or may designate additional restrictions and liabilities. If too many restrictions are placed upon the trustee, it may be difficult to find someone who is willing to serve as trustee, or the trustee may find it difficult to accomplish the goals of the trust. On the other hand, the duties and restrictions normally imposed by statute are designed to protect the interests of the beneficiary and insure that the trustor’s objectives are achieved.

4.5.4.5. Uses of trust income and principal

Unlike a will that distributes property through the probate process and then goes away, a trust can retain the power to supervise the distributions of property it makes. Thus, a trustor can specify how beneficiaries use the distributions they receive. A trustor can specify that distributions be used solely for the beneficiary’s educational or medical expenses, to purchase a home, or for “maintenance of the beneficiary in the custom and lifestyle to which they are accustomed (meaning the beneficiary receives enough distributions to maintain, but not improve, their lifestyle). In some cases, a “special needs trust” may be established to provide for the long-term care of a beneficiary with specific physical or mental health needs, with the amount of distributions tied to those expenses. As mentioned below, distributing only trust income may not be enough in some circumstances; some events may trigger the sale of trust property or the gift of the property directly to provide a larger distribution to a beneficiary. Trustors should think about whether they want to place any restrictions on the use of any distributions made to the beneficiaries, taking into account the additional burden placed on the trustee to enforce those restrictions and the costs to the trust of such enforcement.

4.5.4.6. Timing and amount of distributions

The trust document should contain instructions for the trustee as to when distributions of trust income and/or trust property are to be made. In some cases, these may be defined by specific dates or periods, such as when a beneficiary turns 18 and can legally receive income or property himself or herself, or to make distributions of trust income to a beneficiary on an annual basis. Other distributions may be based on events rather than scheduled times, such as when a beneficiary starts college, gets married, wants to buy a home, start a farm, or has a critical need caused by illness or other emergency. Regardless of whether the distribution is triggered by a specific time period or event, the trust document should clearly instruct the trustee when such distributions are made.

An important factor that is sometimes overlooked is when to make distributions of income or property to young people. Although a person is legally capable of receiving income or property at the age of 18, some young people have not developed the judgment or experience to care for such gifts at that age. In many cases, trustors may instruct that the distributions are not to be made until the young person is 21, 25, 30, or even older, when they feel confident the beneficiary can properly handle the distribution.

By the same virtue, the trust document should also define the amount of distribution to be made to
the beneficiaries. Some distributions may be defined by a specific dollar amount, and if so, the trust should also include contingency instructions in case the trust does not have enough income to fund that amount. Alternatively, the trust may specify a distribution as a percentage of the trust's income for the period in question. In either case, the trustor should be sure the payments will not drain trust resources too quickly for the trust to accomplish all of its goals. If the trustee has been given the power to sell trust property or give it directly to a beneficiary for a large expense (such as a medical emergency or other major expenditure), the trust should also include instructions for what property is to be used for such purposes, if the beneficiary’s future distributions are to be held or otherwise affected, and what to do if the distribution will affect the distribution to other beneficiaries.

4.5.5. Advantages and disadvantages of the trust as an estate planning tool

Trusts have been heavily promoted for years as an estate planning tool. Trusts can be tremendously flexible estate planning tools, posing significant advantages. At the same time, though, trusts have limitations just like any other estate planning tool.

4.5.5.1. Advantages for trusts as estate planning tools

The foremost advantage of trusts in the minds of many estate planners is the fact that assets held by the trust do not have to go through the probate process to be distributed. In many cases, this can save both considerable time and expense compared to the probate process.

The separate ownership and management of trust assets also means that property can be held and managed for minor children until they reach a desired age (as discussed in section 4.5.4.6. above). However, the trust arrangement can also minimize the need for appointment of a guardian in case a beneficiary is over the age of 18 as well. For example, if the vast majority of the trustor's assets are in the trust, most of the business affairs of the trustor can be handled by the trustee. This could effectively avoid the need for the appointment of a guardian for the trustor. If the trustor was also the trustee, though, this arrangement is only effective if a successor trustee was named in the trust document.

Trusts carry another advantage in the confidentiality they provide relative to the probate process. While probate is a case filed in open court (giving the public the ability to access records such as the will, the estate’s inventory, and the decree of distribution), there is no such public disclosure with a trust. The trust document itself may remain confidential. However, it should be noted that the transfer of titled property into the trust (such as real estate) requires filing in the appropriate public records offices. Still, many people feel more comfortable with the level of confidentiality provided by a trust than that provided by probate.

Trusts are also difficult to contest. While someone unhappy with what they receive under a will can attack the several execution requirements of wills or the mental capacity of the person making the will, there are far fewer points of attack available in a trust. In essence, someone contesting the validity of the trust can only attack the mental capacity of the trustor or the execution of the trust (which is simply a contract, with far fewer requirements than a will). Additionally, courts show great deference to the terms of a trust, and are very reluctant to modify the terms of a trust unless extraordinary circumstances dictate otherwise.

4.5.5.2. Disadvantages for trusts as estate planning tools

Trusts do have aspects that detract from their effectiveness as estate planning tools. First, if an individual other than the trustor, or an institution, is named as the trustee, trustee fees must likely be paid. Depending on the revenue productivity of the assets in the trust, the effectiveness of the assets' management, and the structure of the fee, the trustee fee may in some cases be a significant draw upon the trust's resources. At the same time, though, one must weigh this against the cost of probate administration. Some estate planners consider the use of a trust as “front loading” the costs of distributing property at death by paying the majority of the costs in advance, while they regard a will and the probate process as “back loading” those costs.
Trusts also add some complexity to the management of the trustor's assets while alive. Remember, the trustor does not hold legal title to the assets placed in the trust; the trust does. This means the trustor cannot deal directly with the assets; they must act through their role as trustee (if the trustor is also the trustee) or by requesting the trustee to act on their behalf.

As with all estate planning tools, a trust must be carefully coordinated with all other estate planning tools to make sure no conflicting transactions are triggered, and to make sure the most efficient and effective tool is used for each item of property.

Finally, even the most comprehensive and well-managed trust does not eliminate the need for a will. Frequently, people who thought their trust handled all of their property at death neglect to place a recently-purchased item into the trust. When they die, not only is the trust powerless to handle that item; it must also go through the intestate succession process if no other estate planning tool acts on it. Thus, even if a comprehensive and far-reaching trust is in place, a will is still needed to round up any property not already in the trust and place it there. Such wills (often called “pour-over wills”) still must go through probate, but once probated, they enable the trust to do its job of handling the property.

4.6. Life Insurance

Life insurance is a financial planning tool with numerous applications to estate planning. Typically, people think of life insurance as a means of providing income for a surviving spouse and dependent children, and this is certainly an important use. However, there are several other ways that life insurance can play a crucial role in supporting the successful transition of farm assets.

4.6.1. Types of Life Insurance

There are dozens of types of life insurance policies, and as with most topics in this workbook, entire books have been written about the topic. To keep things relatively simple, this discussion will focus on two categories of life insurance policies: term policies and permanent policies.

Term policies are purchases for a specific number of years, and as the name implies, provide insurance coverage for a defined term. For example, a ten-year term policy will pay the policy amount if and only if the insured party dies within that ten-year period. If the insured party dies after that period, the policy pays nothing. Term life insurance is typically much less expensive for young purchasers and generally provides more dollars of death benefit per dollar of premium paid than permanent life for young people; however, term life becomes much more expensive the older the insured party becomes.

Permanent policies stay in effect throughout the life of the insured party up to a specified age (frequently 95 years). This means that, unlike term policies, permanent policies pay the policy amount whenever the insured party dies, up to the specified age. Conversely, permanent policies can be much more expensive in terms of dollars of death benefit per dollar of premium paid for young people, though they can also be much less expensive as the insured party ages. In some cases, permanent policies can also accumulate a residual value (sometimes called cash value or surrender value) accessible through withdrawals or loans. It is because of this cash value accumulation that some people regard life insurance as an investment vehicle, although many financial analysts suggest any form of life insurance is best used as an insurance tool only rather than as an investment tool.

As you can see from the differences between term and permanent policies, several factors will influence the choice of which tool is right for you and your estate planning objectives. For many young families, term coverage may have important cost benefits, but for older families, permanent coverage may be needed for the transition objectives they hold. As with all estate planning tools, work closely with your professional team to
determine which insurance policy best meets your objectives.

4.6.2. Uses of Life Insurance in Estate Planning

There are numerous ways life insurance can be used to facilitate your estate planning goals. Before purchasing a life insurance product, though, complete your inventory and financial analysis as outlined in Section 1 of this workbook, and work closely with your accountant, tax professional, and financial advisor to make sure you select the best and most cost-effective tool for your purposes.

4.6.2.1. Care of dependent children and surviving spouses

As mentioned in the introduction to this subsection, perhaps the first use of life insurance thought of is to provide support for any surviving dependent children and a surviving spouse. If you have minor children (or adult children with special needs) who depend on you for care, it is crucial to conduct a financial analysis to determine if enough assets remain to provide for their care until they can become self-sufficient. This may mean providing not only for their care until they are 18, but providing for college education as well. Life insurance proceeds may be an asset directed by your estate plan to any trusts established for your children and/or for their care while in the custody of a guardian (see sections 4.4.4.3. and 4.5.4.5. above). Providing financially for a surviving spouse is an important consideration also, since the surviving spouse will be managing a household (or perhaps even farm operation) without the income provided by the deceased spouse.

4.6.2.2. Payment of final medical expenses

While you may have one or more medical insurance plans to cover the majority of your medical expenses, life insurance may be an important supplement to medical insurance. Medical expenses continue to increase at a rate in excess of inflation, and these costs can be drastically increased when someone dies at the end of a prolonged illness. Life insurance can provide a buffer in case there are medical expenses not covered by medical insurance plans, eliminating the need to “dip into” the other estate assets.

4.6.2.3. Debt retirement

As referenced in section 4.4.4.6., your debts must be handled by your estate in some way or another, and if not paid, they continue to burden the assets of the estate even in the hands of the parties that eventually receive them. Many times, the vast majority of farm assets consist of land or machinery crucial to the farm’s operations. Land is generally not considered a liquid asset (meaning it cannot be quickly converted to cash) and frequently is directed specifically to heirs under an estate plan. The heirs may also need the machinery of the estate to operate the estate assets. Thus, even while your farm may have a strong net worth, life insurance may provide the financial liquidity necessary to pay the debts of the estate without having to sell estate assets for those debts.

4.6.2.4. Estate administration costs

Administering even the best-planned estate under the best circumstances incurs some expenses. Administering a highly-contested estate takes far more resources. To avoid the loss of estate assets to these costs, some people purchase life insurance plans specifically to cover estate administration costs.

4.6.2.5. Liquidity for operations

Depending on the amount of liquid assets held by the farm operation, an additional infusion of cash may be needed to maintain the operation during the administration of the estate. This is particularly true if there is any possibility some assets required for the operation may be “tied up” by the administration process or if the distribution of those assets is contested.

4.6.2.6. Estate taxes

Estate taxes can take a significant portion of the estate if the estate is large enough to exceed the amount
of the federal unified credit (see subsection 4.6.2.6. below). In some cases, people may purchase a life insurance 
policy specifically to cover their anticipated estate tax liability. This strategy can be very effective, but must be 
carefully coordinated with an estate tax professional and attorney; if the policy is not carefully constructed, it 
could actually increase the estate tax liability by enlarging the estate.

4.6.2.7. Second marriages

If someone has children from a previous marriage, he or she may not want to force those children to 
operate the farm with a surviving spouse who is not their parent. Life insurance could be used to provide an asset 
to care for the needs of the surviving parent while giving the farm assets to children immediately. Such an 
arrangement might minimize the opportunity for conflicts between the surviving spouse and children.

4.6.2.8. Handling asset allocation among on-farm and off-farm heirs

At a number of points in this workbook, we have discussed the conflicting interests of on-farm and off-
farm heirs. In many cases, parents do not want to treat their children unequally, which often results in giving 
joint interests in farm assets to off-farm and on-farm heirs. This can often lead to the off-farm heirs selling their 
interests to the on-farm heirs, or even to an outside party. Such transactions can place financial stress on the 
on-farm heirs and deprive the farm of needed assets. However, life insurance provides a handful of options to 
alleviate these situations. In the most straightforward application, parents can purchase life insurance plans and 
make the off-farm heirs the beneficiaries of the plans. While the off-farm heirs may not receive precisely the 
same amount of asset value as on-farm heirs who receive farm assets, the allocation of the life insurance proceeds 
to the off-farm heirs may be much less disruptive to the farm operation. Conversely, if parents chose to grant 
joint interest in the farm assets to on-farm and off-farm heirs, the on-farm heirs could purchase life insurance 
plans on the lives of the parents to provide proceeds that could be used to purchase the interests of the off-farm 
heirs if such a transaction should become necessary.

4.6.3. Final considerations in using life insurance as part of the estate plan

Regardless of the life insurance product(s) you purchase, work closely with an accountant, tax 
professional, accredited financial planner and estate planning attorney to determine who should be the owner 
of the policy, who will be named the beneficiary, how the policy should be funded, and the instructions needed 
through the will, trust, or other estate instrument to make sure the insurance proceeds are properly directed to 
their intended uses.

4.7. The Estate Tax

One of the most frequently cited objectives in estate planning is “minimization of estate and gift taxes.” One 
should always bear in mind, though, the economically optimal objective might be better stated “maximization 
of after-tax wealth transferred.” Knowing some of the key estate and gift tax rules can help in evaluating your 
current situation and in selecting strategies to maximize the wealth transferred.

Before we begin our discussion of the estate tax, it is important to note Oklahoma abolished its estate tax 
effective on January 1, 2010. Thus, the only estate tax that remains for Oklahoma residents is the federal estate 
tax.

4.7.1. Calculating the federal gross estate

The federal estate tax is a tax on all the property owned or controlled (for example, through a power of 
appointment) by a deceased person. The laws governing the federal estate tax were significantly modified by 
the American Taxpayer Relief Act of 2012 (2012 ATRA), which modified the estate tax for decedents dying and
estate transfers made after December 31, 2012. One such change was the estate tax exclusion, i.e. the amount of estate value that can pass without estate taxes. This amount was set at $5,000,000 and indexed for inflation each year thereafter. For 2015 the estate tax exclusion is $5,430,000. The maximum estate tax rate was increased from 35 to 40 percent for deaths and transfers in 2013 and future years.

The calculation of the federal estate tax starts with determining the decedent’s “gross estate.” The gross estate includes all real and personal property, whether tangible or intangible. These properties include the following:

- All death benefits under life insurance policies on the life of the decedent owned or controlled by him or her, or payable to his or her estate and cash values of all life insurance policies owned by him or her on lives of others.
- Lifetime gifts are no longer included in the gross estate (although the taxable portion will be included in the tax base for estate tax computations).
- Property over which the decedent held a general power of appointment.
- Property given away during life in which the decedent retained some control or a life estate. Revocable trust assets are included because the deceased retained control until death.

The property must be appraised at its fair market value, or if the executor of the estate elects, certain qualified property may be appraised at its current use value. Current use values for qualified property and the current market value will be discussed later in section 4.7.3. Fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to sell or buy.

The completion of the estate tax return is generally overseen by the executor of the decedent’s will.

### 4.7.2. Taxing Joint Tenancy Property

Generally, the value of all joint tenancy property is included in the estate of the first joint tenant to die, except for the proportion the executor can prove was contributed to its acquisition by the surviving joint tenant and/or as a gift by a third party to the credit of the surviving joint tenant. If the surviving spouse and the decedent were the only joint tenants, only one-half of the value of the joint tenancy property will be included in the estate. If the joint tenants are not spouses, the amount each party contributes to the purchase of the property will be what each person uses as their ownership interest for estate tax purposes. For example, say Tom provides $300,000 and Harry provides $200,000 to the purchase of the property. Their value for estate tax purposes would be $300,000 basis for Tom and $200,000 basis for Harry.

As result of the marital deduction, property held jointly by spouses with rights of survivorship does not trigger any estate tax in the estate of the first spouse to die. Technically, only one-half of the jointly held property would be included in the estate, and that one-half would be excluded by the marital deduction. For example, Husband and Wife purchase a property for $100,000. One-half of the value belongs to each; that is, Husband has a basis of $50,000 and Wife has a basis of $50,000. At Husband’s death, the fair market value of the property is $250,000. When Husband’s joint tenancy interest passes to Wife at Husband’s death, her basis in the property is now $175,000 ($50,000 contributed by her + husband’s $125,000 [half of the total value of the property at death]).
4.7.3. Current Use Value

In some cases, farm land could have a market value significantly higher than its value for farm use. For example, in an area near a town or city, residential development might be near the farm, and land might be worth several thousand dollars per acre for residential development, while the revenues produced by farming the land alone would not support nearly that price. Thus, in some cases, valuing the land in its “current use” could reduce the value of the estate (and thus the amount of estate taxes paid). The executor may elect to value real property devoted to farming or other closely-held business at its current use value rather than market value if certain conditions are met. Contact your tax professional to determine whether current use valuation would be a benefit to your specific situation.

4.7.4. Computation of the Taxable Estate

The taxable estate is the gross estate less deductible expenses such as:

- Funeral expenses
- Estate administration expenses
- Claims against the estate, such as the decedent’s debts
- Taxes accrued but unpaid at the date of death
- Loss from fire, storm, and theft (casualty losses) not compensated by insurance or claimed as a deduction in a prior income tax return
- An unlimited marital deduction is allowed for property that passes to a surviving spouse. The executor may even elect to have certain life interests qualify for the marital deduction. See the discussion below on marital deduction for more detail.
- The amount of transfers to charitable, religious, and similar institutions approved by IRS

After the taxable estate is determined, the includible taxable gifts are added to the taxable estate before referring to the tax tables to determine the amount of the estate tax.

Once the value of the taxable estate is determined, it is reduced by the estate tax exemption amount (for 2015, the amount is $5,430,000). The exemption amount for this and previous years is shown in Table 1 below. Functionally, this means for decedents dying in 2015, no estate tax is owed if their estate had a value of $5,430,000 or less.

<table>
<thead>
<tr>
<th>For decedents dying in year</th>
<th>Federal Estate Tax Credit</th>
<th>Equivalent Exemption</th>
<th>Federal Gift Tax Credit</th>
<th>Equivalent Exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>$1,772,800</td>
<td>$5,120,000</td>
<td>$1,772,800</td>
<td>$5,120,000</td>
</tr>
<tr>
<td>2012</td>
<td>$2,045,800</td>
<td>$5,250,000</td>
<td>$2,045,800</td>
<td>$5,250,000</td>
</tr>
<tr>
<td>2014</td>
<td>$2,081,800</td>
<td>$5,340,000</td>
<td>$2,081,800</td>
<td>$5,340,000</td>
</tr>
<tr>
<td>2015</td>
<td>$2,117,800</td>
<td>$5,430,000</td>
<td>$2,117,800</td>
<td>$5,430,000</td>
</tr>
</tbody>
</table>

4.7.4.1. Marital Deductions

There is an unlimited marital deduction for decedents, meaning the value of any property transferred to the decedent’s spouse is deducted from the value of the gross estate. The decisions on the use and amount of
marital deduction will vary with the size of the estate and the unified tax credit. Given the current “portability” rules (discussed in the next subsection), fewer estates will find it necessary to use the marital deduction for the purposes of managing estate taxes.

4.7.4.2. Portability of the Deceased Spouse’s Unused Exemption

“Spousal portability” means the ability to take the unused estate tax exclusion amount of the first spouse to die and add it to the surviving spouse’s exclusion amount. The 2012 ATRA made this ability a permanent part of federal estate tax law.

The estate tax law defines the applicable exclusion amount as the sum of the basic exclusion amount and, in the case of a surviving spouse, the deceased spouse’s unused exclusion amount. For 2015 each spouse’s basic estate tax exclusion amount is $5,430,000 and this provision allows the spouses to combine their individual exclusion amounts for a maximum exclusion of $10,860,000 (should both spouses pass in 2015).

Consider this scenario: Husband passes in 2011 and the value of the estate is $4.25 million. There is an unused amount of $750,000 from the husband’s estate that can be used for the wife’s estate (the 2011 estate tax exclusion was $5.0 million). In 2015, the wife passes and the fair market value of the estate is now $6.0 million. The heirs can use her $5.43 million exclusion (the exclusion amount for 2015) plus $570,000 of the Husband’s $750,000 in unused exclusion, thus avoiding estate tax.

The amount of deceased spouse’s unused exemption is available to the surviving spouse only if the executor of the deceased spouse’s estate elects portability of the unused exemption amount on a timely filed estate tax return for the deceased spouse. An estate tax return must be filed to elect portability even though an estate tax return would not otherwise need to be filed.

4.7.5. Federal Gift Taxes

For gifts made in 2015 and thereafter the annual exclusion has been increased to $14,000 per recipient (this amount is indexed for inflation, but only increases by $1,000 increments). With gift-splitting (that is, the gifting of property by husband and wife), spouses may transfer $28,000 per recipient per year without gift tax.

Also, an unlimited gift tax exclusion is allowed for amounts paid on behalf of a donee directly to an educational organization for tuition and to a health care provider for medical services.

For a gift in trust, each beneficiary is treated as a separate person for purposes of the exclusion. The annual exclusion is not available for gifts of future interests such as a remainder interest in a trust or life estate, except for gifts to minors in trust or under the Uniform Gift to Minors Act.

Gifts given within three years of death generally will not be included in the deceased donor’s estate (the taxable portion of gifts would be included in the tax base for estate tax computations). However, gifts with retained life estates, transfers effective at death, revocable transfers, transfers of general powers of appointment and transfers of life insurance will be included in the estate. The three year rule was retained for redemption of stock to pay estate taxes, special valuation of certain farm property, extension of time to pay estate tax, and for determining property subject to a lien for taxes.

An unlimited marital deduction is permitted for gifts from one spouse to another and the law exempts all such transfers from gift tax filing requirements. However, gifts between spouses within three years of death must comply with the requirements listed above for gifts given within three years of death.

Gifts to charitable organizations and other institutions specifically mentioned in the regulations may also be deducted from the gross amount of gifts given (they are nontaxable gifts).
Usually, gifts must be complete and permit the recipient to use the property immediately to qualify for the exclusions. If the owner retains certain powers or control over property, it may be taxed as a gift and also in the estate at death. In such cases, however, credit may be allowed on the estate tax return for gift taxes paid.

Normally, the basis of property transferred in an estate is adjusted to its fair market value at the donee's death. However, the basis of appreciated property acquired by gift within one year of donee's death is not adjusted to its fair market value at date of donee's death if it is returned to donor or donor's spouse.

Gift tax returns are to be filed and gift taxes are to be paid on an annual basis. The due date for filing the return and payment of the tax for gifts made during the year is the next April 15.

Oklahoma gift taxes have been eliminated for all gifts made since January 1, 1982. No Oklahoma gift taxes have been imposed on gifts between spouses since September 6, 1975.

4.7.6. “Stepped up” basis in property

Although not actually an estate tax issue, it is important to note that the tax basis in property transferred through an estate will be “stepped up” as a result of that transfer. For example, say Owner purchased a piece of property for $100,000. Currently, the fair market value of that property is $500,000. If Owner were to sell the property today, she would pay capital gains tax on her capital gain of $400,000 ($500,000 current value - $100,000 cost basis = $400,000). Now, say that Owner died and in her will gave the property to Daughter. Thanks to “stepped up basis,” Daughter does not have the owner's original $100,000 cost basis in the property, but rather gets a “stepped up” basis that is the fair market value of the property at the date of the decedent's death (in our example, $500,000). If the daughter were to sell the property in six months for $525,000, she would only owe capital gains tax on $25,000 ($525,000 current value - $500,000 stepped up basis = $25,000 capital gain).

The principle of stepped up basis does not affect estate tax liability, but does impact the potential tax liability of heirs who may sell the property after the death of the decedent. Be sure to consult your tax professional to discuss how your particular estate plan can take advantage of this principle.

4.8 Conclusion: Discussing the Estate Plan with Your Family

Although this workbook devotes an entire section to discussing your farm transition plan with your family, it bears repeating here: maintaining good communication with your family as you develop your estate plan can provide a number of important benefits. Two crucial benefits stand out.

First, such communication can help guide your planning efforts. Knowing the hopes and expectations your family holds with regard to the farm operation provides you with important information that may impact your decision about how to allocate assets in your estate plan.

Second, people tend to react negatively to surprises if they perceive the “surprise” information as negative. For example, consider a scenario in which parents have decided to give all of their farm assets to an on-farm heir, and to give financial assets not related to the farm to an off-farm heir. Although the off-farm heir receives a substantial amount of value, it is not as much as the on-farm heir. Without good communication in advance, the off-farm heir may perceive this as a bad surprise, and motivated by negative emotions, could attempt to undermine the estate plan. Whether the heir's attack is successful, it will likely add significant time and expense to the estate plan, to say nothing of the emotional damage it might cause to the family. While many people wish to avoid conflict in life by not discussing their estate plans, they must also consider the fact that after they are gone, they can do nothing to repair the damage caused by conflicts arising from the plan. If these potential conflicts can be identified and dealt with in life, there is a much greater chance of family unity for years to come.
For More Information:

Neil Harl, Farm Estate and Business Planning (18th Ed., 2014)

The Estate Planning Center – Keeping the Family Farm in the Family
http://tlcplanning.com/FamilyFarmsALastingLegacy/KeepingtheFamilyFarmintheFamily.aspx

The Farmland Information Center – Farm Transfer and Estate Planning
http://www.farmlandinfo.org/landowner-options/transfer-your-farm


Oklahoma Cooperative Extension Service Fact Sheet - Trusts: Uses and Considerations

Oklahoma Cooperative Extension Service Fact Sheet – Probate

Oklahoma Cooperative Extension Service Fact Sheet –Wills: Requirements and Considerations

Oklahoma Cooperative Extension Service Fact Sheet – Developing an Estate Plan

ENDNOTES

1 In many ways, the appointment of a guardian for a mentally incompetent adult is similar to the appointment of a guardian for a child under the age of 18.

2 The issues arising with co-proxies are not limited to siblings in that role; any time co-proxies are appointed, many of the same issues will arise.

3 “Life sustaining treatment” is generally defined as “any treatment that is designed to prolong life and delay the moment of death and includes, but is not limited to, cardiac or respiratory resuscitation, artificially administered hydration and nutrition, kidney dialysis, antibiotics, curative procedures, most diagnostic procedures and surgeries except those to relieve pain or symptoms. It is presumed that every person would want palliative care which relieves symptoms and promotes comfort but is not designed to extend life.” Jan Slater, “Oklahoma's Remarkable Law Regulating End of Life,” 85:26 Okla. Bar J. (2014).

4 “Terminal condition” means an incurable and irreversible condition that, even with the administration of life-sustaining treatment, will, in the opinion of the attending physician and another physician, result in death within six (6) months. 63 Okla. Stat. § 3101.3 (12).

5 “Persistently unconscious” means an irreversible condition, as determined by the attending physician and another physician, in which thought and awareness of self and environment are absent. 63 Okla. Stat. § 3101.3 (7).

6 “End-stage condition” means a condition caused by injury, disease, or illness, which results in severe and permanent deterioration indicated by incompetency and complete physical dependency for which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective. 63 Okla. Stat. § 3101.3 (4).
Property law dictates that all joint tenants have equal fractional shares in the property. Compare this to a tenancy in common, in which it is possible for all of the tenants to have different fractional shares in the property.

It should be noted, though, that if the life estate holder sells or otherwise transfers his or her interest, that transaction does not affect the remainderman’s interest. If, for example, the life estate holder (who, for the sake of this example, is also the measuring life) sold his or her interest, the purchaser would only own the right to possess and use the property while the life estate holder was alive; as soon as the life estate holder died, title to the property would go to the remainderman.

Oklahoma provides a statutory form for the transfer on death deed at 58 Okla. Stat. § 1253.

Under Oklahoma law, there is only one circumstance in which an oral will is considered legally valid. A person in military service and in fear of immediate death related to the military service can make an oral statement as to how he or she wants to distribute property. The estate cannot exceed $1,000 and cannot include real estate. At least two witnesses must be able to establish not only that an oral will was made, but also the contents of the will. Consequently, oral wills have very little practical usefulness.

The decree may deviate from the will’s instructions if some property was required to pay the debts of the estate, or if provisions in the will have been invalidated for some reason (see section 4.4.3. regarding will contests).

Oklahoma has a statutory procedure that allows for small estates (with less than $200,000) to go through a process called “summary administration” which proceeds much more quickly than a full probate proceeding. See 58 Okla. Stat. §§ 245 – 247.

See 84 Okla. Stat. § 44 providing the “spousal election” to take one-half of the joint industry property acquired while the couple was married. Courts have held “no contest” clauses cannot override the spousal election. See Matter of Estate of Zarrow, 688 P.2d 47 (Okla. 1984). However, pre-nuptial agreements can override the spousal election.

However, banks acting as trustees may obtain approval to maintain common trust fund accounts in which funds from several trusts are combined and used by the bank in the same manner as deposits in other accounts. This permits the bank to minimize the costs of managing small trust accounts. In such cases, the bank still has a duty to keep records of the status of each trust and to account for the administration of each trust to the beneficiaries.

See 60 Okla. Stat. § § 31 and 175.47. The case of Pipkin v. Pipkin, 370 P.2d 826 (Okla. 1962), however, held the rule against perpetuities did not apply to the trusts if the trustee had the full power to sell or transfer the trust assets.