



ESTATE PLANNING

A Simplified Guide for Oklahoma Farm and Ranch Families

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ESTATE PLANNING¹

In broad terms “estate planning” involves the acquisition, investment, protection and disposition of assets. Oklahoma families are faced with many problems in transferring property to the next generation. Increasing numbers of farm families are becoming aware of these problems, and are searching for satisfactory methods of transferring property within their families.

This publication is intended to furnish basic information about the problems existing, to point out the many alternatives that are available, and to encourage more families to make adequate plans. Major emphasis in this publication will be placed on minimization of disposition costs. Careful estate planning under legal advice can reduce probate expenses and tax losses.

This circular is not designed as a substitute for legal advice. Rather, it is designed to acquaint families with the various alternative methods of land transfer and thereby enable them to consult legal counsel more intelligently. An informed client makes better use of the lawyer’s time. Farm families are encouraged to use this publication as a means of becoming informed and then to consult an attorney to develop a plan best suited to their own situation.

Estate Planning Problems

Death is a certainty for all of us. Failure to carefully plan for this eventuality may result in inability to achieve your desired objectives. Consideration must be given, not only to the way property will be distributed at your death, but also to ensuring lifetime income for yourself and possibly a surviving spouse.

Certain characteristics of agricultural estates pose additional problems. Lack of liquidity may require the sale of business assets in order to pay estate taxes and debts. Indivisibility makes periodic gifts more difficult. In addition, many farm operations are very capital-intensive with low cash returns relative to the amount of investment. These problems are not unique to agriculture. Many estates involving other closely-held businesses encounter similar problems.

Faced with these problems, and not knowing what to do, many families do nothing, or delay planning until it is too late. A few of the typical problems which may result from lack of planning include:

- The division of a farm under state inheritance laws results in small, uneconomical units.² The combined value of the small units when sold separately may not equal the value of the farm when sold as a total unit; nor could the smaller units be separately operated as efficiently as the whole farm.
- The farm-operating heir may not be adequately compensated for contributions to capital improvements, labor and management, and the care of the parents. Under state inheritance laws, the heir will share equally with other brothers and sisters who have not made similar contributions.
- Guardianship of minor children may require close court supervision with numerous costs and restrictions where one or both parents die without a will.
- A will may be challenged for incompetency of the parent or parents who waited too long to make a will or the potential of undue influence being placed upon the parent from other sources or family members.
- Land may be divided and subdivided to the extent that it becomes difficult to obtain a mineral lease covering an entire tract inherited by widely scattered co-owners.
- It may be necessary to sell much of the estate if no provisions are made for payment of taxes and other costs.
- Estate taxes may be greater than they would have been if some other method of distributing the estate had been chosen.
- The farm-operating heir may be saddled with an impossible debt-load. This sometimes results from attempting to buy out the other heirs at an unreasonable price and on inadequate terms.
- Ill-feelings and bitterness may arise among heirs, resulting from lack of knowledge and understanding of the law.
- Parents may suffer from economic hardships due to unexpected illness or disability if insufficient property is retained to care for them adequately during their remaining years.
- Unnecessary problems may be created by not understanding implications of a joint tenancy or life estate.
- Problems may also arise from failure to consider desired qualifications of an executor.

Many of these problems could be eliminated by proper planning. Determining the facts in the particular transfer problem and understanding the alternative ways of handling the problem, are the first steps that must be taken.

Estate Planning Objectives

Objectives in estate planning will vary from family to family, due to differences in resources, number of children, and value judgments. Clarifying the objectives is one of the first steps in logical, systematic estate planning. Objectives often listed by families may include one or more of the following:

- To provide sufficient income to the parents for the rest of their lives.
- To reduce state and federal estate and gift taxes.
- To reduce lawyers' fees, probate costs, and other fees.
- To reduce income taxes.
- To minimize disruption during estate settlement.
- To treat all children equitably, not necessarily equally.
- To keep the farm in the family.
- To help one or more of the children to start farming.
- To maintain and continue an efficient operating unit.
- To reward certain children for specific contributions they have made to the parents or to the estate.
- To provide for special needs of some heirs.
- To inform heirs what to expect, so they can make plans accordingly.

The fact that two or more objectives conflict should not deter families from making plans. It is in such cases that planning is most needed. Usually some compromises among the conflicting or competing objectives will have to be made, and it may be impossible to develop fully satisfactory plans. But the results of good planning will be far superior to unplanned property transfers.

How Property is Owned

Kinds of Property

There are two general kinds of property, called "real property" and "personal property." Real property consists of land and the permanent improvements on it. Personal property includes movable items. Personal property may include tangible objects such as livestock, machinery, and household goods or intangibles such as bank accounts, bonds, stocks, and negotiable notes.

The law makes a distinction between real and personal property in matters of inheritance, sale, and mortgage. Also, tax laws and assessments are applied differently to each of these two kinds of property.

Ways of Owning Real Property

Real property may be owned by one or more persons. Ownership may be classified by 1) type of estate and 2) if one or more people are co-owners, by type of co-ownership. Estates are a means of measuring ownership in terms of duration or a specific length of time. Leasehold estates involve a right to possession and use of property for a designated limited time period. Freehold estates are of potentially infinite duration or last for an unpredictable length of time. Types of freehold estates include fee simple ownership, life estate, fee simple determinable, and fee simple estates subject to condition subsequent.

- **Fee Simple Ownership.** Ownership of real estate in fee simple gives an unrestricted right to sell, mortgage, or dispose of the property during life or at death. It is the most complete estate that can be owned in land and includes all of the privileges of land ownership. All other types of freehold estate involve a subdivision of a fee simple estate into two estates: a present interest and a future interest.
- **Life Estate.** A person with a life estate in a farm who has the use of the farm during his or her lifetime is called a life tenant. Although the life tenant can sell the life estate, the buyer would have ownership rights only as long as the original life tenant lived. These rights do not become part of the life tenant's estate. At the death of a party holding a life estate, the person or persons owning the reversion or remainder interest (all rights not held by the life tenant) would come into possession of the property. If the original owner of the property retains the right to possess the property after the death of the life tenant, this interest is known as a reversion. If the original owner gives the

future ownership right to someone else, the future interest is called a remainder and the holder is the remainderman. The owner of a reversion or remainder interest can sell or mortgage his or her interest prior to the death of the life tenant, but the buyer could not obtain present possession of the property until after the death of the life tenant.

In the case of homestead property, rights similar to those under a life estate are given to a surviving spouse. The surviving spouse may continue to occupy the homestead and receive the income from the property to the exclusion of all adult heirs. The surviving spouse's interest is similar to a life estate in the homestead, and it would endure so long as the surviving spouse occupied the homestead as his or her home. However, in the case of homestead property, the surviving spouse's interest is personal and may not be sold or transferred to anyone else.

Conflicts sometimes arise between the life tenant and the remaindermen. The life tenant does have some legal responsibilities that help protect the interests of the remaindermen. The life tenant must avoid waste, which is the unreasonable use of the land that results in injury to the land. The injury must be permanent and affect the future possession and condition of the land. The life tenant must also pay ad valorem taxes and interest on mortgages on the property. The life tenant cannot force remaindermen to contribute to the cost of improving the property unless they consent to do so, even though the remaindermen may benefit from the improvements.

The value of the property in which the owner has reserved a life estate must be included in the estate of the life tenant. However, if the life estate is acquired by gift, inheritance, or will the value of that property would not be included in the life tenant's estate.

- **Fee Simple Determinable.** This type of estate arises when property is conditionally transferred for a specific use but will revert back to the original owner or will go to the designatee if it ceases to be used for that purpose. For example, property might be given for use as a church but the grant might specify that if the property ceases to be used as a church, the property will once again belong to the original owner. In such a case, the church owners would have a fee simple determinable estate and the original owner would have a possibility of reverter.
- **Fee Simple Estates Subject to Condition Subsequent.** These estates are very similar to fee simple determinable estates. The chief difference is that in the case of a fee simple determinable estate, the property ownership automatically goes to the future interest holder if the condition is broken, whereas in this type of estate, the future interest holder must take some action to gain title to the property after the condition is broken. If the interest holder fails to take any action, the holder of the Fee Simple Estate Subject to Condition Subsequent will continue to own the property. In this type of estate, the future interest holder has a right of reentry if the original owner retained the future interest or a power of termination if the right was given to someone else. Great care must be taken in creating either a fee simple determinable estate or a fee simple estate subject to condition subsequent to ensure that the wishes of the grantor are fulfilled.

Co-ownership

One piece of property can also have two or more present owners, rather than being owned by just one individual. Co-ownership can be for real property as well as personal property. In legal language, it is owned "in undivided interests." There are three types of such co-ownership: tenancy-in-common, joint tenancy with the rights of survivorship, and tenancy by the entirety. The type of co-ownership affects:

1. Who will inherit property
 2. How it will be taxed for estate tax purposes
- **Tenancy-in-Common.** Tenants-in-common have undivided interests in the same land. Two or more persons may be owners in undivided interests as tenants-in-common. Tenancies-in-common are frequently created by the laws of inheritance. For example, if a widow with two children owns a farm and dies without a will, the two children will each own an undivided one-half interest as tenants-in-common.

There is no right of survivorship between tenants-in-common. Each tenant-in-common can sell or devise (will) his share. For example, if two married brothers own 320 acres as tenants-in-common and one brother dies, his one-half interest would pass to his heirs and be included in his estate for estate tax purposes. It would only pass to the surviving brother if he were an heir designated to receive the property.

If two or more persons own property jointly, it is normally presumed that they own as tenants-in-common unless the deed or title documents clearly indicate that a right of survivorship was intended.

- **Joint Tenancy.** The owners are called "joint tenants." The joint tenants do not have to be husband and wife. When one joint tenant dies, his or her undivided interest is distributed equally among the surviving joint tenants. This is the characteristic peculiar to joint tenancy, and is referred to as "right of survivorship."

Under Oklahoma law³ a joint tenancy can be created by the present owner deeding property to himself or herself and another as joint tenants or by a third party transferring property to two or more persons in a deed that specifies they will own as joint tenants. Use of words “and/or” alone is insufficient to create joint tenancy. Since some institutions or firms do not rigidly follow the law in this respect, it is best to review and decide with your legal counsel how titles should be held for bank accounts, savings and loans, bonds, stocks, insurance policies, and automobiles. Inadequate or improper wording may result in unnecessary litigation or additional estate taxes. A common abbreviation designating joint tenancy, as used here, is “J.T.W.R.O.S.,” meaning joint tenancy with rights of survivorship.

A joint tenant can sell or mortgage their interest, but cannot dispose of it by will. If a husband and wife own real property as joint tenants and the husband dies, the wife takes full ownership to the exclusion of the children. It is possible for the joint tenancy to be broken by one joint tenant conveying his or her interest outside the existing joint ownership.

For estate tax purposes, generally the entire value of joint tenancy property is included in the estate of the first joint tenant to die, but it may be reduced by the proportionate value contributed by the survivors.⁴ There is an exception for gifts of joint tenancy property to a spouse which occurred after December 31, 1976. See Section “Taxing Joint Tenancy Property.”

- **Tenancy by the Entirety.** Tenancy by the entirety is a type of joint tenancy between husband and wife that is characterized by the fact that neither party can sever it without the consent of the other. Upon the death of one, the survivor acquires title to the property. This type of ownership is similar in nature to joint tenancy. Therefore, it is recommended that the deed or contract specifically refer to tenancy by the entirety if this type of co-ownership is desired.

The Deed as Evidence of Ownership

A deed represents evidence of ownership of real estate. Thus, it is the instrument by which a real estate owner acknowledges transfer of the property to a new owner. There are two kinds of deeds that are customarily used in conveying land: warranty deeds and quitclaim deeds.

- **Warranty Deeds.** A warranty deed usually contains the phrase, “and warrants the title thereto.” Such a deed contains covenants (assurances or guarantees) of title that impose contractual liability upon the grantor (person transferring title). Typical covenants are: 1) that the seller had an estate free of adverse claims in fee simple with the right and power to convey, 2) that the property was free from encumbrances of liens except those listed on the deed, and 3) that the buyer will have quiet and peaceable possession and the seller will defend title against all persons lawfully claiming it. A warranty deed actually conveys no more title than does a quitclaim deed. However, if a warranty deed is used, the grantor may be held liable if the title is limited, defective, or encumbered. For example, if the property being conveyed by warranty deed is mortgaged and the deed is not made subject to the mortgage, then the grantor may be personally liable for any damages suffered by the grantee (person receiving the title). Such liability of the grantor may even extend beyond the grantee to subsequent grantees. The warranty deed also assures the grantee that if the grantor did not have title at the time of delivering the deed, but should later acquire title, then the grantee will thereby receive all of such title.
- **Quitclaim Deed.** A quitclaim deed indicates that the seller is conveying whatever rights he possesses in the property to the buyer but does not promise that the seller owns anything. Such a deed does not obligate the grantor beyond his present ownership. If the grantor has no interest in the property, none will be conveyed. A quitclaim deed contains the words “and quitclaim” as a usual term in the granting clause of the deed. It is possible to insert in the quitclaim deed an additional clause by which the grantor obligates himself to convey all interest, if any, which he may thereafter acquire in the land. This would accomplish one of the additional protections of a warranty deed but would not help the buyer if the seller never acquired title.
- **Purpose of Recording a Deed.** Deeds should be recorded, not for the purpose of giving them validity, but to give notice of their contents and effects to all the world. To be recorded, the deed should be acknowledged with a declaration that the grantor personally appeared before a public officer, such as a notary public, and certified that the deed was voluntarily signed by the grantor. Deeds are recorded in the County Clerk’s office of the county in which the land is located.
- **Importance of Delivery.** Sometimes a grantor will sign a deed covering land which he or she wants to keep until death expecting the deed to be the method by which title to the land is transferred. Instead of delivering the deed di-

rectly to the grantee, the owner places the deed in a safety deposit box or among private papers. Undelivered deeds like these are commonly called “dresser drawer deeds.” Such deeds are invalid because they were not delivered to the grantee or his or her agent during the lifetime of the grantor. **Delivery is necessary to accomplish a conveyance by deed.**

Unless the deed is drawn and executed in the form of a will (which would be extraordinary and unusual), it could not become legally effective without delivery of the deed to the grantee or his agent. One alternative for handling this problem is for the grantor to retain a life estate for himself and transfer a remainder interest to the person he wants to own the property after death. At death, the property would automatically pass to the remainderman. This may, however, present problems in terms of potential conflicts between the life tenant and remainderman regarding management of the property.

The deed could also be delivered to an escrow holder, who acts independently of both the grantor and grantee, with instructions that the escrow holder is to deliver the deed to the grantee upon the completion of certain acts or the happening of a certain event. In such a case, the law regards the date when the deed was delivered to the escrow holder as the effective date of the delivery, which makes the deed valid. The law would not pay any attention to the date when the deed was physically delivered to the grantee and, therefore, it would not make any difference if the grantor were dead at the time when the grantee received the deed. Escrow transactions are frequently used to overcome the risk of a grantor’s death pending the closing of a prolonged real estate transaction or one involving installment payments extending over many years.

The key to effective delivery of a deed is that the grantor must presently transfer legal control over the deed to the grantee or an independent third party. If the grantor retains a right to change his mind, then control has not been presently transferred. Because of the potential legal problems that may arise in using this type of device in estate planning, it is especially important to obtain legal advice. An alternative planning tool may better meet your needs with less risk of legal challenge.

If a mortgage covers the property to be transferred, the grantor (transferor) should keep in mind that liability for the debt remains unless a release from the lender is obtained.

Estate and Gift Taxes

One of the most frequently cited objectives in estate planning is “minimization of estate and gift taxes.” Knowledge of some of the key state and federal estate and gift tax rules can be helpful in evaluating your current situation and in selecting strategies to minimize such taxes.

Federal Estate Taxes

Federal Gross Estate⁵

The federal estate tax is a tax on all property of a deceased person. The reader should be aware that these provisions are subject to change. The American Taxpayer Relief Act of 2012 (2012 ATRA) modified the estate tax for decedents dying and estate transfers made after December 31, 2012. The estate tax exclusion was fixed for 2011 at \$5,000,000 and indexed for inflation. For 2015, the estate tax exclusion was \$5,430,000 and for 2016 the estate tax exclusion is \$5,450,000. The maximum tax rate was increased from 35 to 40 percent for deaths and transfers in 2013 and future years.

The gross estate includes all real and personal property, whether tangible or intangible. These properties include the following:

- The estate of the first spouse to die will include one-half the value of joint tenancy property, regardless of which spouse furnished the consideration for the property. This rule applies only where the spouses are the only joint tenants.
- All death benefits under life insurance policies on life of decedent owned or controlled by him or payable to his estate and cash values of all life insurance policies owned by him 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 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 this material. 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.

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.⁶

As result of the marital deduction (page 11), 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. The act similarly applies to tenancies by the entirety.

Current Use Value

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. The conditions are as follows:

1. The adjusted value of the farm or other closely-held business assets (assets minus debt) must comprise at least fifty percent of the decedent’s adjusted gross estate (assets minus debts).
2. At least twenty-five percent of the adjusted value of the gross estate must be qualified farm or other closely-held business real property.
3. The farm or other closely-held business must pass to qualified heirs.
4. The real property must have been owned by the decedent or a member of the decedent’s family and held for use as a farm five out of the last eight years preceding the decedent’s death.
5. The decedent or member of the decedent’s family must have materially participated in the operation of the farm or other business for five out of the last eight years immediately preceding the decedent’s death (or retirement or disability).

Special rules for decedents who are retired or disabled are as follows: The material participation has to be satisfied during periods aggregating five or more of the eight year period ending before the earlier of (1) the date of death; (2) the date on which the decedent became disabled; or (3) the date on which the individual began receiving Social Security retirement benefits, which continued until decedent’s death.

If the property was passed to the surviving spouse, he or she will be treated as having materially participated during periods when engaged in active management of the farm or business. The term “active management” means the making of management decisions of a business that is more than just the daily operating decisions.

The definition of a member of a family means only (a) an ancestor, (b) the spouse, (c) a lineal descendent of decedent or of decedent’s parents or of decedent’s spouse, or (d) the spouse of any lineal descendent described in (c) above. For purposes of the preceding sentence, a legally adopted child of an individual shall be treated as the child of such individual by blood. Lineal descendents of the decedent’s grandparents are no longer considered to be family members unless they are also descendents of the decedent’s parents. This means that aunts, uncles, nieces, nephews, and cousins are excluded.

6. The special valuation cannot reduce the decedent’s gross estate by more than \$1,100,000 for 2015, \$1,110,000 for 2016, and is indexed for inflation.
7. An election to specially value the property must be made on the other decedent’s estate tax return.
8. A written agreement must be signed by each person who has an interest in the property for which the special use is elected, stating that additional estate taxes will be paid if there is a premature disposition or cessation of qualified use of the property.
9. Special rules exist relative to standing timber.

• **Computing “Current Use” Value.** The “Current Use” value is determined in one of two ways:

1. Capitalization of rent, which is computed by dividing the five-year average annual gross cash rental for comparable farmland in the locality less the five-year average real property taxes, by the IRS published Farm Credit System Bank Interest Rate used to compute the current year’s Special Use Value.

If there is no comparable land from which the average annual gross cash rental may be determined, “average net share rental” may be substituted for average gross cash rental. Net share rental is defined as the excess of the value of the produce received by the lessor of the land over the cash operating expenses of growing such produce, which are paid by the lessor under terms of the lease.

Each average annual computation is to be made on the basis of the five most recent calendar years. For decedents dying in 2015, the average interest rate was 4.17 percent; The rates for 2016 will be released later in the year. The following example assumes that the current average land rent is \$50.00 per acre, taxes are \$3.50 per acre, and the Farm Credit System Bank interest rate was 4.17 percent.

$$\frac{50.00 - \$3.50}{.0417} = \$ 1,115.11 \text{ per acre current use value}$$

2. If there are no comparable sales or the formula method is not used, the value of real property may be determined by application of the following factors:
 - a. The capitalization of income that the property can expect to yield for farming or for closely-held business purposes over a reasonable period of time under prudent management, using traditional cropping patterns for the area, taking into account soil capacity, terrain configuration, and similar factors.
 - b. The capitalization of the fair rental value of the land for farming or for closely-held business purposes.
 - c. The assessed land values in a state that provides a differential or use value assessment law for farmland or closely-held business property.
 - d. Comparable sales of other farm or closely-held business land in the same geographical area far enough removed from a metropolitan or resort area so that nonagricultural use is not a significant factor in the sales price.
 - e. Any other factor which fairly values the farm or closely-held business value of the property.
- **Recapture of “Current Use” Benefits.** If the property is disposed of within ten years after the death of the decedent to nonfamily members or ceases to be used for farming or other closely-held business purposes, the tax benefits are fully or partially recaptured.
 1. Full recapture occurs within the first ten years.
 2. Recapture does not occur, however, on death of the qualified heir.
 3. Partial dispositions lead to partial recapture of the tax savings.
 4. The qualified heirs are responsible for the recaptured tax.
 5. For purposes of “cessation of qualified use,” absence of material participation for three or more years during any eight-year period ending after decedent’s death triggers recapture.
 6. A special lien, in favor of the United States, will be attached to the property. Liens on loans by the Treasury will be subordinate to bank loans.
 7. A two year grace period after the decedent’s death during which a qualified heir’s failure to use the qualifying property in the qualified use will not cause imposition of a recapture tax.
 8. Active management by eligible qualified heirs will satisfy the post-death material participation requirement. Eligible heirs in this case include the decedent’s spouse, or a qualified heir who has not attained age 21, who is a student or is disabled.
- **Increase in Basis of Property on Which a Recapture Tax is Paid.** Where the recapture tax is paid, the new law permits a qualified heir to make an irrevocable election to have the income tax basis of the qualified real property increased to the fair market value as of the decedent’s death or the alternative valuation date.

Computation of the Taxable Estate

The taxable estate is the gross estate less deductible:

- Funeral expenses.
- Estate administration expenses.
- Claims against the estate.
- Taxes accrued but unpaid at the date of death.
- Loss from fire, storm, and theft (casualty losses) not compensated for by the insurance or claimed as a deduction in an income tax return.

- An unlimited marital deduction is allowed for qualifying property that passes to a surviving spouse. The executor may even elect to have certain life interests qualify for the marital deduction. A special rule applies for charitable remainder trusts. See discussion below on marital deduction.
- 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.

Marital Deductions.⁷

There is an unlimited marital deduction for decedents. The decisions on the use and amount of marital deduction will vary with the size of the estate and the unified tax credit. The strategy for some persons will be to change the amount of the marital deduction during this period if the objective is to reduce estate taxes. The executor will often have to make computations to determine whether to elect to have certain qualified terminal interest properties qualify. Qualified terminal interest property means property that passes from the decedent, and in which the surviving spouse has a qualifying income interest for life. (See section on disclaimers.)

Portability of the Deceased Spouse's Unused Exemption

The Tax Relief Act of 2010 (2010 TRA) modified the estate tax law allowing the estate of an individual who died in 2011 and 2012 to elect to add the deceased spousal unused estate tax exclusion amount to the surviving spouse's basic estate tax exclusion amount. The American Taxpayer Relief Act of 2012 (ATRA) made the provision a permanent part of the 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 2016, each spouse's basic estate tax exclusion amount is \$5,450,000 and this provision allows the spouses to combine their individual exclusion amounts for a maximum exclusion of \$10,900,000 should both spouses pass in 2016.

Thus a surviving spouse may use the deceased spouse's unused exclusion amount in addition to his or her own basic exclusion amount. If the surviving spouse remarries and is preceded in death by more than one spouse, generally only the deceased spouse unused exemption of the last deceased spouse is added to the surviving spouse's basic exclusion amount.

The deceased spouse unused exemption amount 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.

Federal Estate Tax Rates

Federal estate tax rates are shown in Table 1. Table 1 is effective for 2016.

Determining Estate Taxes for Spouses

Estimating the tax liabilities under different alternatives is a part of good estate planning. The tax estimates and other transfer costs should include the costs for both the husband and wife. Well thought-out plans will explore the potential tax burden resulting from the unexpected death of either husband or wife.

Credits Against Federal Estate Tax

Credits against federal estate taxes are allowed for the following:

- a. Credit for estate taxes paid to the state. There is a maximum limit for the amount of this credit.
 - b. Credit for federal gift tax paid on gifts regarded by Internal Revenue Service to be a part of the estate for estate tax purposes.
 - c. Credit for taxes paid on transfers of property received from previous estates.
 - d. Credit for foreign death taxes paid.
 - e. Federal Estate Tax and Gift Tax Credit.
- **Federal Estate and Gift Tax Credit.** The following credits (shown in Table 2) are effective against estate taxes for decedents and for gifts made after 2012. The credit is applied against either the gift tax or estate tax, not as a

Table 1. Unified Rate Schedule.

Column A	Column B	Column C	Column D
Taxable amount over	Taxable amount not over	Tax on amount in Column A	Rate of Tax on Excess over Amount in Column A (Percent)
0	\$10,000	0	18
\$10,000	20,000	\$1,800	20
20,000	40,000	3,800	22
40,000	60,000	8,200	24
60,000	80,000	13,000	26
80,000	100,000	18,200	28
100,000	150,000	23,800	30
150,000	250,000	38,800	32
250,000	500,000	70,800	34
500,000	750,000	155,800	37
750,000	1,000,000	248,300	39
1,000,000	---	345,800	40

deduction against the taxable value of the estate. Note that the credit is increased over time. In 2016, a decedent with an estate of \$5,450,000 or less will not have to pay estate taxes.

- **Deduction for State Death Taxes.** The 2012 ATRA continues the allowance of a deduction for certain death taxes paid to any state including the District of Columbia for decedents dying after December 31, 2012.
- **Installment Payment of Estate Taxes.** If the closely-held business interest exceeds 35% (formerly 65%) of the adjusted gross estate, the taxes attributable to that interest may be deferred up to 5 years; annual interest payments may be paid for the first four years and the balance may be paid in up to 10 annual installments of principal and interest.

Federal Gift Taxes

For gifts made in 2016 and thereafter the annual exclusion has been increased to \$14,000 per recipient. Since 1997, the excludable amount has been indexed for inflation, but will only move in \$1,000 increments. With gift-splitting, spouses may transfer \$28,000 per recipient per year without gift tax even if one spouse owns all of the property. The consent of the spouse not owning property must be signified on the gift tax returns.

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.

Table 2. Federal Estate Tax Credit and Gift Tax Credit.

For Decedents Dying	Federal Estate Tax Credit	Equivalent Exemption	Federal Gift Tax Credit	Equivalent Exemption
2012 ¹	1,772,800	5,120,000	1,772,800	5,120,000
2013	2,045,800	5,250,000	2,045,800	5,250,000
2014	2,081,800	5,340,000	2,081,800	5,340,000
2015	2,117,800	5,430,000	2,117,800	5,430,000
2016	2,125,800	5,450,000	2,125,800	5,450,000

¹ (effective for 2012 and future years, the credit amount is indexed for inflation)

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.

Marital Gift Taxes

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

Gift Tax Computations

A gift and estate tax rate schedule applies for taxable gifts made and for estate taxes (See Table 1).

- **Example of Gift Tax Computations.** A single unified gift and estate tax rate schedule applies for gifts made and for estate taxes after Dec. 31, 2010. See Table 1. An example of a gift tax computation for 2016 is as follows:

Gift for 2016	\$5,700,000
Less annual exclusion	(14,000)
Taxable gifts	\$5,686,000
Plus: Prior taxable gifts	450,000
Total taxable gifts	\$6,136,000
Tentative tax on taxable gifts (From Table 1)	\$2,400,200
Minus: Tax paid on prior taxable gifts	(18,000)
Gross gift tax	2,382,200
Minus: Available unified credit in 2016	(2,125,800)
Net gift tax due	\$ 256,400

Taxable Gifts and Decedent's Final Estate Taxes

Taxable gifts must be taken into consideration in computing a decedent's final estate taxes. The taxable portion of the gifts is added to the decedent's taxable estate, the tax computed, and then the unified credit is deducted from the total estate tax. An example follows:

Taxable estate 2016	\$5,050,000
Add adjusted taxable gifts	450,000
Taxable amount	5,500,000
Tentative tax	2,145,800
Minus: Taxes paid on gifts	(17,000)
Estate tax before credits	2,128,800
Less unified credit in 2016	(2,125,800)
Estate tax after credit	3,000

Other Gift Items

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 present enjoyment 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.

Basis of Property Received Within One Year of Death

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.

Annual Payment of Gift Tax

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

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.

Oklahoma Estate Tax

The Oklahoma Estate Tax Law has been permanently repealed effective January 1, 2010.

Transferring Ownership

This section describes some of the methods by which the legal ownership of property may be transferred from one person to another, and describes the various ways in which these methods may be used in estate planning.

Transfer by Contract

Sale of the farm to the member of the family who is to take it over is a common method of transfer. The buyer in such cases seldom has enough capital to pay for the farm in a lump sum, and the parents usually need to be assured of some income or return from the farm. This situation may be handled by a sale subject to a mortgage or by one of the several types of conditional sale.

Outright Sale, with Mortgage

Use of a deed and a mortgage in combination is a common method of transferring the ownership of real estate between unrelated persons. The seller deeds title to the property to the buyer. The buyer makes a down payment and gives the seller a mortgage on the property to ensure payment of the balance of the purchase price.

Where this method is used in estate planning, the parents may for example deed title of the farm to the child and the child could encumber title by giving a mortgage back to the parents. This method should be encouraged, provided the child can make sufficient down payment. Often the child cannot; and, from the parents' viewpoint, there are serious disadvantages when little or no down payment is required. Passing the title to a person who might have little incentive to increase equity involves some risk. In this type of situation, some authorities believe the child should pay at least one-fourth of the purchase price before the parents pass title. This amount could reasonably vary due to a number of factors.

Advantages

- Outright sale permits the purchasers to make permanent improvements on the land.
- A sale with a mortgage is a businesslike way of making the transfer. It is usually best to have the farm appraised to prevent family misunderstanding as to its value, especially if there is more than one heir.
- Equitable treatment of all the heirs can be separated from the problem of transferring the farm.
- The transfer may prevent the farm from becoming run down when owners become too old to maintain it properly.
- In instances where an estate tax problem exists, sale of the farm will set the value to be included in the estate for estate tax purposes.
- A sale to children makes it possible for the buying children to operate the farm during their most productive years.

Disadvantages

- The parents lose control over the property.
- The capital gains tax may be greater than the estate taxes would be. Selling by the installment sales method can be used to reduce the taxes. Installment sales must conform to certain restrictions.
- The parents may not receive enough for the farm. The parents often are tempted to sell for less than the market price; and, if their wealth is limited, this may later cause them hardships.
- If parents sell to one child for less than market price, conflicts may result with their other children.
- The estate cannot take advantage of current use valuation.

Land Contract (Purchase Contract)

The land contract, purchase contract, or contract for deed is recommended as a method of sale when the buyer does not have a sufficient down payment. It is an agreement whereby one party agrees to convey land to another party for a certain price, with the seller retaining legal title and the deed until some specified future date (for example, until all payments are made). Although legal title stays with the seller during the contract, equitable title passes immediately to the buyer. The land contract is becoming popular in several states among unrelated parties.

There are several variations in methods of payment under the land contract. Some are as follows:

- Fixed money price and fixed annual payments.
- Payment based on fixed amount of commodities each year. For example, the contract could specify so many bushels of wheat each year. The value of the payment would then be determined by the price of wheat for that year.
- Fixed purchase price with yearly payment based on percentage of gross receipts. This method is sometimes used on dairy farms.
- Variable purchase price with variable payments. The payments could consist of a certain percentage of the gross income during the parents' lifetime.
- Combinations and variations of the above may be worked out.

Advantages

- The purchase contract facilitates the purchase of a farm by a young buyer with limited funds. It is one of the few ways this can be done.
- The repayment schedule encourages a young farmer to build up equity during the early years.
- Some sellers like the purchase contract because of income tax savings due to use of the installment plan. Installment payments allow the gain from the sale to be spread over several years.
- An element of control is left in the hands of the seller.
- Ejection of a defaulting buyer under a contract for deed may be easier than a mortgage foreclosure. However, courts often tend to require similar procedures in each case.

Disadvantages

- The buyer has less secure title to the property, since it is an equitable title, but not the legal title.
- It may be more difficult for the buyer to sell his equity if, for health reasons, he wants to quit farming.
- If the down payment is small, the seller takes more credit risk in the early years of the contract than is taken by regular lending agencies that require a larger buyer equity.

Reserving a Life Estate

The parents can deed a remainder interest to the child and reserve to themselves a life estate. This is a method of assuring lifetime income for the parents. The child actually owns an interest in the land, but the right to use the land belongs to the parents during their lifetime. The parents, if they so desire, could give a lifetime lease to the child. The property is still subject to estate taxes when the parents have retained a life estate and have deeded a remainder interest to a child but the property is not subject to regular probate.

Advantages

- The child is assured of having the farm and the parents are entitled to income during their lifetime.
- If the parents have no other property, no regular probate proceeding will be necessary to determine fact of death and terminate the life estate. In this procedure, an estate tax return is prepared and a certificate of tax clearance is obtained from the tax commission. The cost of this shorter probate procedure is much less than the cost of a regular probate proceeding.

Disadvantages

- Conflicts regarding management of the property may arise between the life tenants and remaindermen.
- The child could sell his remainder interest to an uncooperative person. The parents could prevent this by inserting a clause in the deed that states, "if the child transferred his rights during the lifetime of either parent, the remainder interest would revert to the parents."
- It is hard to value what the child is getting.
- The laws are unclear regarding how mineral interests are handled in a life estate.

- Once the life estate is created, parents cannot change their mind about how the property will be distributed at their death. Thus flexibility to handle changing circumstances is cancelled.
- Creditors of the child may be able to reach the child's remainder interest and if the child has financial difficulties, his inheritance may be lost.

Transfer by Gift

Parents in position to do so may, if they wish, transfer property to the younger generation by gift. When the gift is made early in life, the knowledge of ownership usually results in added enthusiasm and energy in developing the property by the donee and learning to care for it under the guidance and advice of the donor.

Transfer of the property at an early age is usually restricted by economic considerations and by the reluctance of parents to part too early with worldly goods. The economic reason is, of course, the most important. In many cases, the parents need all of their property to provide income in later years.

A gift is very easy to make. Land may be given by a deed properly signed, acknowledged, and delivered. **Delivery of the deed is very important** (see The Deed as Evidence of Ownership section on page 7). Personal property can be given by handing over the property with the apparent intention of making the recipient the present owner. There must be a manual transfer of the property itself or of something symbolic of it. It is best, however, to evidence the intention of the donor by written instrument.

Most gifts are made **inter vivos** – that is, by a person who may be in no immediate expectation of death. Ownership of property transferred by gift inter vivos vests absolutely and at the time the transfer is made.

A gift made by a donor in expectation that he will die of some immediate threat of death is known as a gift causa mortis. Such a gift is frequently conditional so that if the donor does not die as expected, the transfer of ownership is nullified. The courts generally hold that ownership passes at the time of the gift to the donee, but that it reverts to the donor if he does not die as he expected. That is, the donor can recover the property if he survives the peril that caused him to make a gift causa mortis.

Advantages

- A gift can be given at any age and provides ownership security for the recipient.
- Knowledge of ownership may encourage development of the property under the guidance of the donor.
- A gift may reduce net income taxes. A younger person may be in a lower tax bracket; thus he would retain more of the earnings from the asset.
- A gift may help to reduce estate taxes by removing assets from the estate and by establishing the value of the assets at the time the gift was made, thus avoiding the effects of inflation.
- Individuals may make gifts of up to \$14,000 per recipient during 2016 without any federal gift tax consequence.

Disadvantages

- Unless the parents have other income, a large gift may create a financial hardship on them later in life. Loss of purchasing power through inflation should be kept in mind.
- Transfer by gift may result in family disagreements.
- Gifts may be subject to federal gift taxes if larger than \$14,000 per recipient during 2016.
- If assets are declining in value, gift taxes today may be higher than estate taxes would be later.
- In some cases, the donee may not have sufficient maturity to manage the assets wisely.
- If the child is having financial problems and the gift is not sufficiently large to pay the creditors, the creditors may attach the gift property and the family inheritance may be lost.

Transfer by Combined Sale and Gift

Sale and gift can sometimes be effectively combined. In fact, if property is sold at a low price, the difference between the market price and the selling price is considered a gift. If the gift is large enough, federal gift taxes will be due.

Reduced purchase price, low interest rates, and easy terms could be considered in the nature of a gift. In some cases, these are designed to offset the child's contribution to the farm business. Lower than market interest rates may result in unfavorable income tax results. The differences between the rate used and the Applicable Federal Rates used by the IRS may be treated as income to the buyer with no deduction to the seller.

If a combination of sale and gift is used, the agreement should be carefully worded in writing. This may prevent misunderstandings between the farming child and the other children.

Transfer by Co-ownership

Some types of co-ownership provide a means of transferring property when one of the owners dies, as well as a way of sharing ownership.

Joint Tenancy

Joint tenancy has been a popular way to own property primarily because it is a way to transfer property. It is one way in which two or more people can own real property together. Perhaps the popularity has been due to a large extent to a lack of knowledge of the disadvantages.

The outstanding characteristic of joint tenancy is that when one joint tenant dies, ownership passes to the surviving joint tenant or tenants. Usually it is a husband and wife who are joint tenants, but unrelated persons may be joint tenants. It is sometimes desirable for married couples to own checking accounts and motor vehicles as joint tenants in order for the surviving spouse to have prompt access to those items during settlement of the estate.

Advantages

- Fewer court proceedings are needed to clear up the survivor's rights. Usually less time and costs are involved in proceedings to terminate a joint tenancy than in a probate. The proceedings to terminate joint tenancy between spouses have been reduced even further. The surviving spouse may obtain a merchantable title to real property in joint tenancy with rights of survivorship by filing the following documents with the County Clerk, as provided by Title 58 O.S., Section 912.
 1. A certified copy of the death certificate.
 2. An affidavit by the surviving joint tenant stating that the decedent named in such certificate is one and the same person as the joint tenant named in a previously recorded document by book and page where recorded. The document itself satisfies this requirement as to recording information.
 3. If property is held in joint tenancy other than only with the spouse, a waiver or release by the Oklahoma Tax Commission of their estate tax lien must also be filed.
- It is easy to create a joint tenancy. Usually executing a deed naming all the parties is necessary, but the courts have been strict in requiring language to show that the grantor intended a joint tenancy and not tenancy-in-common. Use of the words "and/or" alone is insufficient to create a joint tenancy.

Disadvantages

- Very few farmers own all property in joint tenancy; therefore, if probate proceedings are required for part of the estate, much of the advantage of simplified legal proceedings is gone.
- Gift and estate taxes may be higher when property is held in joint tenancy than when property is held in one person's name. For example, if a widowed mother puts her farm in joint tenancy with her son, a gift tax may have to be paid if the value of the child's half interest is great enough. Then, when one joint tenant dies, the entire value of the farm may be subject to both federal and state estate taxes. However, the value may be reduced by the amount that the executor can prove was furnished by the surviving joint tenant in acquiring the property but contribution to the purchase price is sometimes difficult to prove. This may be costly. The marital deduction avoids this problem in cases where the joint tenants are married to each other. Once parents transfer property to a child in joint tenancy, they cannot change their minds. An individual may change his will at anytime.
- The child could sell his interest to the farm if he so desired.
- The joint tenancy can be severed by a judgment creditor proceeding against the land belonging to the joint tenant against whom he has had judgment.
- A parent holding title to property in joint tenancy with several children might have difficulty in mortgaging the property.
- The right of survivorship may create unfair distributional results. For example, if a widow or widower remarries, places inherited property in joint tenancy with the new spouse, and dies before the new spouse, children may be disinherited. The property would belong to the surviving joint tenant and will eventually go to the surviving joint tenant's heirs unless the survivor's will designates otherwise.
- Conflicts may arise between the joint tenants concerning management of the property.
- Large estates held jointly may increase estate taxes compared to most alternatives.

Terminating Joint Tenancies for Estate Planning Purposes. In large estates, with some exceptions, it is usually desirable to avoid joint tenancy with rights of survivorship. Owning property in joint tenancy prevents an individual from using a life estate plan or a marital deduction trust for such specific property. Thus, terminating joint tenancies is a part of the total estate plan for some people. As a result of the unlimited marital deduction, joint tenancies between husband and wife no longer have adverse tax consequences at the death of the first spouse.

A severance of joint tenancy can occur at the election of any co-owner by transferring the interest to another person. This can be done without the approval of the other co-owners; and if such transfer should be made, the transferee thereof becomes a tenant in common with the other co-owners who may remain joint tenants to each other. Survivorship rights would not then apply to the interest transferred but would continue to apply to interests remaining in joint tenancy.

Tenancy-in-Common

A deed creating a tenancy-in-common can be used to pass a portion of the farm to a member of the second generation, without passing ownership of the entire farm to the same individual. Thus a parent could, if so desired, transfer a fractional share of the farm to a child. This arrangement is sometimes used in gift/purchase agreements. In the beginning the parent might transfer a small interest. As the child grows older and becomes more financially able, he may purchase a larger share.

The portion remaining in the parent's name at death could be divided among immediate members of the family, or left to the child who already owned part of the farm. The parent could include in the will a provision permitting the child owning part of the farm to buyout the other heirs if desired. Such a provision may allow the child to pay a reasonable amount each year over a fixed period of time.

Advantages

- The surviving owner does not take all, as in joint tenancy. The decedent's interest passes to his legal heirs or according to his will.
- A small or large fractional share can be owned or conveyed without consent of co-tenants.
- Several persons can own land in unequal undivided shares.

Disadvantages

- A tenant-in-common may use a proceeding called partition to have the jointly owned property physically divided or sold so he can receive his share. This right may jeopardize long-range planning by co-owners.
- Common ownership and responsibility may demonstrate the old maxim, "Everybody's business is nobody's business," thus discouraging proper attention and care to farm management and operation. Keeping account of labor and improvements invested in the farm by co-owners may prove to be inconvenient. Some co-owners may be unable to pay or may refuse to pay their share of farm maintenance and improvement costs.

Partnership

A partnership may be used to enable the transfer of farm property from one generation to the next. Usually the child obtains an interest in the farm operation by gift or purchase, or by an operating agreement under which he invests part of his income share in either real or personal property, or by both gift and purchase. Later, arrangements can be made to buy a larger part of the parent's interest. Provision is then made for the child to purchase the remainder of the parent's interest at the parent's death when the partnership is dissolved and liquidated. Often this provision is made by a "buy and sell agreement" whereby the partners agree that the parent's remaining share shall be sold to one child at the parent's death. An agreed payment by the purchaser to other potential heirs is made a part of the arrangement. The payments could be made on an installment basis or by using proceeds from life insurance policies.

Transfer by Will: Types and Requirements

A will is an instrument used to distribute property upon death. The person who makes the will is called the testator or if a woman, testatrix. Each state has statutes that regulate the making of wills. The following information is, of course, based on Oklahoma law.⁸

Advantages

- A will leaves full control of the property with the owner until his death, when transfer of property will be made under impartial supervision and approval of the probate court.

- It permits the owner to distribute his property to best fit his particular situation and wants.
- A will can be changed when conditions warrant. (An exception occurs when a contract has been entered into between two testators binding themselves to dispose of their property in a certain manner.)
- The will may direct that the devisees (the persons designated to receive real property by will) or legatees (the beneficiaries to whom personal property is willed) may be excluded from certain benefits under the will if they fail to survive the testator by a given number of days. This provision would avoid double probate upon property that would be held for only a short time by a person dying soon after the death of the testator.
- Power to lease and sell property in the estate may be vested in the executor, making unnecessary a special application to the court for such purposes.
- It permits disinheritance of heirs at law, except a surviving spouse, if testator so chooses, if he does so by proper language.
- The owner may select the executor of the estate and save the cost of a surety bond if he desires by specifying that the executor serve without bond.
- It may offer tax advantages by reducing estate taxes through careful planning, as contrasted with a sale during the owner's lifetime.
- The testator may name the guardian of his minor children, and although this is only a recommendation to the court, it is usually followed if the court regards the nomination as reasonable for the interests of the children.

Disadvantages

- A will may be poorly prepared and fail to carry out the wishes of the owner. **Thus, making of a will alone does not necessarily provide a satisfactory way of transferring property. What goes into a will is what counts.** The contents of the will are important - the choice of words; the contingency clauses; freedom from ambiguity; avoidance of contradiction; special bequest provisions.
- It permits an owner to direct the use of the property for many years after his death. This sometimes causes hardship for heirs as a result of changing economic and family circumstances.
- Neglect, inefficiency, and indifference in farm operations may be produced because heirs are uncertain as to how and to whom the property may be distributed. This uncertainty may be avoided by transfers made during lifetime of the owner.

General Provisions Applying to All Wills

General provisions that apply to all types of wills include:

- A spouse may dispose of all his or her separate estate by will, without the consent of the other spouse.
- A will cannot take precedence over:
 1. A written antenuptial agreement. An antenuptial agreement is one made up between a man and woman prior to their marriage in which each agrees upon death of the other to take less property or different interest than which the law allows the surviving spouse.
 2. A spouse's elective share. The amount of property a spouse may receive under the laws of succession cannot be reduced by will without approval of the surviving spouse. If by chance this happened, the surviving spouse could elect to receive property under the state laws of succession which would, in effect, invalidate the distribution provisions to him or her under the will.

Types of Wills

The only type of will recommended for estate planning is a formally executed will drawn by a lawyer. The law recognizes other types of wills, but these other types are best used only in emergency situations. A **nuncupative will** is an oral will which can be made only by a person in military service and in fear of death connected therewith. The estate must not exceed \$1,000 and cannot include real estate. The will must be proved by two witnesses. A **holographic will** is one that is entirely written, dated, and signed by the hand of the testator himself. It need not be witnessed. This type is not recommended for use under normal circumstances, because it is usually drawn without the counsel and assistance of a lawyer.

- **Formally Executed Will.** Every will, other than the two types described in the endnote, must be executed and attested as follows:
 1. The will must be signed at the end by the testator himself, or he may direct someone in his presence to sign his name thereto. (Usually this would happen only if the testator is physically unable to sign).

2. The signing must be in the presence of at least two witnesses.
 3. The testator must at the time of signing the will advise the witnesses that the instrument is his will.
 4. The two witnesses at the testator's request and in his presence must affix their signatures and should write their addresses in their own handwriting at the bottom of the will.
- **Self-Proved Will**⁹. Oklahoma law now permits testators to make their wills self-proving. Influenced by Texas procedure, Oklahoma has adopted the practice of allowing the execution by a testator and the attestations by the witnesses to be acknowledged. This will excuse testimony by the witnesses at the time the will is offered in probate unless the will is contested. In absence of contest, this feature will save time and costs in the probate proceeding.
 - **Mutual or Joint Will**. A formally executed will that is executed jointly by two persons with reciprocal provisions is called a joint will. It may be revoked by either of the testators in like manner as any other will and may be executed as a self-proved will. If two separate wills are executed with reciprocal provisions, they are called mutual wills. In either case, wills that contain reciprocal provisions should generally state whether or not they were executed pursuant to any agreement. Wills executed pursuant to an agreement (contractual wills) should generally be avoided since the potential for litigation is high in such cases.

Simultaneous Death

The will may provide that testator's spouse shall be presumed to have survived the testator if both should die in a common disaster under circumstances that make it uncertain who died first. If the will does not contain such a simultaneous death clause, Oklahoma's statute (Title 58, Oklahoma Statutes Annotated, Section 1001) directs that in event of such common disaster causing the simultaneous death of both husband and wife, it shall be ruled by the court that neither spouse shall have survived the other. The estate of each then would pass to his or her respective heirs or in accordance with their respective wills. The statute would disqualify the marital deduction savings on federal estate taxes if this provision is not included.

Changing or Correcting a Will

A supplement to a will, consisting of revisions, additions, or alterations made after the will has been made, is known as a codicil. The codicil must be executed (signed, witnessed, etc.) in the same manner as the will being amended.

Corrections should not be made in a will by erasures, insertions, or cross-outs. All corrections or other changes should be made by codicil and in many cases it may be preferable to execute a new will.

If a new will is made, it should state that all prior wills are revoked. It may also be desirable to physically destroy a previous will to avoid any possible confusion later.

Importance of Legal Assistance

By all means, consult a lawyer in planning and writing your will. If your will is not executed as the law prescribes, or if it attempts to do illegal things, it may be declared invalid. An untrained person is likely to use inaccurate or ambiguous language in drawing his will that when contested would be subject to the interpretation of the courts.

A lawyer is equipped by training and experience to help accomplish what you desire. Tell your lawyer what you want done and allow him to put your wishes into draft form and have him explain the language and effect to you. Careful thought should be given in drafting a will. Remember, at the time the will goes into effect, you will not be around to explain what you meant to say.

Transfer by Law of Descent

When a person dies without leaving a valid will, his property is distributed according to the law of descent. The law designates who will receive ownership of property and the shares received by each heir. It is possible that your plan for disposition of your estate after death would exactly coincide with the Oklahoma laws of descent. But the law of descent is complex and **it would definitely be necessary to consult a lawyer before assuming that the law would carry out your wishes.**

The laws of descent vary from state to state. The distribution made of Oklahoma property of an owner who dies without a valid will¹⁰ is described briefly in Property Distribution According to Laws of Descent in Oklahoma on page 33. Of course, not all conditions are presented. For example, an antenuptial agreement made prior to a marriage may affect distribution of property under the laws of descent.

Title 84, Oklahoma Statutes 1953, Section 232, provides that the surviving spouse may have one automobile that belonged to the deceased spouse at the time of his death if he dies intestate. If the deceased Spouse owned more than one automobile at the time of his death, the surviving spouse may choose one of the automobiles. For the surviving spouse to obtain a title transfer, it would be necessary to obtain an order of the probate courts finding him or her entitled to have the car under this statute.

Survivor's Homestead Rights

Homestead rights in Oklahoma may consist of an estate in land and personal property as well as exemption from certain debts. The homestead of any family living in a rural area shall consist of not more than 160 acres. It may be in one or more parcels to be selected by the owner. The homestead in a city or town, or platted area, and occupied as a residence only shall consist of not more than one acre of land. The statute limits an urban homestead to a value of \$5,000, but in no case will it be reduced to less than one-quarter of an acre. Some of the personal property not subject to administration proceedings are family pictures, church pew, lot or lots in a burial ground, Bible, school books, other books not in excess of a value of \$100, clothing, food and fuel for one year, and household and kitchen furniture. This property is to be delivered immediately by the executor or administrator to the surviving spouse and children, if any.

Upon the death of either the husband or wife, the survivor may continue to possess and occupy the whole homestead. It is not subject to administration proceedings until it is disposed of according to law. Also, upon the death of both the husband and wife, the children may continue to occupy the homestead until the youngest child reaches the age of majority. The homestead right is similar to a life estate. It comes into play when one spouse owns the homestead and dies. The surviving spouse may occupy the homestead until death. At the death of the surviving spouse, if there are no minor children, the property will pass to the heirs of the spouse who owned the homestead. The homestead rights are designed to prevent the spouse or minor children from being ejected from their home at the death of the spouse who held title to the property. The homestead is also not subject to the payment of any debt or liability contracted by either the husband or wife, except for liens such as mortgages on the homestead.

Qualified Disclaimers

With reference to the estate tax, gift tax, and generation skipping transfer taxes, if a recipient makes a qualified disclaimer with respect to any interest in property within the estate of decedent or donor, the property will be treated as if it had never been transferred to the recipient.

An example of when this might be used wisely is as follows: John Doe dies unexpectedly and his will leaves everything to his wife and the will was written 30 years ago. If the wife now owns considerable assets in her name, she might prefer that part of the property in her husband's estate pass to their children instead. By properly disclaiming some of the property designated to pass to her, she could reduce her estate taxes at her death (see an attorney for details on how this can be done).

Payable On Death (POD) or Transfer On Death (TOD) Registration

Savings accounts may be made payable on death of the owner to a named beneficiary, if living.¹¹ Securities may be registered in beneficiary form that indicates the present owner and the intended beneficiary who will become the owner upon the death of the present owner.¹² Sole owners or multiple owners with right of survivorship may use this form to designate a beneficiary to take ownership at the deaths of all owners. This form is created by using the words "transfer on death" or "TOD" or "pay on death" or "POD" after the name of the registered owner and before the name of the beneficiary. On proof of death of all owners and compliance with other requirements of the registering entity, the security may be reregistered in the name of the beneficiary. If no beneficiary survives the owner, the security belongs to the estate of the owner. Debts, taxes, and expenses of administration, including allowances to the surviving spouse and minor or dependent children take precedence over the beneficial owner's interest if other estate assets are insufficient. Registering entities are not required to offer this form, but many do offer it.

Estate Planning Aids

Services provided by banks, insurance companies, and similar institutions are often helpful in making and carrying out an estate plan. The following section describes some of these services.

Annuities

An annuity is an amount of money payable each year for a specified period. A life annuity usually refers to a sum of money to be paid yearly for the rest of the person's life. Annuities, which can be used in a farm transfer plan, can be purchased from life insurance companies. The person buying the farm would pay the cost of the annuity to the insurance company; the company would then make payments to the seller of the farm. The person receiving the payments is called an annuitant. There are many variations of annuities, such as straight life, cash refund, joint, and deferred. Annuities can be purchased in a lump sum or in units over a period of time. An insurance company is in a much better position to assume the obligation of paying a lifetime annuity than is an individual.

Private Annuities

A private annuity differs from a commercial one in two respects. First, ordinary property other than cash, normally real estate, is used to acquire the annuity and, second, the promise to make the payment is made by an individual, often a son or daughter rather than an insurance company. Payments under a private annuity are payable periodically, but they usually cease upon death of the annuitant.

A private annuity can be used if a parent wants to transfer a farm or ranch to a child in exchange for a guaranteed income for life. However, no mortgage or other security (except life insurance in the event of death) may be given to the parent to guarantee payment of the required annual amount. Some parents might consider such an arrangement a serious drawback. In addition, there may be adverse income tax consequences to the child should he sell the real property acquired by the annuity prior to the annuitant's death. The tax basis becomes the sum of all annuity payments.

Generally, private annuities are discouraged in estate planning; however, there may be exceptions. If a child agrees to pay to the parent a fixed payment for the farm for the rest of the parent's life and if the parent dies prematurely, the child buying the farm receives a windfall that may make the other children unhappy. On the other hand, if the parent lives longer than a normal life, the child purchasing the farm pays in excess of the property's value. An insurance company usually is in a financially better position to fund a lifetime annuity than is an individual.

The main advantage of selling the farm for a lifetime annuity is that the farm is not included in the seller's estate for estate taxes. The main disadvantage to the selling parent is that the buyer's promise is unsecured and the parent is left with little financial protection if the buyer dies or becomes bankrupt. To enjoy the tax saving features of a private annuity requires that the buyer's promise must not be secured by seller retaining rights in the property involved. Thus, it is different from a typical installment sale. Each annual payment to the parent is usually comprised of ordinary income, return of capital, and capital gain.

A situation in which the lifetime annuity might be justified is where the parent has several farms, is short of liquid assets, such as cash, is unable to take advantage of the annual gift tax exclusions and all of his children are interested in buying a farm. In this case, if a default occurs, the parent would still have land and income remaining from the other farms. Also, if all children were involved, a charge of favoritism to one child could not be made.

The parties involved in a private annuity should seriously consider all tax ramifications of private annuity transactions. Private annuities often result in liability for income and gift taxes. Check with your attorney and tax accountant for further details on private annuities.

Insurance

Life insurance is normally purchased to provide cash for three primary purposes: (1) for income for dependents in case of premature death, (2) for retirement income, and (3) for the payment of estate settlement costs such as debts, claims, lawyers' fees, and estate taxes. Adequate insurance may prevent a forced sale of business assets on a depressed market in order to meet costs in settling the estate. It may be used to provide liquidity in the estate of both spouses. The importance of insurance is sometimes overlooked in the estate of the surviving spouse, but it may be sorely needed since the surviving spouse's estate will not be eligible to use the federal marital deduction. Recognizing the need and providing for liquid assets is a part of estate planning.

Sometimes owners will leave the farm to a farm-operating heir, and proceeds of a life insurance policy to the non-farming heirs. This method serves two purposes: it leaves the farm intact, and it treats the heirs fairly. Many partners' "buy and sell agreements" are financed with life insurance. Life insurance trusts are discussed in the section under trusts.

Gifts of life insurance policies are sometimes made in large estates, especially when most of the assets are in one spouse's name. Although the unlimited marital deduction has to some extent reduced the need for concern about equaling the estates of both spouses, it still may be desirable. A gift of an insurance policy removes the proceeds from the estate

of the insured. However, the cash value of the policy will become part of the estate of the new policy holder. Forms and instructions may be obtained from the insurance company. The gift of the insurance policy (slightly more than the cash value) would be subject to gift taxes. Oklahoma law permits the assignment of any or all incidents of ownership of group term life insurance.

Generally, life insurance proceeds payable to the estate or policies in which the decedent retained “incidents of ownership” would be included in the decedent’s estate for estate tax purposes. Incidents of ownership include the right to change beneficiaries, use the policy for a loan, borrow against the policy, cancel or surrender the policy, assign or revoke the assignment of a policy, or convert the policy to another form of insurance. Incidents of ownership also include a reversionary interest in the policy or proceeds if the value of the reversionary interest immediately before the death of the decedent exceeded five percent of the value of the policy. “Reversionary interest” includes a possibility that the policy or its proceeds may return to the decedent or his estate. Thus, when a gift of insurance is made, action should be taken to ensure that a reversionary interest does not exceed five percent, that is, it will not pass back to the donee by inheritance.

If additional insurance is desired on a parent’s life, the children should consider purchasing the insurance. Since the children would be the owners of the policy, it would not be included in the parent’s estate. If a child should die first, only the cash value of the policy would become part of the child’s estate.

Trusts

The trust is becoming more popular as a tool in estate planning. The trust is a written agreement by which an owner of property (the trustor) transfers his title to a trustee for the benefit of persons called the beneficiaries. Both real and personal property may be placed in a trust. The trustee may be a person or persons, a corporation, or a combination of the two. A trust can continue for any period of time set by the owner—for a lifetime, until the youngest child reaches age 21, and so forth. If the trust extends beyond a lifetime, there are limitations that should be explained by your attorney.

An important advantage of the trust is its flexibility. The trustee can be empowered to “sprinkle” or “spray” trust property among the beneficiaries as their respective needs may require; this feature especially accommodates the unpredicted emergency or misfortune that might arise. In addition, the trustor (settlor) may place numerous restrictions and requirements in the trust relative to the payments to be made to the beneficiaries. For example, the income earned by the trust, a fixed percent of the assets or part of the principal may be paid out each year. These requirements must be carried out by the trustee.

Kinds of Trusts

Basically there are two kinds of trusts, living trusts and testamentary trusts. The living or inter vivos trust is created and made effective while the trustor is living. A living trust is in essence an agreement between the trustor and the trustee and may be revocable or irrevocable.

The testamentary trust is so-called because it is established under the provisions of a last will and testament. The testamentary trust does not become effective until the will has passed through probate. Since a testamentary trust does not go into effect until death of the owner, there is no tax saving in his estate. However, the trust may be drafted to save estate taxes in the estates of the beneficiaries. A testamentary trust is also useful when the heirs are minors or inexperienced in money matters.

Duration of Trusts

Trusts may be either revocable or irrevocable. The revocable trust can be terminated or altered and offers no special estate tax advantage. In other words, the assets of a revocable trust are included in the estate of the deceased creating the trust. It can, however, be written in such a manner as to substantially reduce the estate taxes of the beneficiaries. For example, a person placing property in trust for a son for life with a remainder interest to the grandson would skip one generation of estate taxes. Although a generation-skipping transfer tax may be imposed, the value of the property in trust would not be included in the son’s estate. The revocable trust, while offering no estate tax advantages to the grantor’s estate will, however, eliminate the cost of probate applicable to his trust property. The probate costs may include executor’s fees, attorney’s fees, court costs, and appraisal fees.

The irrevocable trust cannot be amended, altered, revoked, or terminated. The trustor cannot get his property back. Assets placed in an irrevocable trust are removed from the estate of the person creating it. It is, therefore, useful in estate planning because it will reduce estate taxes. Gift tax rules would apply when the property is placed in trust. If the value exceeded the gift tax exemption, a tax would be due.

Special Purpose Trusts

There are a number of special named trusts depending on their purpose and use. A few of them are as follows:

- A **charitable** trust may be either permanent or short term (reversionary) depending on the objective of the grantor. For example, a man could set up a permanent trust with the income payable to his wife for her lifetime. At her death, the remaining assets could be paid over to the charitable or educational institution. The grantor in this case would receive an immediate charitable deduction from his taxable yearly income for the “present value” of the amount that the institution will receive from the trust fund. The amount is calculated from actuarial tables. The total assets would be removed from the grantor’s estate for estate tax purposes provided all requirements are met.
- A short term reversionary trust may be used as a tax-saving tool for making annual donations to charity. For example, securities might be placed in trust to provide \$1200 of income per year. The trustee pays the whole income to the charity without it having been taxed as part of the grantor’s income. A charitable trust may last for as short a period as two years and still relieve the grantor of the tax on its income.
- **Marital deduction trusts** are used to take maximum advantage of the estate tax laws. Usually they are divided into two parts. One-half of the trust assets are given to the spouse for life with a general power of appointment. The other half would name him or her as the beneficiary for life with a remainder interest to the children. It is usual to suggest that the spouse use money from the part one trust first in order to reduce estate taxes at his or her death.
- The **reversionary trust or short term trust** is sometimes referred to as the “Clifford Trust.” The trust property in a reversionary trust reverts to the trustor (settlor) of the trust after a stated period of time. Under this type of trust the property and/or securities are placed in the care of a trustee for a period of not less than ten years. At the end of the ten-year period, the property would revert back to the original owners. Normally the objective of creating a reversionary trust is to reduce income taxes. However, the 1986 Tax Reform Act removed the ability to reduce income taxes by using a Clifford trust. Note that if all the income is paid to the beneficiary(s), the tax return is filed by the beneficiary(s). If the funds are accumulated, the tax return is filed by the trust; note that a trust required to distribute all of its income currently is allowed a personal exemption of \$300. All other trusts are allowed \$100. (I.R.C. Sec. 642.)
- **Life insurance trusts** are used widely in estate planning. The trusts may be either funded or unfunded. If the policies are on the lives of persons other than the creator of the trust, the income from trust funds used to pay the premiums will be taxed to the trust. Thus an income tax saving may result. There are many variations of the insurance trusts for which insurance advisors should be consulted.
- **Power of Appointment Trust.** A general power to appoint during life is the equivalent of outright ownership since the capital is available for the asking. Most authorities prefer to restrict the power to one exercisable by will only. This is enough to qualify the bequest for the marital deduction and preserve the property for future generations.

Some of the advantages of a power of appointment trust are as follows:

- There is a good chance the property will pass according to the wishes of the first spouse to die, because of the usual clause designating how the capital will be distributed at the surviving spouse’s death in the event he or she fails to exercise the power.
- There will be savings in administration fees and attorney fees since the trust assets will form no part of the surviving spouse’s probate estate.
- It relieves the surviving spouse of investment and management problems.
- Flexibility may be introduced, allowing the surviving spouse limited invasion privileges during life and by authorizing the trustee to pay additional capital sums to the surviving spouse at any time or times.

Other Uses of Trusts

Some additional conditions and uses for which a trust should be considered are as follows:

- When the beneficiaries are minors.
- When dependents are incapacitated.
- When a beneficiary is a spendthrift or incapable of managing the business.
- When the beneficiary is a person who does not desire to worry or be bothered with the business responsibilities.

Many professional trustees, such as banks and trust companies, have special arrangements for handling farm trusts. Generally banks and trust management companies charge 1/2 to 1 1/2 percent of the trust principal per year. This charge

may vary depending on size and nature of the trust. On the other hand, a relative or a person having management experience and qualifications and trusted by the family could be named as a trustee.

Probate Proceedings

The process of settling an estate is usually referred to as probate. The primary purpose of probate is to fix the rights of the persons who are to receive the property of the decedent. When these rights are established by the probate court, questions will not likely arise later as to ownership of the property.

The steps in probating an estate of a deceased person are similar whether the decedent died testate (with a will) or intestate (without a will). A petition is filed in the District Court setting out the time and place the decedent died, together with facts showing that the Court has jurisdiction over the estate. Such facts may be that the decedent died or owned property within that county, or was a resident thereof when he died; in addition the petition shows the name of the executor (the person named by the decedent in his will to be his personal representative) and whether he is willing to serve, the names, ages, and residences of known heirs, and the probable value and character of estate property. The petition may be filed by any person interested in the estate including creditors of decedent.

Whether the decedent died testate or intestate, a hearing will be held. A legal notice must be published at least one time in a newspaper within the county. The publication must appear at least ten days before the date set by the court for hearing the petition; also the notice must be mailed to every known heir, legatee, and devisee of decedent.

At the hearing on the petition to probate a will, evidence is offered to prove the above mentioned statements. The executor testifies at the hearing and at least one witness who attested the execution of the will must testify unless the will is self-proving. If no will was left by the decedent, then in addition to the above-mentioned facts, the testimony must show that the applicant for Letters of Administration is eligible to serve.

After an executor or administrator is appointed, a Notice to Creditors is published in a newspaper within the county twice a week for two consecutive weeks. The notice directs the creditors of the decedent to submit their claims against the estate within two months from first publication of the notice or the claims will be barred from collection.

While the Notice to Creditors is being published, the executor or administrator prepares an inventory of the real and personal property in the decedent's estate under the direction of his attorney. Three appraisers (usually nominated by the executor) are appointed by the court. The appraisers are directed to determine the value of property shown on the inventory. Their report is then filed with the court. The executor must prepare and file an estate tax return with the Oklahoma Tax Commission and if the gross estate exceeds the allowable exemptions and deductions a return must also be prepared and filed with the Federal Government. These returns must be submitted by the executor and if any tax is due, it must be paid by the executor from the estate of the decedent.

After the estate taxes have been paid, the executor files his final account with the court showing all income and disbursements of the estate and the property under his control available for distribution; he asks the court to fix a time for hearing his accounting and report. A notice of the hearing is published two times by a newspaper at least 20 days before the hearing. It is mailed to all of the heirs, legatees, and devisees of decedent prior to the hearing on the final account. The notice must also state that the court will make a determination of the heirs and devisees of the decedent. At the time of the hearing on the final account, evidence is offered in support of the final accounting and to prove the identity and eligibility of those persons who by law or by the will are entitled to receive property remaining in the estate. When proof of distribution can be shown by the executor, he asks the court for discharge from his office as executor.

Terminating Life and Joint Tenancies

The regular procedure for terminating a joint or life tenancy prescribes the filing of a petition in the District Court. The Court fixes a time and place for hearing on the petition and enters an order accordingly. Notice to all persons deemed by law to be interested in the hearing is given pursuant to the court's order that directs the mailing of notice to interested persons and the publishing of notice in a legal newspaper. The notice informs all persons having an interest in the estate of decedent that they may attend the hearing and file their objections.

At the hearing, evidence is adduced to show that the real property involved was owned by decedent in joint tenancy and that the co-owner(s) survive(s) and is entitled to have the property decreed to the surviving joint tenant(s) upon death of decedent. Upon finding sufficient evidence in support of the petition and that the notices were properly given is ordered, the Court enters its decree terminating the joint tenancy and ordering title to the real property to be vested in the surviving joint tenant(s) upon death of decedent. Refer to the section entitled "Transfer by Co-ownership" (page 17) for a list of the documents required for termination of joint tenancy.

Some Duties of an Executor

The choice of an executor is important, because the administration of the estate during probate is placed within his power. His familiarity with the nature of decedent's family affairs, business, and investments together with his qualifications and experience should be considered. Normally, the courts permit the surviving spouse to be the administrator of the decedent who dies without a will. Both an "executor" and an "administrator" may be generally identified as the personal representative of the decedent.

In small estates, the spouse of the decedent usually can perform satisfactorily the duties of the personal representative. Supervision by a lawyer guides and assists the performance of duties normally carried out by the personal representative.

In large estates, or in estates where there is an ongoing business in which many management decisions must be made, serious consideration should be given to naming an executor with more seasoned managerial experience.

It is legally proper to name a natural person who is a nonresident to serve as executor (or executrix). After receiving Letters Testamentary from the Court, which certifies the authority to proceed, the executor must appoint a resident agent, who could be the lawyer for the executor. There may be greater inconvenience to the lawyer and accountants in working with a nonresident executor and there will be more extended travel by the executor, but such nonresident is eligible to serve as executor.

The executor employs the attorney to conduct the legal activities required in probating the estate of the decedent. The lawyer is the executor's lawyer. Even if the will named a lawyer to handle the legal responsibilities of probate, the executor is not bound by such nomination.

The testator (one who signs the will) may want to provide in his will that the executor shall have the power to buy, sell, and carry out any of the duties necessary to manage the business while the estate is being probated. Naming a corporate executor or perhaps a successor executor (in case the executor becomes ill or for some reason is unable to serve) should be considered.

Some of the specific duties of an executor are listed below. As previously mentioned, in actual practice the lawyer usually supervises and coordinates the performance of these jobs by the executor.

- Select lawyer and assist in gathering evidence to prove the will and obtain Letters Testamentary, sign the oath of the executor, and help identify the legal heirs entitled to notices of court proceedings.
- Transfer bank deposits to executor's account.
- Collect debts, interest, royalties and dividends due to estate, and if necessary, file suits for their collection.
- Pay taxes and debts owing against property of the estate. Usually debts are paid after formal claims of creditors have been approved by the court.
- Take charge of real estate and other personal property subject to rights belonging to third parties, such as lessee or easement owners.
- Provide for management of property during probate. Arrange for proper insurance coverage for property.
- Notify life insurance companies of decedent's death, submit proof of death and the policies, and collect insurance benefits.
- Make a general inventory showing all the property belonging to decedent at time of death, also sign and submit it to the three appraisers appointed by the court to value all property identified in the General Inventory.
- Determine the immediate financial needs of the surviving dependents in decedent's family, such as support money, and apply to the court for an order authorizing him to use money or to liquidate property of the estate to provide for such needs.
- Take over any ongoing business belonging to the decedent and arrange for its management, sale, or liquidation and distribution as may be authorized under the will.
- Review and analyze securities, stocks, and bonds to decide whether they should be kept or sold, as may be directed and authorized under the will.
- File estate tax returns and participate in the settlement negotiation of all tax liabilities.
- Set up records and maintain itemized accounting of all incomes and disbursements of money belonging to the estate. This information is vital to assist the lawyer in preparation of the Annual Account and/or Final Account that must be filed with the court for approval.
- Pay legacies and deliver specific bequests as directed by the will and as authorized by the court.
- Attend court hearings as required during the probate proceedings, and otherwise assist the attorney as requested from time to time.

The executor pays the debts of the estate, usually after claims for them have been approved by the Court. The executor may pay the expenses for the funeral and of last sickness, taxes, and undisputed debts without awaiting approval of creditor's claims by the Court. He does assume the risk, however, that some legatees or devisees of the estate may challenge payments contending that such debts and claim were inaccurate, unfounded, or exorbitant. For this reason, the executor usually prefers the safer policy of securing the Court's approval of such claims before paying them if he suspects any such discord or his acts might be contested.

One of the major responsibilities of executor is to see that all taxes of decedent and the estate have been paid to the extent that the estate has the capacity to pay. An Estate Tax Return, together with the estate tax, must be filed with the Internal Revenue Service and Oklahoma Tax Commission within nine months after death of decedent. Failure to pay taxes due may impose the liability upon the executor personally.

The executor being the legal owner of all personal property of the estate is charged with the duty to pay and distribute such property to the persons entitled to receive it as ordered in the Court's Final Decree of Distribution, and, thereupon, the executor is entitled to his discharge by the Court. The executor should always obtain receipts from the distributees (legatees) of the estate as proof that he has performed his duties of distribution and payment.

Executors and administrators may be interested in writing to the District Office of the Internal Revenue Service and obtaining a copy of Publication 559, "Federal Tax Guide for Survivors, Executors, and Administrators."

Surviving Spouse as Executor

As a result of 1984 legislative changes, the surviving spouse may have access to a safe deposit box held in joint tenancy with the decedent and may remove any or all of the contents of the box even before an executor is appointed. Individuals other than the surviving spouse may remove wills, insurance policies, and burial instructions or burial plot deeds but may not remove other contents until an executor or administrator is appointed and claims the contents.¹³ Title 58 OSA§1104 provides special probate procedures where an Oklahoma resident leaves a will that gives all of the estate to his or her surviving spouse and that names the surviving spouse as executor. In such a situation, the court in its discretion, unless the will provides otherwise, may waive bond by the spouse regardless of the known or estimated value of the estate.

After being appointed executor, the surviving spouse shall: (1) give notice to creditors by publication one time in a newspaper published in the county of the probate proceedings and creditors shall be required to file their claims within one month after the date of the publication; (2) the surviving spouse alone may appraise the estate of the decedent at fair market values and no appraisers need be appointed; (3) prepare all returns and reports relative to income and other taxes of the decedent and obtain an order from the District Court releasing the estate from tax liability; and (4) carry out all other duties of an executor as in other estate proceedings.

Estate Settlement Costs

An adequate job of estate planning must include consideration of estate settlement costs. Failure to anticipate costs and to plan accordingly may prevent the deceased owner's wishes from being carried out.

The probate of an estate under Oklahoma law commences in the District Court of the county where the deceased died or in which the deceased owned property. Probate appeals from the District Court are made to the Oklahoma Supreme Court.

The length of time for probating small, uncontested estates is generally about four to six months, allowing for reasonable continuances in court hearings to accommodate lawyers, parties, and the court.

The costs of probating an estate vary. Of course, such costs of probating an estate will increase with each additional estate matter. The number of heirs, length of notices, contests among heirs and devisees, sale of real estate necessary to cover costs, and the nature and valuation of the estate may considerably influence the total costs.

Probating an estate wherein the property is owned in joint tenancy ordinarily costs less and requires less time, but a probate proceeding must be conducted as in the case of general procedure to clear the title to the real estate.

Attorney Fees

Formerly, the legal profession followed approved minimum fee schedules in fixing fees for various legal services. Such fee schedules reflected the lower range of fees conventionally charged by most lawyers across the state. Minimum fee schedules have been abolished, and therefore, the nature, complexity, and magnitude of the service rendered and the

benefit conferred upon the client are all considered in fixing the fees that may be charged. Fees charged by lawyers in probate matters are subject to the approval of the court at the time of the hearing on the final account of the personal representative. Fees for legal services will run at least as much as those fees authorized by statute to be paid to the personal representative and in most cases they run higher.

Since probate costs depend upon varying factors, any references herein as to fees charged by lawyers are only general approximations. In each case, problems may differ, thus creating more than the usual and normal professional work and thus increasing the cost of legal services. Lawyers are willing to discuss their fees with the personal representative at the time of being employed.

Executor or Administrator Fees

The executor and administrator are referred to commonly as “personal representatives” of the decedent. The executor is one appointed in the will of the decedent. The administrator is appointed by the District Judge. The person named as executor, if otherwise eligible, must petition the court for letters testamentary. If a personal representative is not named in the will, the court issues letters of administration to persons eligible to serve as administrators.

The surviving husband or wife (or competent person whom such husband or wife may recommend for appointment) is first legally preferred to receive letters of administration. Then other classes follow in order: children; father or mother of decedent; brothers; sisters; and grandchildren; next of kin; creditors; and any other person legally competent. A business partner of the decedent is not eligible to serve as administrator.

The fees allowed the personal representative are based on a percentage of the appraised value of the estate as shown upon the tax return (before exemptions and deductions reduce the estate to taxable value). The schedule as provided by Oklahoma Statutes¹⁴ for determining the fees for the personal representative is as follows: 5 percent of the first \$1,000; 4 percent of the next \$5,000; and 2 1/2 percent of excess.

In the event of complex and time consuming litigation requiring the personal representative to spend time for consultation and preparation for trial and for travel and unusual personal expenses, the court will be inclined to increase the fees to the personal representative.

Except in the case of paying for the cost of obtaining a bond to secure his faithful performance, the administrator’s fee will be no higher than that for an executor. Their duties generally are the same, and the time and expense in the performance of their duties usually will be similar. The only difference might be when the will of the decedent prescribes unusual duties or confers certain authorities on the executor that would differ from the duties and powers of an administrator.

Court and Other Costs

Court and other costs will also vary, depending on length of time used in the proceedings, contests, and disputes; the length of will; and size of estate. For each instrument in the court proceedings that is filed in the office of the court clerk, a fee governed by statute is charged against the total cost. For this reason the length of the instrument, as well as the nature of it, influences the court costs. If there are parcels of land involved in the decedent’s estate, they must be appraised separately; and if they are scattered through the country or over the state (and in other states), additional costs will accrue for the three appraisers’ travel and time.

The total of publication fees will vary with length of each notice. The cost of notices is affected by the length and number of times that hearings must be had on accounting and actions of the personal representative.

Funeral expenses and costs of last sickness must be paid from estate funds. These costs will, of course, vary considerably. Other costs that may be incurred are sale expenses, abstract fees, and internal revenue stamps. Income taxes and federal and state estate taxes will also vary from estate to estate.

Often liquid assets are held in joint tenancy and life insurance policies name specific beneficiaries. Under these conditions, no cash would be available to pay estate settlement costs and taxes. This is why some estate counselors recommend the estate be named as the beneficiary of some life insurance.

Business Information Left to Survivor

Many couples allocate responsibility for management decisions or for record keeping and bill-payment to one spouse. This may pose problems if the responsible spouse dies without sharing important information with the surviving spouse. Spouses should keep each other advised as to the following:

- The location of valuable papers such as deeds, wills, leases, insurance policies, military service records, marriage certificate, birth certificates, and social security records. Also, a record of each person's contribution to the purchase of property may be important. This would include records of earnings and property inherited.
- Records and inventories of the business, including any outstanding debts, notes, and mortgages.
- Records of employment and investments.
- The names of the banks where checking and saving accounts are kept.
- The names of persons usually consulted on business, legal, and personal matters.

General Estate Planning Guides

Consider alternatives – An analysis of several alternatives should be made. Very likely there will be one plan or a combination of plans for a particular family that is better than the others.

Discuss proposals with persons concerned – This is especially important if a child or children are taking over the farm. Leaving the farm a productive unit and seeing that an unreasonable debt load is not assumed by a child while trying to buyout the other heirs may be very important. Most families, unfortunately, are hesitant to discuss property transfer arrangements. The responsibility for initiating this action should usually be taken by the parents. These discussions contribute to the interest and welfare of the entire family.

Protect parents – The financial security of the parents should have a high priority in every plan. A comfortable home for the parents with income sufficient to take care of emergencies should be insisted upon by the children.

Treat children equitably – It may not be equitable for all the children to receive equal shares. The size of share may justifiably be larger or smaller depending upon the contributions made to the parents or the farm, financial assistance received from the parents, health, or other reasons. These factors should be recognized by the parents and understood by the children.

Consider estate tax, gifts, marital deduction, and costs – These items can be of vital importance in large estates.

Have some liquid reserves – It requires money to settle estates and debts, and taxes must be paid first. Unless cash is available through insurance or other sources, some of the property may have to be sold, possibly at a loss.

Obtain competent business advice – Certain phases of the plan may require expert help to achieve the best plan. If indicated, perhaps the banker, an appraiser, a farm management specialist, an insurance counselor, or others should be consulted.

Consult a lawyer – After considering the alternatives and as part of your planning, a lawyer should be consulted. Working out the details, the applying the law, and creating legal documents is the practice of law.

Take action – Knowledge and a plan are important, but they must be activated to achieve the desired results.

Keep plans current: review and revise if necessary – Conditions will change over time. The transfer plans may have to be revised due to changed family composition, changes in laws, or a changing financial condition.

Glossary of Terms

Administrator—A male person appointed by the probate court to administer the estate of a decedent who dies without naming an executor.

Administratrix—A female appointed to perform the duties of Administrator.

Administratrix (administrator) with the Will Annexed—A person appointed by the probate court who administers the estate of a decedent according to the will. Sometimes written administrator C.T.A. (cum testamento annexo).

Annuity—A yearly payment of a specified sum of money for life or a definite period of years.

Antenuptial—Determined or made before a marriage (prenuptial).

Bequeath—The giving of personal property by will.

Bequest—A gift of personal property by will. Bequest is either general (satisfied from the general assets of the estate) or specific (involving designated property). Such gifts may also be referred to as general or specific legacies.

Codicil—An addition or change of a will.

Conservator—A person who is appointed by a court to manage the estate of a protected person who, because of age, intellect, or health is incapable of managing his own affairs, similar to guardian.

Contemplation of Death—The expectation of death provides the primary motive to make a gift.

Corpus—Trust property, the principal sum as distinguished from interest or income.

Decedent—A deceased or dead person.

Deed—The legal instrument used to transfer title in real property from one person to another.

Descendant—One who has descended or is the offspring of another.

Devisee—One designated to receive real property by will.

Donee—The person to whom a gift is made, the recipient.

Donor—The person who makes a gift, the giver.

Estate—The total value of the interest a person has in all property, real and personal, the property itself.

Executor—A male person appointed by a will to carry out the directions and requests and disposition of the decedent's property in accordance with the will.

Executrix—A female appointed by will to perform duties of Executor.

Fiduciary—Any person in a position of answering for actions arising from a relation of trust and confidence. Also used as an adjective denoting a character of trust and confidence. Includes personal representative, guardian, conservator, or trustee.

Fiduciary Obligation—A duty or obligation performed by one person in a relation of trust and confidence for the benefit of another party.

Gift—A voluntary, gratuitous transfer of property from one person to another.

Grantor—The person who makes a grant or transfer of real property to another.

Guardian—A person legally empowered and charged with the duty of taking care of another person and/or his property, appointed by a will or by the Court.

Heir—A person who inherits property upon the death of another as provided by statute of inheritance.

Income in Respect of Decedent—Income that is uncollected at death and is subjected to income taxation (when realized by the estate, heir, or beneficiary) in the same manner as would have been imposed upon the decedent if he or she had survived.

Intangible Property—Property that has no intrinsic value but is merely the evidence of value such as certificates of stock, bonds, promissory notes and franchises.

Intestate—A person who dies without making a valid will.

Inter Vivos—During the life-time, used in reference to transfers of and trusts from one living person to another living person.

Irrevocable Trust—A trust arrangement that generally cannot be cancelled, rescinded, or repealed by the maker (trustor or settlor).

Joint Tenancy—Co-ownership of property by two or more individuals, each with the right of survivorship.

Laws of Descent—The state statutes that specify how a deceased's property is to be divided among his heirs if he does not have a valid will. (Also, Laws of Inheritance, Laws of Succession.)

Legatee—The beneficiary to whom personal property is willed.

Life Estate—A property interest that is limited in duration to the life of the individual holding the interest; the holder of this type of interest is called a life tenant.

Lineal—Proceeding in a direct or unbroken line from a common source; hereditary as from father to child, includes ascending or descending heirs.

Litigation—A lawsuit; a judicial contest to enforce a law or right.

Marital Deduction—The deduction(s) that can be taken in the determination of gift and estate tax liabilities because of the existence of a marriage or marital relationship.

Mortgage—A lien or encumbrance on real property to secure the payment of a debt.

Personal Property—Property that is not permanently in place but is temporary or movable; in general, all property that is not real property.

Personal Representative—Executor or executrix, administrator, or administratrix.

Private Annuity—A means of transferring property from one owner to another by "selling" it for an unsecured promise to pay the original owner a periodic income for his lifetime. The sale price is based on fair market value at the time of sale. Each annuity payment is apportioned into return of capital, capital gain, and ordinary income and taxability is determined accordingly.

Probate—The judicial act or process of establishing the validity of a will and administering or settling an estate.

Real Property—Land and all immovable fixtures erected, growing, or affixed to land.

Remainder—An interest in property that takes effect in the future at a specified time or after the occurrence of some event such as death of a life tenant.

Remainderman—A person who inherits property when someone passes away that has executed a life estate.

Retained Life Estate—A property transfer whereby the transferor retains for life the right to the use of the property's income for the enjoyment of himself or anyone he designates.

Revocable Trust—A trust agreement that can be cancelled, rescinded, or repealed by the maker (grantor).

Right of Survivorship—The ownership rights that result in the acquisition of title to property by reason of having survived other co-owners; usually refers to the rights that exist in property held as joint tenants or tenants by the entirety.

Tangible Property—Property (real or personal) that can be felt or touched and having a material existence.

Tenancy by the Entirety—Co-ownership of property between husband and wife with the right of survivorship.

Tenancy in Common—Co-ownership of property by two or more individuals where at death the interest owned by each co-owner passes to heirs under a will or by inheritance.

Testate—An adverb describing the act of leaving a will at death. A person who has made a will.

Testator—A male person who leaves a last will and testament.

Testatrix—A female person who leaves a last will and testament.

Trust—The legal relationship created by virtue of one party holding legal title to property, whether real or personal, for the benefit of another or others who would enjoy the equitable title.

Trustee—The person or corporate trustee holding title to the trust property, appointed to execute, administer, and carry out the terms of a trust or under trust law for the benefit of the beneficiary.

Trustor—Maker of a trust. Also referred to as a settlor, grantor, or creator.

Suggested References for Further Study

Publication 559 - Federal Tax Guide for Survivors, Executors, and Administrators, District Director, Internal Revenue Service.

Publication 950 - Introduction to Estate and Gift Taxes, Internal Revenue Service.

Oklahoma Estate Tax Law and Oklahoma Gift Tax Law, Oklahoma Tax Commission.

End Notes

- ¹ This publication is a revised and updated version of a former publication, entitled *Estate Planning*. Authors include J C. Hobbs, Agricultural Economics Specialist, Mike Hardin, Extension Economist Emeritus, Farm Management; Glenn Laughlin, Professor Emeritus, Business Law; Cecil D. Maynard, Professor Emeritus, Agricultural Economics; and Marcia L. Tilley, Associate Professor Emeritus, Agricultural Law.
- ² References will be made throughout this circular to statutes or laws of “succession,” “descent,” and “inheritance.” These terms are intended to mean the same, and all refer to Title 84, Oklahoma Statutes, Sec. 213.
- ³ Title 60, Oklahoma Statutes, Sec. 74.
- ⁴ The rule is generally stated as follows: The value of the joint tenancy property is included in the estate of a decedent, except the portion of the property that was acquired by the other joint owner or owners, for adequate and full consideration in money or money’s worth, or by bequest or gift from a third party. (For marital joint tenancy, see Taxing Joint Tenancy Property on page 9.)
- ⁵ Federal Estate Tax Law is complex. This discussion is limited to some of the broad aspects for planning purposes. As there are many technical exceptions and limitations, Internal Revenue Code Sections 2001 through 2622, should be referred to as the final authority. Your tax counsel will help you interpret these references.
- ⁶ After 1976 and before 1/1/1982, joint tenancy property may have met the “qualified joint interest” test. If the test was met, the joint tenancy ownership in properties created by husband and wife after 1976 and before 1/1/1982 was treated as belonging one-half to each spouse for estate tax purpose. Also in the 1978 Revenue Act, spouses were given credit on jointly-owned property when they participated in the management and operation of the business. These tests were difficult because many spouses could not prove such participation.
- ⁷ The new increased marital deduction will not apply under an old will or trust unless certain conditions are met. Prior to 1/1/1982 a marital deduction in effect was the greater of \$250,000 or one-half of the adjusted gross estate. Wills should therefore be reviewed and revised, if written prior to 1/1/1982. The transitional rule was extended to 1/1/1983 for generation-skipping trusts.
- ⁸ Title 84, Oklahoma Statutes, Sections 41 through 57.
- ⁹ Title 84, Oklahoma Statutes Annotated, Section 55.
- ¹⁰ Title 84, Oklahoma Statutes, Section 213.
- ¹¹ Title 18 O.S. Sec. 381.
- ¹² Title 71 O.S. Sec. 9.
- ¹³ 60 O. S. § 1308.
- ¹⁴ Title 58, Oklahoma Statutes Section 527.

Property Distribution According to Laws of Descent in Oklahoma

Survivors	Division of Property	Comments
Surviving spouse only (No children, parents, brothers, or sisters)	Surviving Spouse	
Surviving spouse and one or more children	1/2 to surviving spouse 1/2 to children ^a	The children share equally. Homestead rights may apply.
Surviving spouse plus decedent's children, stepchildren, and adopted children	Surviving Spouse 1/2 jointly acquired property ^b Child's share of non-joint property. Children and adopted children 1/2 marital jointly acquired property (in equal shares) Equal share of non-joint property. None to decedent's stepchildren.	Half-blood sisters and brothers with a common deceased parent share alike. However, nonadopted step-children do not share in the estate. Also, homestead rights may apply.
Mother and one nephew (No spouse, father, brothers, sisters, or children)	All to mother	
Surviving spouse and decedent's parents ^c (No children)	Surviving Spouse All joint industry property 1/3 of non-joint property Parents - 2/3 of non-joint industry property. ^d	
One child and one grandchild whose parents are deceased (No spouse)	1/2 to child 1/2 to grandchild whose parents are deceased.	
Father, mother, brothers and sisters (No spouse or children)	All to father and mother equally ^e	
Brothers and sisters (No children, spouse, or parents)	Shared equally by brothers & sisters. The children of a deceased brother or sister would receive one share.	If one of the brothers and sisters is deceased and leaving no children, then the other brothers and sisters would inherit that share equally.
No spouse or relation of any kind.	The estate escheats (passes) to the state for the support of common schools.	

^a This reflects a change in the law effective July 1, 1985. Prior to that time, if there were children, the surviving spouse received only a 1/3 share and the children shared equally in the remaining 2/3 share.

^b Non-joint industry property includes property acquired before marriage and property acquired individually during marriage such as an individual inheritance. If there is no will, a lawsuit will probably develop to determine when and how the property was acquired.

^c If no parents survive, then the 2/3 of non-joint property goes to brothers and sisters and the children of any deceased brothers and sisters.

^d This reflects a change in the law effective July 1, 1985. Prior to that time, the surviving spouse received a 1/2 share of non-joint industry property and the parents received a 1/2 share.

^e If the deceased is a minor and parents do not live together, the entire estate would go to the parent who was responsible for care of the minor.

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