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# Succession law

## BUSINESS SIDE WITH...

### **(R.H.) WHAT LEGAL DOCUMENTS ARE IMPORTANT FOR FARM FAMILIES GOING THROUGH A TRANSITION?**

(R.F.) The top legal concern I encounter in agriculture is a succession planning one, whether it includes the drafting of wills, providing ownership in the farm to the next generation, dealing with estate taxes, or otherwise. The most important documents are wills, power of attorney, and shareholder or partnership agreements if there is more than one party involved.

There may also be leases involved in terms of land or possibly in terms of houses on the farm in a case where the next generation is farming but the parents lease the house that they have always been in. Depending on the complexity of the succession plan, there may also be corporation shares and trust documents involved.

### **WHAT DO YOU RECOMMEND IS INCLUDED IN WRITTEN AGREEMENTS?**

A shareholders agreement should cover the five possible Ds – death, disability, divorce, disagreement, and disengagement. This means figuring out how things would be resolved if each situation were to occur. For example, a disagreement could be solved through one generation giving the final say, 49 votes versus 51 votes or calling in an arbitrator. An agreement like this should be in place in almost every situation where there are multiple parties.

From this perspective, spouses working together can become a unique issue. The only way to be mostly bullet proof is to have your spouse sign a marriage contract. This type of contract does not have to be all or nothing – it really can be tailored properly to cover all concerns. The agreement could state that spouses will split everything except for the farm or could include entitlement based on number of years of marriage or an entitlement and repayment option. A shareholders agreement could also include a request for marriage contracts among partners and their spouses.

I always remind clients of the importance of their will and marriage contract (if applicable) because 100% of marriages end, either in death or divorce.

### **WHAT ARE THE RISKS OF NOT HAVING THESE DOCUMENTS IN PLACE?**

Without an agreement, there is a host of problems that can occur if something goes wrong or one of the five Ds takes place.

As an example, picture two siblings who own a piece of farm property. One sibling wants to make a change in terms of building a barn or selling or renting it out for specialty production. The second sibling does not want to take any action and would rather continue renting as they are now, resulting in a disagreement.

As joint owners without an agreement, a decision cannot be forced and one sibling cannot exit. In this situation they would have to go to court and get an order for partition or sale – an expensive and discretionary measure.

### **WHAT ADVICE CAN YOU PROVIDE REGARDING WILLS AND ESTATES?**

It is my experience that a lot of people tend to leave wills for a long time and only start one when a significant life event has occurred. Realistically, accidents happen and they do not respect age. Starting a will soon after turning 18 years of age is recommended. Wills can be changed in response to circumstances.

One of the practical issues that I see when farms move to the next generation is the question of when to get the child involved in the business – should it be now or later? If it is later, the child is often told that the transition will be made through the will. The problem with this strategy is that as long as you are competent, wills can be changed. This leaves the child with little guarantee that the transition will happen as agreed.

There are lots of people who will come to me and say that they do not want to pay tax. When you are going through succession planning, it is important to solve the issues in the most tax efficient way but income tax, estate tax and others should not be the focus. Be cautious about letting estate tax govern.

### **WHEN SHOULD FARM FAMILIES SEEK LEGAL ADVICE?**

A lawyer should be on the succession team and involved from the beginning of the process. Family farms have a huge emotional impact and while other professionals might be working on the soft issues, the family also needs to see someone with the legal skill set required. There are solutions to most issues, some are just more complicated than others. ●

