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AGRICULTURAL ECONOMICS MISCELLANEOUS REPORT NO. 38 AUGUST 1978

FAMILY ESTATE PLANNING

A JOINT AGRICULTURAL ECONOMICS/LAW RESEARCH REPORT

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FAMILY ESTATE PLANNING

by

JEROME E. JOHNSON, ROBERT E. BECK, and LYNN SCHLOESSER*

I. FAMILY ESTATE PLANNING

A. What Is It?

Family estate planning is preparing and maintaining your affairs in a manner best suited to provide for and protect your family both now and in the future with a maximum of financial security. One focal point concerns the transfer of your property to the next generation. This requires a study of the transfer method or combination of methods best suited to you and your family.

A person's estate may be defined as property or property rights which he owns and which he may pass to others either during his lifetime or upon his death. It includes all property that the planner owns which can be measured in dollars either now or in the future.

Estate planning is resource planning for the assets you control or own. Estate taxes are paid on the value of assets owned or controlled upon your death. The fewer assets that are owned or controlled at death, the greater the chance that no taxes will be levied. Estate planning is an opportunity to regulate the amount of assets in your estate at death and, hence, the amount of estate taxes your estate must pay. It uses a variety of legal instruments and concepts, such as insurance policies, deeds, wills, and trusts.

B. When Should You Plan?

Planning should start as soon as you begin acquiring assets or are married and/or have children. You should regularly update the plan as long as you live. A widow or widower who has not remarried and has acquired a considerable estate from the deceased spouse and/or others without a two-trust or similar estate plan should implement an estate plan to pass the property to designated heirs to avoid an excessive tax burden.

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C. Who Should Plan?

All property owners need to plan for their retirement and the eventual transfer of their estates. If the owner does not provide a workable transfer plan for the courts to follow, state statutes will do so for him.

Estate planning can be an involved process. Ideally the advice of several specialists should be sought to tailor the estate plan to a particular family's needs. Such specialists would include: an insurance agent, an attorney, an accountant, and a banker or other financial specialist.

It is extremely important that all family members participate in establishing the objectives of the estate plan if the finished plan is to be implemented now and in the future to minimize financial or familial conflicts. Discussions among family members and estate planning specialists should be attended by as many family members as practicable.

D. Why Plan?

Many families appear satisfied with an estate plan providing no more than the maximum federal marital deduction, the maximum North Dakota exemption, and enough life insurance to meet immediate family needs; such as, payment of the estate taxes, and the administrative costs. Although such a plan is better than none at all, it falls far short of what can be accomplished in good estate planning.

The will is an important part of estate planning, but more is involved in complete estate planning. Increased purchases of diverse insurance plans, property ownership in more than one state, and large increases in farmland values are important reasons why planning today requires careful attention. Other reasons for estate planning also are important:

1. **To assure adequate retirement income to support the surviving spouse.**
2. **To transfer property in which survivors have interests and to assure equal treatment of the children.**

3. To attempt to prevent ill feeling and bitterness among heirs resulting from lack of knowledge and misunderstanding of the plan.
4. To avoid economic hardships for spouse and heirs from lack of money available for living expenses while waiting for settlement of the estate.
5. To minimize or avoid waste of the estate in taxes and legal costs.
6. To avoid unexpected problems created by the lack of a will, by the will being successfully challenged, or by failure to understand the nature of joint tenancy and life estates.
7. To prevent splitting a farm or farms into units that are too small.
8. To compensate the farm operating heir for his contributions by avoiding settlement under state descent and distribution laws.
9. To avoid a loss of income and depreciation of the estate from the uncertainty over who will become the eventual owner upon the death of the present owner(s).

The young family farmer especially should know that family estate and income planning are most important. Often heavily indebted and with young children, his untimely death can be very traumatic. Yet he can avoid much of the later suffering and misery by being responsible now.

Results of a failure to plan can lead to retirement income hardships and estate problems which range from needless waste to a property distribution completely contrary to the planner's wishes. After all, who wants his or her survivors to inherit a lawsuit? Action now in preparation for the future can reduce many of these problems.

Some of the most significant gains from estate planning include:

1. Providing financial support for surviving spouse and children in case of untimely death when young.
2. Yielding parents an adequate retirement income for the remainder of their lives.
3. Acquainting heirs with what to expect so that they may plan accordingly.
4. Rewarding children for specific contributions given to the parents.
5. Reducing taxes - state and federal estate, income and gift taxes.
6. Reducing probate costs, attorney's fees, and other transfer fees.
7. Keeping the farm in the family while helping one or more children to get established in farming.

Advantages of good estate planning can be many. It is your decision whether you and your family shall enjoy them. By planning now you can effect an orderly transfer of the farm to the children while they are still interested and best able to pay for it, while providing yourself a steady income to enjoy during retirement.

Shrinkage of the estate by taxes, legal fees, and incidental costs can be minimized. The peace of mind both now and in the future gained by all concerned can be more than sufficient reward for estate planning.

E. Avoid Probate

Probate is the orderly passing of your assets through a probate court to your heirs. Probate can be avoided by giving away everything you own at least three years before your death. This is possible, but will it achieve your estate and retirement income planning goals?

Property owners generally cannot avoid probate, although one option under the new Uniform Probate Code is the "no-action option." However, probate of a properly planned estate usually is not costly, taking only 4 to 6 percent or so of the taxable value of the estate. Costs may be much higher if your estate planning team does not consider all asset transfer costs. There are many situations where it is cheaper for the property owner to subject his estate to probate costs than to the paying of a multitude of taxes that could have been avoided by good estate planning.

F. The Cost

Good estate planning saves more than it costs. It reduces estate shrinkage and enhances the peace of mind of all those involved to more than offset its cost of planning. Reduction in death taxes alone can be a major saving and may be critical to the heirs.

Administrative costs can be reduced by good planning. The choice of an administrator and/or trustees can be important in carrying out an estate plan over a long period of time. For example, one might consider a bank trust department where charges vary according to the size of the principal balance within the trust each year. In a $10,000 trust the administrative cost would be approximately $150, while in a $100,000 trust it would be about $625. Charges vary from bank to bank and according to specific services that the bank would be required to provide.

The cost of not planning can be substantial waste of your properties, long delays before your heirs get reduced shares, and hardships due to the delays. Five taxes must be considered by your planners: federal estate tax, state estate tax, gift taxes, income taxes, and capital gains taxes. No one is obligated to pay more in taxes than is legally necessary. Estate planning is the way to conserve your hard-earned estate. Why work hard all your life to build an estate only to allow a lot more than necessary to go for state and federal taxes?

II. PROPERTY OWNERSHIP

A. Ways of Owning Property

The decision on how property can be transferred depends upon the types and amounts of property involved. There are two kinds of property: real and personal. Real property consists of land and fixtures on it. Personal property consists of movable items, either tangible or intangible. Tangible objects are such things as livestock, machinery, and household goods. Intangible property includes bank accounts, bonds, shares of stock, and mortgages.

There are numerous ways of owning property. The way in which title to property is held generally determines whether it will become a part of the estate upon its owner's death. The type of ownership also indicates the degree of control the owner has over the use and disposition of property. Sole ownership is having the full title to the farm in one person's name only. Holding of title in this manner is an almost unrestricted right to sell, mortgage, or dispose of the property during or after lifetime. This property becomes a part of the owner's estate upon his death.

The owner of a life estate has a right to use the real estate during his lifetime, but not to dispose of it at his death. Consequently, a farm held under a life estate does not become a part of the owner's estate upon his death, except under certain circumstances where it may be included for tax calculation purposes. Upon the death of the life tenant, the holders of the remainder interest, which includes all rights not held by the life tenant, acquire the right to possession of the property.

Co-ownership of farm property exists when two or more persons hold legal title to a farm. About 70 percent of the farm titles in North Dakota are held in co-ownership. Co-ownership is "an undivided interest" in the whole farm, so that the co-owners do not have separate rights to any given part of the land. The two usual types of co-ownership are tenancy-in-common and joint tenancy.

Tenancy-in-common exists when two or more people each own an undivided interest in the same property. Tenancy-in-common may be created by deed or will and usually results from the operation of state inheritance laws. This arises when two or more children inherit undivided fractional interests in a farm. Each can sell during life or devise by will his share. If he dies, his share becomes a part of his land in common with him.

Joint tenancy usually exists where two or more people own the real estate with the "right of survivorship." When one joint tenant dies, his undivided interest is extinguished, and the surviving joint tenants now each own a larger fraction. Thus, the property does not pass to the joint tenant's heirs as would be the case if he were a tenant-in-common. This characteristic generally is peculiar to joint tenancy and is called the "right of survivorship." While a joint tenant may sell his interest in the property before death, he may not dispose of it by will. If husband and wife own a farm as joint tenants and the husband dies, his wife would have full ownership to the exclusion of the children. Joint tenancy usually involves a much shorter settlement procedure than regular probate.

The law in North Dakota is very specific about the wording of a title in joint tenancy. The usual form is "To John Doe and Mary Doe, husband and wife, as joint tenants, and not as tenants-in-common." It may be advisable to have an attorney examine the title if there is any question about the form of co-ownership presently existing. An attorney will ordinarily want to do this as part of his estate planning services.

Thus far, we have spoken about co-ownership of real property only; however, such ownership of personal property is also possible. Both checking accounts and savings accounts may be held as an individual or in co-ownership either with or without the right of survivorship. Joint accounts with survivorship rights become the property of the survivor. Individual accounts may be transferred to another only by way of gifts, trusts, or wills. Similarly, bonds, shares of stock, and other personal property may be held either individually or in co-ownership with or without rights of survivorship.

The use of joint tenancy with its consequential

right of survivorship is frequently pointed out as a device to pass property at death without the necessity of a will and the required probate administration. This general statement is no longer necessarily true. Under the Uniform Probate Code there will be certain times when property held in joint tenancy will be included within the administrative activities of the estate. Also, possible adverse estate tax consequences from receiving property through joint tenancy are so great that this factor must be evaluated carefully in any estate plan.

B. Deeds and the Importance of Delivery

A deed is written evidence of ownership of real property. It is a written instrument by which a person tranfers real property to a new owner. Deeds should be recorded in the Register of Deeds Office of the county in which the land is located. The purpose of recording is to inform all others of the recorded holder's rights in the property. To record it, the grantor must declare before a competent officer that he has executed the deed.

Two kinds of deeds ordinarily are used in conveying the land: warranty deeds and quit-claim deeds.

A warranty deed is a written instrument containing five, sometimes six, covenants or assurances of title that impose contractual liability upon the person transferring the title. One covenant assures the grantee that the grantor has the right to convey the title. Another assures that he actually possesses the land. He also assures that the title is not limited, defective, or in any way encumbered. If the assurances are broken, the grantor may be personally liable for damages to the grantee or he may have covenanted to give further assurances. Finally, the warranty deed usually contains the clause "and warrants the title thereto," meaning the grantor will defend the title and quiet enjoyment of the grantee against all claims through a superior title.

A quit-claim deed conveys only whatever interest in the property the grantor has at the time of transfer. If he has no interest, none is conveyed. A quit-claim deed can be used to release one's present or future rights, title, or interest to another person without providing a guarantee or warranty of title. This type of deed is useful when the grantor is unsure of his interest in the property.

Delivery is necessary to accomplish a conveyance by deed. Delivery generally is the transfer of a deed from the grantor to the grantee or some third person, such as a trustee, during the lifetime of the grantor. This shows the grantor's intent that the deed should be effective immediately, the key to delivery. Usually, unless the deed is actually delivered to the grantee or his agent during the lifetime of the grantor, the transfer is not effective. For example, if the grantor, after completing the deed, puts it in his own safety deposit box or among his private papers instead of delivering it directly to the grantee, it would then very likely be an undelivered deed and therefore would transfer no interest to the intended grantee.

III. PROPERTY OWNERSHIP AND TRANSFER METHODS AND USES

This section presents and evaluates various ways of tranferring property ownership from one person to another. The more popular methods of transfer are described in some detail along with their advantages and disadvantages. Selection of the one best suited for the particular circumstances of a family requires careful analysis and should be chosen in consultation with an estate planning attorney.

A. Planned Methods of Transferring Property

Legal ownership of property may be transferred from one person to another by one of several methods. In the event that the decedent has failed to provide a plan of transfer, the state will do so for him. Ownership of property may be transferred by the planned means of sale, gift, co-ownership,* wills, insurance, or annuities. Each method will be discussed and its use in estate planning evaluated.

B. Transfer by Will

Everyone should have a will. A will is a written instrument telling how its maker wants his property distributed upon his death. The person who makes the will is called the testator; and if a woman, the testatrix. It is a device which permits you to retain a degree of control after death over the property you owned before death. The main purpose of a will is to guide the court in distributing your property. A study of selected North Dakota estates indicated that 60 percent of the decedents failed

*Co-ownership is not a separate means of transferring property, while technically survivorship is. However, the usage above follows common laymen's terminology.

to have a will. In estates settled as joint tenancies, 79 percent of the decedents did not have a will, whereas in court-administered estates, 40 percent failed to have a will.

A will should be prepared by an attorney to avoid errors and ambiguities that could result in an expensive lawsuit to determine the decedent's intent. A farm's assets consist of both real and personal property and a going business. In preparing to transfer the farm by will, the draftsman must be careful to consider some of the following because of their different treatment by the law: land, buildings, machinery, equipment, livestock, accounts receivable, bank accounts, insurance policies, crops, real estate mortgages, and so forth.

In North Dakota a will may be prepared by any person over the age of 18 and of sound mind. Also, a married woman may dispose of all of her separately owned property by will without the consent of her husband.

A properly executed will must be signed by the testator or in the testator's name by some other person in the testator's presence and by his direction. The will also must be signed by at least two other persons, each of whom witnessed either the testator's signing or the testator's acknowledgement of his signature on the will. A will may be revoked by a subsequent will which revokes the prior document expressly or by inconsistency. A will also may be revoked by destroying the original when such destruction is intended by the testator to act as a revocation.

A person may write his own will and it will be a valid document, whether or not it is witnessed, if the signature and the material provisions of the will are in the handwriting of the testator. However, only an attorney has the necessary training and experience to prepare a written will in accordance with one's wishes and plans. This can be done at a very reasonable cost. An attorney will use the proper language to carry out the intentions, whereas an untrained person is likely to use inaccurate or ambiguous language with the result that an accurate interpretation of the will's meaning is difficult, if not impossible. The attorney also will assure that all legal formalities are observed.

In preparing to make a will as part of estate planning, a person should make a complete record of all property owned and decide just how he wishes his property distributed. This is best accomplished through a thorough discussion with the family and estate planning team.

Advantages:

Transfer by will keeps full control of the property with the owner until his death.

The will permits the owner to distribute his property as he sees fit.

It may save estate taxes because of careful planning practiced while choosing its provisions. Tax savings, however, may not be as important as equitable treatment of the family members.

A will may be changed easily when conditions warrant.

Parents with young children can designate surviving spouse as their guardian and also as his personal representative.

The maker may select the personal representative or executor of his estate and saves the cost of a surety bond by specifying that the person shall serve without bond. Otherwise, some courts are hesitant to let one serve in this capacity without first securing an expensive surety bond. The testator may name the guardian of his minor children.

Disadvantages:

An improperly prepared will usually fails to carry out the wishes of its maker.

Changing economic and family conditions may outdate the will. The maker may fail to revise the will periodically and die with a will which may harm rather than help the family estate plan.

The testator may plan to transfer his property by will without telling his heirs. Thus, the farming heirs may experience uncertainty as to the future of their continuation on the farm and may neglect the farm. This uncertainty may be avoided by transfers during the lifetime of the owner, or by arranging other definite agreements with the farming heirs.

C. Transfer by Insurance

Proceeds from life insurance policies are an important part of most estates. The entire amount of the decedent's life insurance, under the present federal and North Dakota law, is part of his taxable estate if he had the "incidents of ownership" of the

insurance policy. These "incidents" include the right to change the beneficiary, to borrow against the policy, to select the method of settlement, and the right to the cash surrender values. A complete transfer of these rights removes the insurance proceeds from the decedent's estate and federally taxable estates. This may be accomplished by making either your spouse or children the owner or owners of the policies. At death the policy owners can lend the proceeds to the executor or administrator or the estate. Preferably, policies should be purchased originally by the spouse or the children. If existing policies are used as gifts, one possible adverse tax result exists. A gift in excess of annual exclusions and the specific lifetime marital deduction exclusion of $100,000 may be subject to a gift tax and must be added to the estates gross value when death occurs.

Another way to avoid inclusion of life insurance proceeds in an estate is to create an irrevocable trust to hold the policy with the trustee authorized to lend the proceeds to pay estate settlement costs.

Life insurance policies should be reviewed often (at least every 5 years). Since through savings, inheritance, inflation, or otherwise, the size of an estate may have increased, additional insurance may be required to meet liquidity requirements. Life insurance retirement income should be planned in terms of both the husband's and wife's needs. Coordination of policies and wills can result in better estate planning and considerable tax savings.

Insurance has many uses in estate planning. It gives liquidity to the estate, qualifies for the marital deduction, and also provides considerable flexibility in its use. It may be given as a gift.

Insurance can yield retirement income as well as payment to a beneficiary. It can be used to pay off the house mortgage, educate the children, or support the spouse. In partnerships the surviving partner must terminate the partnership or buy out the heirs of the deceased partner, which can be very expensive. A partnership-purchased insurance policy would help the surviving partner in this situation.

Advantages:

Life insurance proceeds go to the beneficiary specified in the policies.

Life insurance proceeds can escape most or all estate taxes by prior transfer of the policy and all incidents of ownership.

The proceeds are received income tax free.

A life insurance trust can be set up to take care of minor children, with secondary beneficiaries named in addition to the primary beneficiaries.

Disadvantages:

The insured often fails to rename beneficiaries even though great changes have occurred since he first bought the policy.

D. Transfer by Means of Co-Ownership

Several types of co-ownership provide a method of transferring property upon the death of one of the co-owners. The form of co-ownership in which the property is held determines how it is transferred upon death.

1. Joint Tenancy

Joint tenancy, meaning joint tenancy with right of survivorship, is a method of holding title to property, including farm property, between two or more people in which each co-owner holds an undivided interest in the entire property. Upon the death of any one of the co-owners, his undivided interest is extinguished and the surviving joint tenants share the full ownership. This property cannot be disposed of by will, except by the last survivor.

Usually, joint tenancy property is not included in probate. Thus, upon the death of one of the joint owners, the survivors may obtain full ownership with a minimum of expense, trouble, and time. Costs of administration may be reduced if the estate is of modest size, and the time necessary to clear the title for the survivor may be reduced to a few weeks. Under certain circumstances, such as the spouse taking his or her forced share, it is brought into probate administration. While putting the property into joint tenancy might eliminate some of estate administration, it does not avoid federal and state estate taxes.

Joint tenancies with right of survivorship are seldom useful and there are many reasons for avoiding them. Under federal law, unless a gift subject to taxation is given when a joint tenancy is created between husband and wife after 1976, the total value of property held in joint tenancy

is taxed in the estate of the first joint tenant to die, with the exception of that portion which a survivor can prove he or she paid for. After many years such proof may be difficult to locate and usually the cost is paid by the estate of the husband who turns out to be the first one to die. Although the federal marital deduction may exclude one-half the value, half or all the value may be taxed when the first of a couple dies, and the entire value will be taxed again when the second dies. If a substantial part of an estate is held in a joint tenancy so that more than half of the net estate goes to the survivor (who does not remarry), the excess, the portion of the estate not held in joint tenancy, will not qualify for the marital deduction and is taxed in both estates. Finally, if the survivor has or inherits another estate of his or her own, then adding the value of that survivorship property may result in a large federal estate tax upon the death of the survivor.

Both the creation and termination of joint tenancies have serious gift, estate, and income tax consequences, many of which are not readily apparent. If you have created any joint tenancies, seek competent legal advice first, to determine whether or not they should be unraveled, and then if appropriate, how they should be terminated.* Some people, who have considered their consequences, have applied the misnomer, "poor man's will" to describe the joint tenancy, but a better description would be a "poor man's trap."

This does not mean that all joint tenancies are filled with inevitably tragic consequences. For example, when a living trust has been created, it is often wise for title in a few assets to be kept outside the trust (i.e., a car and/or a house) to be held jointly by husband, wife, and trustee to avoid probate.

Advantages:

Property held in joint tenancy is not usually a probate asset and therefore is not subject to the delays and expenses of probate.

It is a relatively easy method of transferring property. It is easy to create a joint tenancy, but care must be used to meet the legal requirements.

Disadvantages:

Few owners own all their property in joint tenancy, thus a probate of the remainder of the estate is likely anyway.

Once a farmer has put his property into joint tenancy, even though it is with his wife and/or children, he cannot get more than half of it back without their permission.

Property held in joint tenancy is not subject to a will. If a surviving widow remarries and places the property in joint tenancy with the second husband, it becomes the second husband's property if she dies before he does.

A joint tenant usually can sever the joint tenancy by transferring his undivided interest to another person. The new co-owner will become a tenant-in-common with the other co-owner (the joint tenancy would have been severed or destroyed). Thus, if A and B were joint tenants, and A conveyed his undivided one-half interest to C, B and C now would be tenants-in-common.

*Incompetent termination of a joint tenancy may create gift tax liability.

2. Tenancy-in-Common

This type of co-ownership is commonly used and is probably what most people mean when they speak of "joint ownership." The courts usually will assume this form of co-ownership was intended unless the proper wording for joint tenancy has been used. Tenancy-in-common is frequently created when land is inherited among several heirs. However, the tenants *need not* be related. If one of the tenants dies, his share descends to his heirs instead of to the surviving tenants. Each tenant has the right to sell, assign, mortgage, or convey his undivided share of the property. Only the decedent's actual share of the tenancy-in-common property is taxable in his estate, whereas in joint tenancy the entire jointly held property is taxable in his estate, unless it can be proven that some portions were acquired by inheritance or by money originally belonging to the surviving joint tenants.

Advantages:

If one of the tenants dies, his share is distributed to his heirs.

Several persons can own the same land in unequal and undivided shares.

Only the interest of the deceased tenant-in-common is included in his estate.

Disadvantages:

A tenant-in-common can have the property physically divided or force it to be sold so that he can receive his share of the money.

3. Tenancy-by-the-Entirety

This is another form of co-ownership with the right of survivorship, except that the parties must be husband and wife. At the death of either party, the survivor has the whole estate. Neither husband nor wife alone can dispose of his or her interest to a third party. It costs no more to hold property in either joint tenancy or tenancy-by-the-entirety. In some states, including North Dakota, tenancy-by-the-entirety is not recognized and is now construed to be the same as tenancy-in-common unless specifically stated to be joint tenancy. But North Dakota residents who own real property in other states should be aware of the existence of this form of ownership.

4. Partnership

A partnership is an association of two or more persons to carry on a business as co-owners for profit. A partnership can be used to transfer property from one generation to another. The son can secure an interest in the farm by gift, purchase, or by an operating agreement in either the real or personal property or both. It is important that the partnership *transaction* be entered into by a written agreement so that a permanent record exists. If desired, it can be arranged for the son to later purchase the father's share. The partners may wish to purchase a partnership insurance policy which enables the surviving partner to buy out the interest of the deceased partner. It is important in transferring farms that the interest of children other than those who will continue farming be carefully considered as well. A properly prepared and executed estate plan involving a farm property transfer by partnership (where the son buys into the partnership business initially and later into the real estate, either at some agreed upon time or planned for at the death of the surviving partner) will protect the interests of all the children. A partnership in North Dakota must be established according to North Dakota partnership laws, and the formal agreement should be written by an attorney.

E. Transfer by Sale

A simple and direct method of transferring farm ownership before death is by sale to a member of the family. The sale may be outright or subject to a mortgage or by a contract for deed. This latter method of transfer is ideally suited to situations where the buyer, usually a son, has only a limited amount of capital and the father wants to help the son begin farming, and desires an income from the sale of the farm distributed over a number of years. Under another plan, the parents can transfer the title to the son in return for a token cash payment and either a lifetime support contract or reservation to themselves of a life estate.

1. Direct Sale with Mortgage Back

The simplest sale plan is to have the children purchase the farm "outright" when they start to farm. The seller simply deeds the farm title to the buyer who makes a suitable down payment and gives the seller a mortgage to the property to secure the balance of the payments due.

Advantages:

Direct sale is a businesslike way of making the transfer.

Equitable treatment of all the children is separated from the problem of transferring the farm.

It permits the buyer to operate the farm during his most productive years.

Direct sale permits the buyer to make early permanent improvements to the farm.

Disadvantages:

Parents lose control of property.

2. Conditional Sales with Contract for Deed

A contract for deed can be used as the method of sale when the son does not have a sufficient down payment. By this arrangement the seller agrees to convey the farm to the buyer for a certain price. The equitable title to the property passes to the buyer, but the deed is not delivered until some future date specified in the contract. This method of transfer is very popular in many states among both related and unrelated parties. The particular advantage of the contract for deed is the low down payment by which the buyer secures control of the farm, and possible tax savings to the seller.

Various methods of payment can be adapted to fit the particular family situation. Also, the

payment plan can have great flexibility. It may consist of a fixed money price for the farm and fixed annual payments, or the annual payment may be based upon a share of each year's proceeds, as in crop-share contracts.

Advantages:

The contract for deed helps the young man with limited funds purchase a farm to get started in farming.

The seller may save on capital gains and estate taxes.

The payment schedule can be arranged to encourage building equity during the buyer's most productive years.

Disadvantages:

The seller takes a substantial credit risk during the early years of the contract.

The seller may have the farm unexpectedly defaulted back to him.

The buyer may have less control of the land than under a mortgage since he does not have the legal title.

It is often harder than under a mortgage for the buyer to obtain credit or to sell his equity in the property if this becomes necessary.

3. Transfer with a Life Estate

The parents may reserve to themselves a life estate in the farm and deed the remainder interest to the son. This method assures the parents of income since they have the right to use the land during their lifetime, while the son actually owns a future interest in the land and is assured that he will receive the farm eventually. In addition the parents could give their son a lifetime lease of their life interest in the farm. This method is not without disadvantage, however, since the son could sell his remainder interest to an uncooperative person.

Moreover, where the parents reserve a life estate, the full value of the property will be included in their gross estate upon death. Thus, the life estate is not necessarily a technique to avoid federal and state estate taxes.

As an alternative to a transfer with a retained life estate, the parents might transfer the farm outright to their son, requiring a fixed annual payment to them for their lives or the life of the survivor. The income and gift tax consequences of such a transfer are identical to the taxation of annuities, and if the transfer is for less than a full consideration (that is, the son would pay less than an amount which would represent the fair market value of the property over the expected useful lives of the parents), the balance will be a gift. However, unlike a life estate, upon the death of the parents, no portion of the land value will be entered in their gross estate. In many situations, the same result that is desired by parties seeking to transfer property by retaining a life estate can be accomplished by selling the land for a private annuity, with the exception that the son is obligated for the annuity payments regardless of the income the property may produce.

F. Transfer by Gifts

Transfer of property (money, stocks, real estate, etc.) by gift to the younger generation is important in estate planning. Many small gifts may be given without being taxed. Transfer by gift can be a valuable tool in estate planning but it must be used carefully to achieve all your estate planning goals.

The legal transfer of property ownership by gift is very easy. A valid gift requires that there be (1) an intent on the part of the donor to give a nonrevocable gift, (2) an acceptance of the gift by the donee, and (3) a delivery of the deed or the property itself to the donee. If the donor is giving a number of gifts, it is advisable to maintain a written record of these gifts (including their dollar values) for estate planning purposes.

Unless a donor's taxable gifts exceed $25,000 in a calendar year, no federal gift tax return need be filed until 2 1/2 months after the end of the calendar year in which taxable gifts were given. However, as soon as taxable gifts exceed $25,000 in any given calendar year a return must be filed for the quarter in which the gifts exceed $25,000. If you have failed to file timely gift tax returns, filing deliquent gift tax returns is far better than filing no returns at all.

Although gifts may reduce tax burdens, this should not be the primary objective. Rather, contribution to the happiness and security of a child or grandchild should be the foremost reason for

giving a gift. The unified tax credits should not preclude parents from enjoying the pleasure of seeing children and grandchildren enhance their life styles. However, before giving any substantial gift, you should consider more than tax consequences and the happiness of others.

First, you should not give gifts that will reduce your estate below the level needed to support yourself and your spouse. Tax savings from gifts in excess of annual exclusions are likely to be inconsequential, unless your expected North Dakota adjusted gross estate will be a lot more than $425,625 in 1981.

Secondly, you as a donor can achieve great tax savings under the annual exclusion. Each person has an "annual exclusion" from gift taxes in which he may give gifts of up to $3,000 each calendar year to each of as many donees as he wishes, without paying a gift tax. Before 1977 the donor could give away another $30,000 without the burden of any gift tax, but under the Tax Reform Act of 1976 this specific exemption of $30,000 and the death tax exemption of $60,000 were abolished and a dollar-for-dollar tax credit was created called the "unified gift tax credit" and the "unified estate tax credit," up to a maximum of $47,000.

In addition to the annual exclusions and unified gift tax credit, a donor may give $100,000 to a spouse without having to pay any gift tax. Thereafter, gifts to a spouse up to $200,000 are fully taxable, but after the first $200,000, only one-half of the excess is subject to gift tax. With the spouse's permission, a donor can use each of their annual exclusions of $3,000, for a total exclusion of $6,000 per person to whom each gift is given. Thus, a donor could transfer to his child a $60,000 house in exchange for 10 noninterest bearing notes in the amount of $6,000 each, and each year the donor could forgive one of the notes until at the end of the 10-year period the house had completely transferred without any gift tax liability incurred. Also, a donor could give his spouse up to $103,000 without any gift tax liability; i.e., the marital deduction exclusion of $100,000 plus his $3,000 annual exclusion.

Finally, after the exclusions have been used the unified gift tax credit remains and can be used anytime during life. However, taxable gift value will be included in the donor's estate for estate tax calculation purposes.

Advantages:

There is a $3,000 per donee annual exclusion from gift tax liability. In addition, there is an exclusion for spouse-to-spouse gifts of the first $100,000, then the gifts to $200,000 are fully taxable, and thereafter half of the value of any gift to a spouse is excluded.

There is no state gift tax in North Dakota, but there is an estate tax.

A donor can reduce his own income tax liability by disposing of income producing property.

Although gifts in excess of exclusion equivalents are taxable, increases in the value of the property which occur after the gift has been given will not be included in the donor's estate.

Disadvantages:

Under North Dakota law the taxable estate shall not include the value of any gift given by the decedent only if it is given more than three years prior to death. This may be different from the federal law which may exclude gifts given under the $3,000 annual exclusion from the federal taxable estate even if given within three years of death.

G. Transfer by Annuities

Commercial annuities are contracts usually sold by insurance companies. A life annuity guarantees an income for as long as the annuitant lives, and terminates upon death. A refund annuity provides an income for as long as the annuitant lives, but also provides that the total payment to the annuitant and his beneficiaries will be at least equal to the purchase price of the annuity. A joint life and survivorship annuity guarantees an income to continue as long as either of two annuitants may live. Deferred annuities are bought on the installment plan like life insurance policies instead of in a lump sum. A single life annuity expires at the decedent's death leaving nothing to be included in his gross estate.

One method of transferring farm property using an annuity is to sell the farm to a son, with the son purchasing a commercial annuity for the parents equal to the farm's purchase price. The insurance company would pay a guaranteed income to the parents upon their reaching retirement age.

Private annuities also can be used to transfer property. The private annuity is an arrangement

that may be used whenever one person desires to transfer property for a consideration. It is a device whereby the giver transfers property to the recipient in exchange for the latter's promise to pay him a certain annual income for life. The father can sell the farm to his son in return for an unsecured promise to pay a yearly income to his parents. It is similar to a lifetime support contract or "bond of maintenance" agreement and has many of its problems. Alternative possibilities to the parents would be to use the contract for deed or to reserve a life estate in the farm and transfer the remainder interest to the son.

Advantages:

Assures a definite level of income to the parents while reducing the estate subject to taxes.

No age limit as to when this plan can be started.

Disadvantages:

The value of the annuity remainder becomes part of the decedent's estate and thus subject to estate taxes and probate expenses.

The guaranteed income payments usually are not hedged for inflation effects.

H. Unplanned Methods of Transferring Property

1. Laws of Descent

What happens when one fails to leave a will, i.e., dies intestate? North Dakota laws state that the property of one who dies intestate, passes to his heirs, subject to the control of the county court and the court-appointed administrator.

The order of succession to this property by the heirs is clearly spelled out in the North Dakota Century Code, Chapter 30.1-04:

"Intestate estate defined - Any part of the estate of decedent not effectively disposed of by his will passes to his heirs as prescribed in the following section of this title.

Share of the spouse - The intestate share of the surviving spouse is:

1. *If there is no surviving issue or parent of the decedent, the entire intestate estate.*
2. *If there is no surviving issue but the decedent is survived by a parent or parents, the first fifty thousand dollars, plus one-half of the balance of the intestate estate.*
3. *If there are surviving issue all of whom are issue of the surviving spouse also, the first fifty thousand dollars, plus one-half of the balance of the intestate estate.*
4. *If there are surviving issue, one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.*

Share of heirs other than surviving spouse - The part of the intestate estate not passing to the surviving spouse or the entire intestate estate if there is no surviving spouse, passes as follows:

1. *To the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation.*
2. *If there is no surviving issue, to his parent or parents equally.*
3. *If there is no surviving issue or parent, to the issue of the parents or either of them by representation.*
4. *If there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.*

No taker - If there is no taker under the provisions of this title, the intestate estate passes to the state for the support of the common schools and an action for the recovery of such property and to reduce it into the possession of the state or for its sale and conveyance may be brought by the attorney general or by the state's attorney in the district court of the county in which the property is situated.

Representation - If representation is called for by this title, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

Requirement that heir survive decedent for one hundred

twenty hours - Any person who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by one hundred twenty hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state."

The last statute quoted is a limited version of a common type of clause put in wills to take care of the "common accident" situation, in which several members of the same family are killed or injured and die within a few days of each other. This section avoids multiple administrations which could require more than one probate proceeding and duplicate payments of estate tax on the same property in the space of a few days. A similar statute exists to deal with the situation where there is a will involved.

Two examples may help explain what happens when one dies without a will and his property passes through the statutory laws of descent. In each example, the value of the shareable estate which remains after paying all of the decedent's creditors is $250,000.

Farmer Smith dies leaving his wife and his father. No children have been born. Smith's wife would get the first $50,000 plus one-half of the balance (i.e., $100,000) for a total of $150,000. Smith's father would receive one-half of the balance (i.e., $100,000) after the first $50,000 had been paid to Smith's wife.

Rancher Jones dies leaving his wife, a son and two grandsons by his previously deceased daughter. His wife would receive the first $50,000. The remaining $100,000 would be divided between the son and the two grandsons. Jones' son would get one-half (i.e., $50,000); and his two grandsons would split the share that would have gone to their mother (Jones' daughter) if she had lived (i.e., $50,000). The two grandsons take their share under the right of representation.

2. Homestead Survivor Rights

The surviving family of a decedent who owns real estate in North Dakota may be entitled to a homestead estate. The homestead estate is dependent upon the existence of a homestead. The homestead, real property, consists of the land upon which the claimant resides and all improvements on that land. Total value of the homestead cannot exceed $60,000, over and above liens or encumbrances or both. In no case shall the homestead include different lots or tracts of land unless they are contiguous. While the homestead includes the land and the house, the homestead estate includes a right to the possession, use, and income from the homestead. The homestead cannot be sold for debts of either the decedent or the family that existed previous to death or the debts of the family contracted after the death except those which arise on a mortgage of the homestead premises signed by both spouses or for liens for work done on those premises.

The homestead allowance is something that the spouse would receive in addition to the share given by the state's intestacy laws. So, in the example above under the section entitled "Laws of Descent," in North Dakota, the surviving spouse would get the first $50,000, plus one-half of the balance of the estate plus the homestead allowance. The purpose of the homestead allowance is to insure that the surviving spouse can retain the home as his or her residence after the other spouse dies. Homestead rights may be exercised even if the spouse has inherited property under a will, and the home has been willed to someone else.

3. Exempt Property Entitlement

The spouse, or children if there is no surviving spouse, of the decedent may take certain types of personal property from the estate not exceeding $5,000 in value. This personal property exemption is designed to relieve the personal representative of the duty to sell household goods when there is a spouse or children who want the property. This $5,000 exemption is in addition to any benefits or share passing to the surviving spouse or children by the will of the decedent unless therein otherwise provided; by intestate succession; or by way of the spouse's one-third elective share.

4. Family Allowance

In addition to homestead rights and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported

by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration. However, the allowance may not continue for longer than one year if the estate is inadequate to pay allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the minor and dependent children, or persons having their care and custody. In case any minor child or dependent child is not living with the surviving spouse, the allowance may be paid partially to the child or his guardian or other person having his care and custody, and partially to the spouse as their needs may appear. The family allowance is exempt from and has priority over all claims, but not over the homestead allowance.

The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children either by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. Death of any person entitled to family allowance terminates his right to allowances not yet paid.

The conclusion is evident that if a property owner fails to write a will, the state provides for an orderly distribution of the decedent's property. However, the state's method of distribution and the recipient's share might not be what the decedent had intended. Even if a will is written, the spouse and children receive additional benefits if they claim homestead rights, the exempt property entitlement, and/or the family allowance.

5. Protection of the Spouse - The Augmented Estate

Numerous statutory schemes have been provided throughout the United States to prevent the disinheritance of the spouse. The surviving spouse, under the North Dakota Uniform Probate Code, has a right of election to take one-third of the augmented estate in lieu of any benefits to be received under the decedent's will.

The augmented estate can include more than the property covered by the will of a decedent. The comments to the probate code explain that essentially two separate groups of property are added to the net probate estate to determine the augmented net estate for purposes of computing the one-third elective share: (1) Tansfers, which are essentially will substitutes, by the decedent during the marriage to any person except the surviving spouse. These would include:

a. **Any transfer under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property.**
b. **Any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit.**
c. **Any transfer whereby property is held at the time of the decedent's death by decedent and another with right of survivorship.**
d. **Any transfer given to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed three thousand dollars.**

(2) Transfers to the surviving spouse by the decedent. This would include, for example, all property held in joint tenancy, life insurance benefits, etc.

The purpose of establishing the augmented estate as the basis for determining the spouse's elective share is two-fold: (1) to prevent the decedent from transferring any property to other persons by means other than probate in an effort to deliberately defeat the rights of the surviving spouse; and (2) to prevent the surviving spouse for electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent either during the lifetime of the decedent or at death from life insurance, joint tenancy assets, and other nonprobate arrangements.

The surviving spouse has nine months after the date of death in which to elect. Extended times are available but may result in penalties. Any property in the augmented estate that the surviving spouse has received during life or by will, if he or she chooses not to renounce the will, is deducted from the one-third to which he or she is entitled.

Even if the spouse takes the one-third elective share of the augmented estate instead of taking under the will, the spouse also may receive homestead rights, family allowance, and exempt property entitlement.

IV. ADDITIONAL TOOLS IN ESTATE PLANNING

Four additional tools of considerable importance are available to estate planners to reduce

tax liability, help conserve the assets, and create the retirement and asset distribution plans desired by the property owner. They include marital deduction, trusts, powers of appointment, and insurance.

A. Marital Deduction

Both federal and North Dakota laws recognize a marital deduction in computing federal and state estate taxes. The maximum marital deduction is $250,000 or one-half of the decedent's adjusted gross estate, whichever is greater. Although a federal estate tax would be due, in North Dakota in 1981 and thereafter, an adjusted gross estate worth $461,470.59 could transfer to a surviving spouse without a state estate tax being imposed, when using the $250,000 marital deduction and the North Dakota exemptions of $200,000 and federal estate taxes paid. For example, assume that the decedent had died in 1981, gave no gifts, and left an adjusted gross estate of $461,470.59 to his or her spouse in a form acceptable to claim the marital deduction. The computation of the estate subject to federal and state estate tax would be:*

Federal -

Adjusted Gross Estate	$461,470.59
Less Marital Deduction	-250,000.00
Federal Taxable Estate	$211,470.59
Tentative Tax:	
38,800 + [211,470.59 - 150,000) x .32]	58,470.59
Less Unified Credit	-47,000.00
Federal Estate Tax Due	11,470.59

North Dakota -

Federal Taxable Estate	$211,470.59
Less $200,000 Exemption	-200,000.00
	11,470.59
Less Federal Tax Paid	-11,470.59
State Estate Tax Due	- 0 -

Also, through proper use of the marital deduction, tax credits, and exemptions, an adjusted gross estate under the above assumptions worth $425,625.00 can pass to a surviving spouse entirely free of either federal or North Dakota estate taxes:

*All computations throughout this pamphlet do not consider state death taxes unless specifically indicated.

Federal -

Adjusted Gross Estate	$425,625.00
Less Marital Deduction	-250,000.00
Federal Taxable Estate	$175,625.00
Tentative Tax:	
38,800 + [(175,625 - 150,000) x .32]	47,000.00
Less Unified Credit	-47,000.00
Federal Estate Tax Due	- 0 -

North Dakota -

Federal Taxable Estate	$175,625.00
Less $200,000 Exemption	-200,000.00
State Estate Tax Due	- 0 -

Since the North Dakota and federal taxable estates are the same, and the state estate tax is calculated on the federal taxable estate (the adjusted gross estate less the marital deduction), the estate automatically gets the benefit of the marital deduction on the state estate tax if it has been used on the federal estate tax return.

B. Trusts

A trust under some conditions can be a very useful tool in estate planning by providing flexibility. A trust is an arrangement whereby title to a property right (usually money or real property) is held by one party (trustee) for the benefit of another (beneficiary). The trustee manages, controls, and has legal title to the property while the benefits are given to the beneficiary. The trust offers flexibility to meet changing conditions after the death of its creator which could not be foreseen. Use of trusts can avoid probate, save taxes, protect beneficiaries, provide the grantor personal security, and keep the farm intact. It is a separate tax-paying entity which can avoid income taxes, if desired, by paying out all of its income to the beneficiaries. Two types of trusts are the living trust and the testamentary trust.

A person creates a living trust any time during his lifetime by placing funds or property under the care of the trustee. The trust creator thus does not have to administer or manage the trust property, nor risk the possibility of having the property contested if transferred by a will. A corporate trustee, such as the trust department of a bank, can be selected to protect the spouse when he or she lacks sufficient business skills to handle money. Also, a corporate trustee may be more skilled at

administrating a large estate or trust plan. The living trust can be especially helpful to its creator when the beneficiaries are incapacitated or are minors. The life insurance trust is a form of living trust.

A testamentary trust is created by a will with directions given on how the property is to be handled and distributed. This trust takes effect as soon as the decedent's property has been delivered to the trustee. The testamentary trust may be used to reduce both income and estate taxes when used in conjunction with the marital deduction. A testamentary trust includes all of the property which the will transfers to it. However, property in joint tenancy with right of survivorship is not testamentary (tranferable by will).

A husband can use the trust device as a method of transferring property to qualify for the marital deduction. One such trust is the power of appointment trust whereby a wife gets all of the trust income for life, plus the power to transfer the principal to anyone including to herself. Another way is by the estate trust, in which a wife receives all of the trust income for life, and on her death the principal becomes part of her estate.

The two-trust plan uses a "marital deduction-trust" which is a form of testamentary trust. A husband directs in his will that his estate should be divided into two equal parts. He directs that one part be placed in trust for the benefit of his wife. Usually, he directs that all estate settlement costs are to be paid from the second half of his estate, with the remainder of that half transferred to a second trust. Often he directs that the income from the second trust also go to his wife with the property to be distributed to his children at his wife's death. The remainder interest of the second trust goes directly to the children to keep it out of his wife's taxable estate. An important reason for placing one's property in trust is to subject it to fewer taxing instances. If the decedent places his property in trust, the income to his wife for her life, to his children for their lives, and the principal to the last of his grandchildren then living who reaches the age of 21, the property will be taxed only upon the transfer of his estate and will not be included in the estate of his wife or children. However, in larger estates, where more than $250,000 would be left to each grandchild, it is likely that the excess will be subject to the generation skipping transfer tax imposed by the 1976 federal law.

The following are examples of tax savings using a two-trust marital deduction plan. Two estates valued at $365,000 and $725,000 are used.

COMPARING THE ESTATE TAX EFFECTS OF OWNING TWO SIZES OF NONPROBATE PROPERTY WITH THE TWO-TRUST MARITAL DEDUCTION PLAN.

	Fair Market Value	
Property Owned at Death	**Smaller Estate**	**Larger Estate**
House	$ 50,000	$ 50,000
Life Insurance Proceeds	100,000	100,000
Personal Effects	25,000	25,000
Farmland, Machinery, Etc.	140,000	500,000
Pension Plan Proceeds	50,000	50,000
	$365,000	$725,000

Situation 1 - nonprobate joint tenancy - without the two-trust plan.

Decedent dies in 1981, while employed, and is survived by his wife and two children, ages 23 and 25. His life insurance and pension proceeds are payable to his wife. The house, securities, and personal effects are owned jointly with his wife. Inflation effects are not considered.

Estate Tax Liabilities (Upon Husband's Death)

Gross Estate	$315,000[1]	$675,000[1]
Administrative Expenses (no property subject to probate)	-0-	-0-
Adjusted Gross Estate	315,000	675,000
Marital Deduction	(250,000)	(337,500)
Taxable Estate	65,000	337,500
Tentative Federal Estate Tax	14,300	100,550
Less Unified Credit	(14,300)	(47,000)
Total Federal Estate Tax Due	-0-	53,550
Total State Estate Tax Due	-0-	9,311
Total Estate Taxes Due	-0-	$ 62,861

[1]Pension proceeds excluded under Sec. 2039 (c) IRC.

Wife dies ten years later owning the following property:

House	$ 50,000	$ 50,000
Life Insurance	100,000	100,000
Personal Effects	25,000	25,000
Farmland, Machinery, Etc.	140,000	437,139[2]
Pension Plan Proceeds (no longer excludable)	50,000	50,000
	$365,000	$622,139

[2]This value was reduced by the amount used to pay estate taxes.

Her will leaves all property to children equally. Her will is probated. No taxable gifts have been given since 12/31/76.

Estate Tax Liabilities (Upon Wife's Death)

	Fair Market Value	
	Smaller Estate	Larger Estate
Gross Estate	$365,000	$662,139
Administrative Expenses	(15,000)	(22,139)
Taxable Estate	350,000	640,000
Tentative Federal Estate Tax	104,800	207,600
Less Credit for State Death Taxes Paid	(5,200)	(15,600)
	99,600	192,000
Less Unified Credit	(47,000)	(47,000)
Federal Estate Tax Due	52,600	145,000
North Dakota Estate Tax:		
Federal Taxable Estate	350,000	640,000
Less Federal Tax Paid	(52,600)	(145,000)
	297,400	495,000
North Dakota Exemption	(200,000)	(200,000)
North Dakota Taxable Estate	97,400	295,000
North Dakota Estate Tax Due	$ 11,732	$ 47,300

Net amount passing to children - Situation 1:

Gross Estate	$365,000	$662,139
Less Estate Taxes Due	(64,332)	(192,300)
Less Administrative Expenses	(15,000)	(22,139)
	$285,668	$447,700

Situation 2 - Same sizes of estates using the two-trust plan:

Same as Situation 1 except (1) only house is jointly owned; (2) insurance is payable to husband's estate; (3) husband's will leaves wife an amount determined under a formula so that she receives 1/2 of the federal adjusted gross estate and the balance of estate goes into a residuary trust with income to wife and upon her death remaining principal is distributable to children equally; and (4) pension proceeds are payable to residuary trust.

Estate Tax Liabilities (Upon Husband's Death)

		Smaller Estate	Larger Estate
Gross Estate (same as Situation 1)		$315,000	$675,000
Administrative Expenses		(15,000)	(25,000)
Adjusted Gross Estate		$300,000	$650,000
Home	$ 50,000		
Marital Bequest	$100,000	150,000	325,000
Taxable Estate		150,000	325,000
Tentative Federal Estate Tax		38,800	96,300
Unified Credit		(38,800)	(47,000)
Total Federal Estate Tax Due		- 0 -	49,300
Total State Estate Tax Due ($200,000 exemption)		- 0 -	16,700
Total Estate Taxes Due		- 0 -	$ 66,000

The taxable estate of $325,000 along with the pension proceeds of $50,000 go into the residuary trust and do not become a part of wife's estate.

Wife dies ten years later and her will leaves all property to the children equally.

Estate Tax Liabilities (Upon Wife's Death)

	Fair Market Value	
	Smaller Estate	Larger Estate
Gross Estate:		
Home	$ 50,000	$ 50,000
Marital Deduction	100,000	275,000
	150,000	325,000
Administrative Expenses	(10,000)	(20,000)
	140,000	305,000
Tentative Federal Estate Tax	35,800	89,500
Unified Credit	(35,800)	(47,000)
Federal Estate Tax Due	- 0 -	42,500
State Tax ($200,000 exemption) Due	- 0 -	5,800
Total Estate Taxes Due	- 0 -	48,300

Net amount passing to children - Situation 2.

Original Gross Estate	$365,000	$725,000
Less Administrative Expenses		
Husband	(15,000)	(22,139)
Wife	(10,000)	(20,000)
Termination Expense - Residuary Trust	(5,000)	(10,000)
Estate Taxes Paid	- 0 -	(114,300)
Net Amount Passing to Children	355,000	558,561
Less Amount Passing Situation 1	(285,000)	(447,700)
Tax Savings Using the Two-Trust Plan	$ 50,000	$110,861

Lifetime trusts can be revocable or irrevocable, or revocable under certain conditions. Whether income, gift, or estate taxes will be applicable depends upon these and other important elements in forming the trust. There are so many variations of the trust that only an attorney can determine the best type of trust for each particular situation.

Advantages:

Reduced estate taxes and less estate shrinkage, since the funds pass directly from the father to his children. A trust is a separate tax-paying entity. Income to the trust is usually taxed at lower brackets.

Skillful management can be obtained with increased welfare for the children. A trustee can be selected who is trained in the efficient management of property and securities for others.

A living trust is a private, confidential contract instead of a public probate. It protects inexperienced beneficiaries from business worries and investment responsibilities.

The creator's instructions concerning the use of the property will be faithfully followed so that he is able to direct how his property shall be used long after his death.

Disadvantages:

Almost complete control of the trust property must be given up during the creator's lifetime if he wants to save estate and income taxes.

The trust property in a testamentary trust is included in its creator's estate for estate tax purposes.

C. Powers of Appointment

It has been said that, "The power of appointment is the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out." A power of appointment is a means by which the owner of property or the right to dispose of property reserves to himself or grants to another person or persons the power to designate, within such limits as the person granting the power may prescribe, the persons who shall receive the property or the shares which they may receive. A power of appointment may be created by will or deed and may be either a general or a special power created for some particular purpose.

The power of appointment adds flexibility to the estate plan. The future cannot be clearly foretold, so this power helps the owner avoid rigidity in the estate plan. It is a way for the creator to view the future through the eyes of the recipient (donee) of the power. It is a way of allowing for adjustments in the distribution of the remainder interest of the estate many years in the future to meet then existing circumstances, such as a child being severely handicapped in an accident or the children having different financial successes and responsibilties.

One use of the power of appointment is as a guide and safety measure. It permits the owner to specify in his or her own will the ultimate beneficiaries of the trust principal if his or her spouse fails to use the power to appoint this. Thus, the owner indicates his wishes and his wife can, if she wishes, abide by them merely by doing nothing.

Ownership of a general power of appointment is now treated as the equivalent of ownership of the property subject to the power for federal estate tax purposes. Thus, estate taxation can be escaped only by a valid inter vivos exercise or release of the general power. But these are subject to the gift tax. Furthermore, if the power is exercised before death of the holder of power of appointment in a testamentary fashion, the value of the property subject to the power will still be included in the gross estate.

If the husband leaves one-half of his adjusted gross estate to a trust, with the income to his wife, and to his wife the power to appoint by will the principal to such person as she may desire except her estate or its creditors, it will not be such a power as to be taxable to the wife's estate. Such special limited power of appointment is nontaxable if it specifies that the holder cannot appoint to herself, her creditors, her estate or its creditors the remainder interest of a trust over which she has a power of appointment. The purposes of limiting the power are to make the trust remainder nontaxable and to assure that the trust remainder goes to your descendents or to members of your family and their wives or husbands.

The power of appointment can be a very useful and valuable estate planning tool. There are many potential uses for this power, but it requires considerable skill in analyzing its usefulness. It may result in a sizable gift and estate tax savings. Each situation must be analyzed to determine whether it should be created and, if created, the nature and extent of the power.

Advantages:

A very efficient distributive device that adds flexibility and guidance to the estate plan and

may yield tax savings.

Gives a surviving spouse income from trust property during life with the remainder to a selected group of recipients on his or her death.

May prevent property in a power of appointment trust from becoming a part of surviving spouse's estate on her death and thus not subject to the surviving spouse's creditors or claims.

May prevent trust property from being subject to the costs and shrinkage of a second probate.

Disadvantages:

Holder of power of appointment needs some business skills and understanding of owner's objectives in creating the estate plan.

Holder of power of appointment may permit personal preferences and emotional prejudices to affect his or her distribution.

D. Insurance

Insurance is our most widely held estate-creating asset, and it has many uses in estate planning. It immediately increases the owner's estate and adds to the security of his family. It provides cash to give the estate needed liquidity to pay debts, taxes, and living expenses during the settlement period, and can help the family continue farming in the event of his death. It also can provide retirement income.

Term insurance policies are written for a definite number of years - 1, 5, 10, or 15 - and only if death occurs during this term is the face value of the policy paid. It has no cash or surrender value if the insured lives beyond the term. It is an inexpensive form of short-term life insurance and is especially useful to the young family man buying a home or farm. Costs per thousand of insured value rise with increases in age, especially after age 50 when your insurance needs are usually declining. These policies are frequently required of borrowers on installment sales contracts.

Ordinary life insurance, straight, or "whole life" insurance policies, whose terms are for life, usually have the same size (level) annual payments for the life of the insured. It gives lifetime protection and provides for leaving an insurance estate regardless of whether the insured dies early or lives to an old age.

Limited-pay life insurance policies provide the same benefits as an ordinary life insurance policy but are fully paid for in a limited number of years, commonly 20 years, rather than throughout the life of the insured. Policies typically have level annual premiums for the agreed-on pay period, and the company pays the policy face value upon death of the insured.

Endowment insurance policies require the payment of a fixed premium for a specified number of years during which time the policyholder is insured for the face amount of the policy. If the insured lives to the end of the premium paying period, he receives the face amount and the insurance involved stops.

Disability, or accident and health insurance, is a potentially vital source of income where the insured suffers lengthy sickness or injury. Many insured today have plenty of life insurance but little or no disability insurance, which indicates a need to reevaluate and rebalance the insurance program in light of changing policy offerings and family needs.

Family life insurance policies insure all members of the family under one contract. Typically the head of the household is insured under an ordinary life plan, and the wife and children are insured with "convertible" term insurance. Additions to the family are typically included 15 days after birth, with the cost per thousand the same regardless of the number of children.

Group life insurance policies provide insurance protection to a group of employees or unit members. The expectation is that the age composition of the insured group will remain about constant over time as new and younger members enter the plan and older members leave. The policy usually provides the employee with a rather limited amount of protection. It is an inexpensive form of protection, with no cash or surrender value, and usually it is not transferable if the employee leaves the employer's hire.

Burial insurance policies are no longer easily obtained, but the limited face value of some group life insurance policies often serves the same function, which is to pay all burial expenses. In some areas, funeral directors operate burial companies which offer a complete funeral, but bad experiences with some of these have led to state and congressional investigations. These investigations and other sources have pointed up the success of the many cooperative funeral associations oper-

ating in the Midwest and the memorial associations operating on the West and East Coasts. These associations reflect a movement toward prearranged funerals and a widespread interest in funerals priced as low as reasonably possible. In contrast, legislative action in some states to require embalming or the cremation of a casket as well as the body are unnecessarily increasing the costs of funerals in those states.

A convertible policy is one that permits changing from one form of insurance contract to another, such as term insurance into ordinary life or 20-pay life into whole life.

Most insurance policies provide a choice between lump-sum payment of the face value of the policy to the beneficiary upon the death of the insured and settlements featuring a periodic income or a combination of settlements. The insured chooses the method of settlement, and his choice usually cannot be changed by the beneficiary.

In addition to the lump-sum payment plan, five options are frequently offered: (a) life income, payable monthly or otherwise, with proceeds paid for the life of the beneficiary; (b) limited installment option which pays the face value with interest in equal installments for a fixed number of years with the amount of the installments determined by the number of years selected; (c) payment of installments in a somewhat smaller amount periodically for a guaranteed number of years, but paid only as long as the beneficiary lives; (d) payment of equal installments until the amount of the policy and interest are exhausted; and (e) periodic payment of the interest earned by the principal with or without the right of the beneficiary to receive a part of the principal each year and with the remaining principal to go to the children.

E. Cooperative/Corporation

A cooperative/corporation is an association of members who contribute either capital and/or labor and receive stock or membership in the organization. It distributes all profits back to its members of stockholders.

The cooperative/corporation form of business organization provides many of the advantages of the forbidden corporate organization. North Dakota since 1932 has prohibited farms from organizing as corporations. Some farm families may be able to benefit from the advantages of the cooperative/corporation form of business, which could include:

1. Limited liability to members, so the risk of loss is limited to the amount of a member's investment in the association.
2. Simplified property transfer before or at death. A member may be able to transfer his shares without affecting the continuity of the farm business.
3. Attracting more capital into the farming operation, with its possible perpetual life and larger size.
4. Reduced costs when purchasing larger quantities of fertilizers and other farming inputs, often in bulk forms.
5. Tax consequences which may be an advantage.

Possible disadvantages can include:

1. The cooperative/corporation must follow formal operating rules, which can be both time consuming and expensive.
2. Complications in decision making because of the voting format. Each member has one vote regardless of the amount of capital invested or stock owned.
3. Loss of absolute control of the family farm by the father, when other family members control shares or capital invested.
4. Seventy-five percent of the members must be actual farmers residing on the farm or depending principally on farming for their livelihood. This ratio must not fall below 75 percent or the land may be subject to forced sale.
5. Five adults are required to form a cooperative/corporation.
6. Its use for these purposes has been limited in the past, and therefore it is relatively unknown and untried.

V. RETIREMENT INCOME PLANNING

Complete family estate planning considers a combination of ways to provide retirement income. Social security retirement benefits are included in the family estate plan. Consideration is given to insurance and annuities. Annuities help the property owner assure his own future financial security. Consideration must also be given to income, estate, and gift tax consequences.

The retirement income plan has at least three long-term goals.

1. It must assure that the farmer and his wife do not outlive the sources of their income.

2. **It must provide protection against inflation.**

3. **It must provide some cash or liquid reserves for emergencies.**

A first point to consider in estimating future retirement income needs is the time period for which the income is going to be needed. Life expectancy tables suggest these answers.

Life Span We Enjoy

	At Birth	At Age 50	55	60	65	70	75	80	85
Life Remaining	76	26.7	22.7	19.0	15.6	12.4	9.8	7.6	5.7
White Males	71	23.9	20.0	16.5	13.4	10.6	8.3	6.4	4.9
White Females	81	29.9	25.6	21.5	17.6	14.0	10.8	8.1	6.1

While these figures are not only estimates, they indicate the vital importance of careful planning. People with adequate retirement incomes live longer. As persons in good health grow older, they still have many good years ahead, which places greater emphasis on good family estate and retirement income planning.

The amount of retirement income needed has risen in recent years. In 1940 it was estimated that an average of about $150 a month would provide an adequate retirement monthly income, but today the minimum is three to five times that amount. In another 20 years it may take an additional three to five times as many lower-valued dollars to live on. Medical bills usually increase in the later years. Any plans to travel or visit kinfolk will increase retirement income needs, as it takes more to maintain a home and travel about.

Inflation has been the ruin of many a retirement plan. Inflation averaged about 1 1/2 percent a year up to 1960, 4 to 6 percent annually in the 1960's, and reached "double digit" rates in the 1970's. The result is that the 1940 dollar was worth only 21 cents in 1977, and the 1967 dollar was worth only 55 cents in July, 1977. Take care to "inflation-proof" your retirement income.

Most retirement income plans use a combination of income sources to supplement the monthly social security payments. You must consider the monthly income sources and how each is likely to be affected by inflation. In general, all fixed monthly income payments will be reduced by inflation. Social security monthly payments are now in indexed dollar amounts, cannot be outlived, and may be affected by inflation. Congress has changed the size of payments, but inflation continues to be a problem. Most annuity payments are in fixed monthly amounts and are adversely affected by inflation. Stocks or other investment funds are more commonly a hedge against inflation.

The retirement income plan must include some cash or liquid assets for emergency needs. Most commonly used are the easily converted government bonds, savings accounts, or certificates of deposit. These assets usually yield a lower return as an investment, but are necessary to provide liquidity for unexpected expenditures. The study of selected North Dakota estates shows that many of all sizes had a high percentage of their assets in low yielding forms, with the consequent smaller income earnings to the property owner.

You must consider the income, estate, and gift tax consequences of your retirement income plan. State tax laws vary so that these tax consequences will differ according to where you maintain your permanent retirement residency. An estate planning attorney will help you to consider the various tax consequences and tax liabilities arising from different family estate plans.

Annuities are often used by retired persons to provide a fixed income. The annuity contract states that an individual pays a given sum to the life insurance company and in return receives an income or annuity for as long as he lives. Annuity payments may be received annually, semiannually, quarterly, or monthly. The purchase price of annuities for women is usually greater than for men, because on the average the future life expectancy for a woman is somewhat longer. Usually no medical examination is required for an annuity.

Annuities may be purchased via a single premium or on an installment basis to suit the convenience of the buyer. An immediate annuity provides income to the buyer beginning one year or some agreed-on period after purchase. A de-

ferred annuity is more likely to be purchased by a younger buyer with income returns to commence at some specified future date. Income from a straight-life annuity terminates with the death of the annuitant. A refund annuity provides that should the annuitant die before the total amount of annuity payments received by him equals or exceeds the purchase price, the difference shall be paid to a named beneficiary either as a cash lump sum or as a continuation of the regular installments. A life income on a joint-life-and-survivorship annuity basis may be advantageous for a married couple, but it has disadvantages as well as advantages, which indicate that it should be carefully analyzed. Social Security benefits can form an integral part of the family estate and be an important source of after-retirement income. They are very important and good estate planning includes periodic checks during one's employable period to assure accurate recording of benefits earned. These checks are welcomed by the Social Security Administration. As retirement nears, you should again contact your local office to see that their records are up to date. At least three months before retirement, complete an application for benefits to permit processing and straightening out of any problems to assure the immediate flow of benefits when retirement starts.

VI. ESTATE AND GIFT TAXES

This section briefly explains and illustrates the calculation of North Dakota and federal estate and gift taxes. Good family estate planning will minimize these taxes, but not without some sacrifice to the welfare of the children. Family estate planning is more than just tax saving.

A. Estate Taxes

1. North Dakota Estate Taxes*

Since the 1977 legislative session, the calculation of the North Dakota estate tax generally follows completion of the federal estate tax form. Although the North Dakota "taxable estate" is said to be the same as the federal taxable estate, to arrive at the North Dakota taxable estate three adjustments are necessary:

(a) the federal estate taxes paid are deducted from the federal taxable estate,

(b) an exemption of $200,000 is deducted from the value of the federal estate, and

(c) the value of any gift given by the decedent greater than three years prior to death is *not* included in determining the North Dakota taxable estate.

*Based on an interpretation by the North Dakota State Tax Department.

The 1977 legislature revised the tax rates. The new schedule is:

North Dakota Taxable Estate From	To	Tax	Plus Percent	Of Excess Over
$ 0	$10,000	$ 0	4	$ 0
10,000	20,000	400	6	10,000
20,000	30,000	1,000	8	20,000
30,000	40,000	1,800	10	30,000
40,000	50,000	2,800	12	40,000
50,000	60,000	4,000	14	50,000
60,000	80,000	5,400	16	60,000
80,000 and over		8,600	18	80,000

The increased exemptions from $60,000 to $200,000 and the increase in tax rates changes the impact of North Dakota estate taxes as compared to the old 1975 law. The result is that those who have less valuable estates now pay less estate tax, while those with more valuable estates will pay more estate tax.

The above, effective January 1, 1977, are the major considerations used to calculate the North Dakota taxable estate using the previously calculated federal taxable estate. There are further adjustments necessary when only a part of the real property included in the federal gross estate of the decedent is located in North Dakota.

The total estate taxes assessed in North Dakota by years (ending June 30) were:

Year	Amount	Year	Amount
1970 -	$2,605,380.84	1974 -	$3,826,109.69
1971 -	2,517,899.44	1975 -	5,073,495.28
1972 -	3,675,612.90	1976 -	6,083,485.34
1973 -	3,494,004.81	1977 -	3,655,881.39

Table 1 demonstrates how North Dakota and federal estate tax is determined for different sizes of estates during the phase-in period 1977 to 1981.

2. Federal Estate Tax

The federal estate tax is a tax on the privilege of transferring or shifting relationships (financial interests) to property at death. It is not levied on the property itself.

TABLE 1. EFFECTS OF ESTATE TAX ON DIFFERENT SIZES OF ESTATES DURING THE PHASE-IN PERIOD 1977-1981. Assume Computations Are Made After The Death Of A Husband In Joint Tenancy With His Surviving Wife. Death Taxes Have Not Been Entered Into The Calculations.

	Federal Estate Tax					North Dakota Estate Tax						
Year of Death	Adjusted Gross Estate -	Marital Deduction	Tentative Tax	Tax Credit	Federal Tax Payable	Federal Taxable Estate	Federal Taxes Paid	$200,000 Exemption	North Dakota Taxable Estate	North Dakota Tax Payable	Total Taxes Payable	Amount of Estate Passed to Spouse
1977	375,000	- 250,000 =										
		125,000	31,300	- 30,000 =	1,300	125,000	- 1,300 -	200,000	= 0	$ - 0 -	$ 1,300	$ 373,700
1978				- 34,000 =	0		- 0 -	200,000	= 0	- 0 -	- 0 -	375,000
1979				- 38,000 =	0		- 0 -	200,000	= 0	- 0 -	- 0 -	375,000
1980				- 42,500 =	0		- 0 -	200,000	= 0	- 0 -	- 0 -	375,000
1981				- 47,000 =	0		- 0 -	200,000	= 0	- 0 -	- 0 -	375,000
1977	500,000	- 250,000 =										
		250,000	70,800	- 30,000 =	40,800	250,000	- 40,800 -	200,000	= 9,200	368	41,168	458,832
1978				- 34,000 =	36,800		- 36,800 -	200,000	= 13,200	592	37,392	462,608
1979				- 38,000 =	32,800		- 32,800 -	200,000	= 17,200	832	33,632	466,368
1980				- 42,500 =	28,300		- 28,300 -	200,000	= 21,700	1,136	29,436	470,564
1981				- 47,000 =	23,800		- 23,800 -	200,000	= 26,200	1,496	25,296	474,704
1977	1,000,000	-500,000 =										
		500,000	155,800	- 30,000 =	125,800	500,000	- 125,800 -	200,000	= 174,200	25,556	151,356	848,644
1978				- 34,000 =	121,800		- 121,800 -	200,000	= 178,200	26,276	148,076	851,924
1979				- 38,000 =	117,800		- 117,800 -	200,000	= 182,200	26,996	144,796	855,204
1980				- 42,500 =	113,300		- 113,300 -	200,000	= 186,700	27,806	141,106	858,894
1981				- 47,000 =	108,800		- 108,800 -	200,000	= 191,200	28,616	137,416	862,584
1977	2,000,000	-1,000,000 =										
		1,000,000	345,800	- 30,000 =	315,800	1,000,000	- 315,800 -	200,000	= 484,200	81,356	397,156	1,602,844
1978				- 34,000 =	311,800		- 311,800 -	200,000	= 488,200	82,076	393,876	1,606,124
1979				- 38,000 =	307,800		- 307,800 -	200,000	= 492,200	82,796	390,596	1,609,404
1980				- 42,500 =	303,300		- 303,300 -	200,000	= 496,700	83,606	386,906	1,613,094
1981				- 47,000 =	298,800		- 295,800 -	200,000	= 501,200	84,416	383,216	1,616,784

The importance of the federal estate and gift taxes can be viewed from the number of these tax dollars paid by North Dakotans in recent years.

Year	Estate Tax	Gift Tax
1969	$ 3,297,000	$ 167,000
1970	4,590,000	162,000
1971	4,274,000	239,000
1972	15,946,000	290,000
1973	7,552,000	548,000
1974	8,738,000	472,000
1975	11,950,000	1,086,000
1976	18,100,000	1,443,000

The federal Tax Reform Act of 1976 has changed many features of estate tax. These changes became effective December 31, 1976, and some are described below along with unchanged provisions.

a. Filing Requirement

An estate tax return is required if the decedent's gross estate exceeds:

(1) $120,000 for a decedent dying during 1977;
(2) $134,000 for a decedent dying during 1978;
(3) $147,000 for a decedent dying during 1979;
(4) $161,000 for a decedent dying during 1980;
(5) $175,000 for a decedent dying during 1981 and thereafter.

b. Farm Property - Payment of Estate Tax

It is now easier to obtain 12-month extensions for payment of estate taxes. Merely showing that the executor needs time to collect liquid assets or to convert liquid assets to cash is enough.

A 10-year extension for payment of federal estate taxes may be obtained where the value of the farm exceeds 35 percent of the gross estate value or 50 percent of the taxable estate of the decedent. Also, if a farm value is at least 65 percent of the adjusted gross estate, a special 15-year installment payment provision may be used. It is possible under the 15-year provision to pay only interest for the first five years with the deferred tax bill paid over the following ten years.

c. Farm Property - How to Value

The gross value of the estate is usually its fair market value. But, if the real property included in the decedent's gross estate was and is used for farming or other closely held business use, the property may qualify for special current-use valuation as a farm or business rather than the normally higher fair market valuation. Thus, a farm owner is relieved of the excessive burden of a fair market valuation, for example, where agricultural land is in high demand for housing. This special valuation may be used to lower the "highest and best" value (i.e., the fair market value of the decedent's gross estate) up to $500,000.

Several considerations must be met to qualify for special current use valuation as a farm:

(1) at least 50 percent of the decedent's adjusted gross estate must consist of real *or* personal property devoted to a farm;
(2) at least 25 percent of the adjusted gross estate must be "qualified" real property of a farm;
(3) the property must pass to a qualified heir (that is a member of the decedent's family);
(4) the real property must have been used, or held for use, in a farm for five of the last eight years prior to the decedent's death; and
(5) the decedent or a member of the decedent's family must have been participating "materially" in the operation of the farm for five of the last eight years preceding the decedent's death.

Also, for a farm to qualify for special-use valuation there must be a trade or business use; i.e., the mere passive rental of property will not qualify. However, where a related person leases and conducts farming on the property, the real property may qualify for special-use valuation.

A "farm" includes stock, dairy, poultry, fruit, furbearing animals, and truck farms, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities. Farms also include orchards and woodlands. The activities engaged in on the real property help decide whether it is used as a farm for farming purposes. In addition to cultivation of the soil and raising or harvesting of agricultural or horticultural commodities, and preparing such commodities for market, the term "farming purposes" includes the planting, cultivating, caring for or cutting of trees, and the preparation (other than milling) of trees for market.

Where the material participation requirement is satisfied, the real property which qualified for special use valuation includes the farmhouse or other residential buildings and related improvements located on qualifying real property, if such buildings are occupied on a regular basis by the owner or lessee of the real property (or by em-

ployees of the owner or lessee) for the purpose of operating or maintaining the real property or the business conducted on the property. Qualified real property also includes roads, buildings, and other structures and improvements functionally related to the qualified use. However, elements of value which are not related to the farm or business use (such as mineral rights) are not eligible for special use valuation.

Two methods can be used to determine the special use value of the gross estate: the farm method and the multiple factor method. The farm method is applied by dividing:

(1) The excess of the average annual gross cash rental for comparable land used for farming purposes and located in the locality of such farm over the average annual real estate taxes for such comparable land by

(2) The average annual effective interest rate for all new Federal Land Bank loans.

Each average annual computation is based on the five most recent calendar years ending before the date of the decedent's death.

However, this special farm valuation method is not applicable where:

(1) It is established that there is no comparable land from which the average annual gross cash rental may be determined, or

(2) The executor elects to have the value of the farm determined by applying the multiple factor method.

Example: Assume a landowner died on December 31, 1977. Also, assume the decedent's estate met all requirements necessary to qualify for special use valuation. The following hypothetical example may be what Congress intended:

Year	Average Annual Gross Cash Rental (per acre)	No. of Acres	Average Annual State and Local Real Estate Taxes (per acre)	Average Annual Effective Interest Rate for All New Federal Land Bank Loans
1977	$25.00	1,000	$1.70	8.6%
1976	25.70	1,000	1.50	8.7
1975	20.50	1,000	1.35	8.0
1974	17.50	1,000	1.32	7.5
1973	11.50	1,000	1.27	7.4

The average annual gross cash rental per acre is $20.04 ($100.20 ÷ 5 = $20.04). The average annual state and local real estate taxes per acre are $1.43 ($7.14 ÷ 5 = $1.43). The average annual effective interest rate for all new Federal Land Bank loans is 8.04 percent (40.2 ÷ 5 = 8.04). The excess of the average annual gross cash rental is $18.61 ($20.04 - 1.43 = $18.61). The excess is divided by 8.04 percent, giving the acreage a value of $231.47 per acre. Because the decedent landowner had 1,000 acres, the value of his farm under the special use valuation method is $231,467. Such valuation, however, cannot result in a value more than $500,000 less than the highest and best use value. For example, if the highest and best use value of the farm were $2,500,000, the special use value would have to be increased from $1,000,000 to $2,000,000 in order not to reduce the decedent's gross estate by more than $500,000.

Once the farm value is calculated, the gross value of the estate is determined by taking its farm value and adding to it all gifts given within three years of death (except gifts given under the $3,000 annual exclusion) plus the gift taxes already paid on those gifts.

If the special farm method is not used in determining special use valuation for qualifying real property, then the multiple factor method is used. Under this method, the value of real property is determined by the use of five factors:

(1) The capitalization of income that the property can be expected to yield for farming purposes over a reasonable time under prudent management using traditional cropping patterns for the area, taking into account soil capacity, terrain configuration and other similar factors;

(2) The capitalization of the fair rental value of the land for farmland;

(3) Assessed land values in a state which provides differential or use value assessment for farmland (North Dakota, at present, does not);

(4) Comparable sales of other farmland in the same geographical area far enough from a metropolitan or

resort area so nonagricultural use is not a significant factor in the sales price; and

(5) Any other factor which fairly values the farm.

d. Recapture

If within 15 years after the decedent's death and before the death of the qualified heir the property is disposed of to persons who are not family members or ceases to be used for farming, then all or a portion of the federal estate tax benefits obtained by virtue of the special valuation may be recaptured by the federal government.

Full recapture occurs within the first 10 years with a phase out between 10 and 15 years. However, recapture does not occur on death of the qualified heir.

For purposes of "cessation of qualified use," absence of material participation for three or more years during any eight-year period ending after the decedent's death triggers recapture. Partial disposition leads to partial recapture.

Payment of any recaptured tax benefits is the responsibility of the qualified heir.

e. Determining the Taxable Estate

There is no longer a standard exemption. The allowable deductions for funeral and administrative expenses, and so on, continue. The marital deduction has been changed to $250,000 or one-half of the gross estate, whichever is larger, as long as the spouse receives it in an acceptable form. The larger marital deduction exempts most small estates from federal taxation (see Table 1). However, "taxable" gifts given after 1976 are included in the estate for estate tax computation purposes.

f. Determining the Tax Payable

The tax payable is determined by first applying the rate schedule (Table 2) and then reducing that amount by the tax credit (Table 1). It should be noted that for estate tax computation purposes, the estate includes "taxable" gifts given after 1976. The tax credit replaces the standard exemption. In 1981, and thereafter, the tax credit will be $47,000 for all estates. The credit will be phased in over a five-year period beginning in 1977 and, when fully effective, will be equivalent to an exemption of $175,625; as follows:

TABLE 2. THE UNIFIED RATE SCHEDULE FOR FEDERAL ESTATE AND GIFT TAXES, EFFECTIVE JANUARY 1, 1977

Federal Taxable Estate: From	To	Tax	Plus Percent	Of Excess Over
$ 0	$ 10,000	$ 0	18	$ 0
10,000	20,000	1,800	20	10,000
20,000	40,000	3,800	22	20,000
40,000	60,000	8,200	24	40,000
60,000	80,000	13,000	26	60,000
80,000	100,000	18,200	28	80,000
100,000	150,000	23,800	30	100,000
150,000	250,000	33,800	32	150,000
250,000	500,000	70,800	34	250,000
500,000	750,000	155,800	37	500,000
750,000	1,000,000	248,300	39	750,000
1,000,000	1,250,000	345,800	41	1,000,000
1,250,000	1,500,000	448,300	43	1,250,000
1,500,000	2,000,000	555,800	45	1,500,000
2,000,000	2,500,000	780,800	49	2,000,000
2,500,000	3,000,000	1,025,800	53	2,500,000
3,000,000	3,500,000	1,290,800	57	3,000,000
3,500,000	4,000,000	1,575,800	61	3,500,000
4,000,000	4,500,000	1,880,800	65	4,000,000
4,500,000	5,000,000	2,205,800	69	4,500,000
5,000,000		2,550,800	70	5,000,000

The estate tax credit will be phased in as follows:

Year	Tax Credit	Equivalent Exemption
1977	$30,000	$120,667
1978	34,000	134,000
1979	38,000	147,333
1980	42,500	161,563
1981 and after	47,000	175,625

There are other allowable credits, which were also included in the old law. These include an amount for state estate taxes paid, foreign death taxes paid, and a sliding scale for federal estate taxes paid on the transfer within the last 10 years of property included in this estate. The latter provision lessens the import of federal estate taxes paid on the transfer of the same property when the owners died within ten years of one another.

g. Joint Tenancy

The old rule had been that 100 percent of the value of joint tenancy property is taxed in the estate of the first joint owner to die—except to the extent the survivor could prove contribution toward its acquisition. That is often difficult for a wife as the survivor.

The new rule treats husband-wife joint tenancies as owned equally by each—and hence would be only half taxable at the first death, but only if it is a joint tenancy created after 1976, and the acquisition was subject to gift tax. For land, it is not a gift on acquisition in joint tenancy even if contributions are unequal, but it can be treated as a gift on a timely filed gift tax return.

B. Federal Gift Tax

Although there have been considerable changes in the gift tax by the Tax Reform Act of 1976, one major provision of the old tax law has been retained—the $3,000 annual exclusion. The first $3,000 of gifts to each donee during a calendar year is excluded in determining the total amount of taxable gifts for that calendar year. Thus, a person may give each one of his children $3,000 per year tax-free without filing a tax form. If the gift is given by the husband and wife together, a total of $6,000 may be given to each recipient per year tax-free.

The main change in the law on gift taxes is the uniform rate schedule. One of the underlying themes of the Tax Reform Act of 1976 is to treat lifetime transfers of property (gifts) the same as death time transfers (estates). The rate schedule is the same for gifts as for estates.

Each donor under the old law had a $30,000 lifetime exemption for gifts given. This exemption no longer exists and has been replaced with a tax credit. The tax credit is a lifetime credit for all gifts given after December, 1976. The credit may be used in a single year or over a number of years as the donor wishes. However, it appears that it must be taken against a taxable amount at the earliest opportunity and cannot be "saved" for later use by paying a tax now. The credit for gift taxes, as with the estate tax credit, has a larger effect on donors with moderate incomes than the old law. But, consistent with the theme of treating gift and estate taxes the same, where there has been a taxable gift, whether the credit is applied to the gift taxes due or not, that taxable value will be included in the donor's estate for estate tax computation purposes.

The gift tax credit will be phased in as follows:

Gifts Given In:	Tax Credit
January 1, 1977 to June 30, 1977	$ 6,000
July 1, 1977 to December 31, 1977	30,000
1978	34,000
1979	38,000
1980	42,500
1981 and after	47,000

This tax credit is applied only to taxable gifts and because of "exclusions" considerable gifts can be given under the new law before a taxable gift arises. Besides a $3,000 annual exclusion, there is a marital deduction exclusion that excludes the first $100,000 of gifts to the spouse. While the second $100,000 of gifts to spouse are taxable gifts, one-half of the gifts over $200,000 are excluded. Also, one spouse, with the other spouse's permission, may use both annual exclusions, except in a gift to the other spouse. Thus, a husband or wife, besides giving $6,000 to each of the children and grandchildren, could give $103,000 ($100,000 marital deduction exclusion plus his or her $3,000 annual exclusion) to his or her spouse without having a taxable gift.

C. The Impact of the Tax Reform Act of 1976 on Estate Planning: Gift and Estate Taxes

The following examples further show the interrelation of gift and estate taxes under the new law and the effect of gifts in decreasing the total tax liability in most situations. For the sake of computational ease, the $3,000 exclusion per donee is not included in these calculations.

It will be assumed in all these situations that the decedent died in 1985, after the new tax law has taken full effect. It is also assumed that the decedent is married when he dies, and that all gifts were given in 1981. The effects of the new law vary only in degree for larger estates.

The table below shows how the new law affects estate taxes where no lifetime gifts are given to the surviving spouse:

Decedent's Estate		At Spouse's Death After 5 Years		At Spouse's Death After 10 Years	
Adjusted Gross Value	Taxes Due	Adjusted Gross Value	Taxes Due	Adjusted Gross Value	Taxes Due
$ 600,000	$ 40,800	$ 600,000	$121,320	$ 600,000	$145,000
750,000	66,300	750,000	161,520	750,000	201,000
1,000,000	108,800	1,000,000	233,520	1,000,000	298,000

In the first column of each of the three cases is the gross value of decedent's estates and the corresponding taxes due for the three estate sizes. Since the decedent has given no gifts, the estate tax will have its full effect. For example, with the $600,000 estate, the $40,800 tax figure is arrived at by subtracting $300,000 from the gross estate (the marital deduction) and applying the tax schedule (Table 2) to the remaining $300,000. The tentative tax is $87,700. Since the new tax law is in full effect, a credit of $47,000 will be allowed, and the tax payable will be $40,800.

The estate passes to his or her spouse when decedent dies. Let us assume that after paying the estate tax and other expenses, the estate five years later is valued at $600,000. Estate taxes must be paid on the estate again when the spouse dies. This is called the second tax. The second tax is usually greater than the first tax; since, if the spouse does not remarry, there is no marital deduction. There is a special tax credit for this situation. If the spouse dies within 10 years of the decedent, a certain percentage of the first tax is allowed as a credit to reduce the second tax liability. This is a sliding credit, and it decreases the longer the spouse survives the decedent. There is no more credit after 10 years. The sliding credit for taxes paid on prior transfers is computed as follows:

Spouse dies in 1st or 2nd year after
decedent's death . . . . credit is 100% of taxes paid on decedent's estate
Death in 3rd or 4th year 80%
Death in 5th or 6th year 60%
Death in 7th or 8th year 40%
Death in 9th or 10th year 20%
Death after 10th year. 0%

In the second major column, entitled "Spouse's Death After 5 Years," is shown the estate tax on the same estates after the spouse's death 5 years later. There is no marital deduction, so the tax schedule is applied to the full $600,000. This yields a tentative tax of $192,800, which is reduced by the tax credit of $47,000 to $145,800. The tax credit allowed for the estate tax paid when decedent died (60 percent of $40,800) is $24,480, which reduced the tax due to $121,320. If the spouse dies after 10 years, no credit is allowed for estate taxes paid upon decedent's death, so the tax due is $145,800. In the table above the $600,000 estate has been subject to full estate tax liability twice within a relatively short time. The total amount of estate taxes paid is either $162,120 or $185,600, depending on when the surviving spouse dies. Although the effectiveness of gifts in reducing estate taxes is very limited under the new tax law, some of this tax liability could have been deferred by giving gifts.

Considering the second tax on the surviving spouse's estate, there is little overall tax advantage in making large lifetime gifts to the spouse. The net effect of such large gifts is merely to defer tax payment. Therefore, an advantage lies in the earning capacity or the interest earned by the temporarily saved estate taxes. However, this "additional income" may be partially captured after the surviving spouse's death by virtue of the second tax.

Table 3 shows how the federal estate tax payable is calculated when lifetime gifts are given to a spouse. Notice how tax advantages under the $600,000 estate are the same where gifts between $200,000 and $300,000 are given.

In estates between $525,625 and $601,750, maximum benefits by deferring payment can be achieved by giving lifetime gifts in an amount which will produce a total transfer subject to a tax of $175,625. To obtain that result, the amount of gift necessary is between $200,000 and $351,250. For example, as shown in Table 3, for an estate of $600,000, a lifetime gift of $350,000 will result in no tax on the transfer of the estate to a surviving spouse.

TABLE 3. THE EFFECT OF LIFETIME GIFTS TO A SPOUSE WITH AN ADJUSTED GROSS ESTATE OF $600,000

Gifts	$ 0	$100,000	$150,000	$200,000	$250,000	$300,000	$350,000
Adjusted Gross Estate	600,000	600,000	600,000	600,000	600,000	600,000	600,000
Less: Gifts to Spouse	0	100,000	150,000	200,000	250,000	300,000	350,000
Resultant Adjusted Gross Estate	600,000	500,000	450,000	400,000	350,000	300,000	250,000
Marital Deduction*	300,000	200,000	225,000	250,000	250,000	250,000	250,000
Taxable Estate	300,000	300,000	225,000	150,000	100,000	50,000	0
Plus: Adjusted Taxable Gifts To Spouse	0	0	50,000	100,000	150,000	200,000	250,000
Total Transfers Subject To Tax	300,000	300,000	275,000	250,000	250,000	250,000	175,625
Tentative Tax	87,800	87,800	79,100	70,800	70,800	70,800	47,000
Less: Unified Credit	47,000	47,000	47,000	47,000	47,000	47,000	47,000
Tax Payable	40,800	40,800	32,100	23,800	23,800	23,800	0

* Marital deduction = one-half of the resultant adjusted gross estate or $250,000 whichever is larger reduced by ($100,000 - 1/2 the total gifts given to spouse).

For estates between $601,250 and $851,250 gifting beyond the difference between the value of the adjusted gross estate and $500,000 will reduce estate tax liability with no present gift tax cost. However, for estates valued above $851,250 such gifting will also result in present gift tax cost. Thus, if a gift tax is incurred, the value of deferring the estate tax liability until transfer by the surviving spouse must be compared to the loss of earnings by the money paid as gift tax.

If a gift is given within three years of the donor's death, the value of that gift is included in the adjusted gross value of the decedent's estate. This provision of the new law is meant to prevent transfers of the estate made in contemplation of death. The

old law presumed such gifts were given in contemplation of death, but that presumption could be rebutted. The presumption is conclusive and cannot be challenged under the new law.

The tax results of giving gifts within three years of death can be harsh. These results emphasize the need for lifetime estate planning. Estate planning should be a continuous process, begun in middle-age or earlier. Property owners should not wait until their old age before making estate plans. These results also suggest that trusts are attractive.

VII. ESTATE SETTLEMENT PROCEDURES AND COSTS AND THE PERSONAL REPRESENTATIVE

The Uniform Probate Code (UPC), as adopted in North Dakota, provides more family protection and allows for an informal administration of the estate. As described above, greater family protection is received through provisions in the UPC concerning: homestead survivor rights, exempt property entitlement, family allowance, and the augmented estate.

A. Five Settlement Procedures

Five settlement procedures are available in North Dakota: formal; supervised; "no-action;" informal proceedings; and closings. They differ in the amount of court involvement and protection available to the heirs, creditors, and property recipients. These proceedings can be mixed, or one procedure may be used throughout the administration of an estate.

Formal testacy proceedings are initiated by a petition to the probate court and involve formal notices, hearings, and court dispositions of the issues concerning the estate. It is primarily for determining whether the decedent left a valid will. The formal procedure ends with a hearing before the court to close the estate to further claims or challenges. Once all the formal requirements are fulfilled, court involvement ends.

Supervised administration is a single proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court. The court's authority extends until the entry of an order approving distribution of the estate or a decree of distribution or other order terminates the proceedings. A supervised personal representative is subject to directions by the court concerning the estate on its own motion or on the motion of any interested party.

Under the so-called "no-action" option, no application seeking an informal or formal appointment is filed within three years of death, so administration is barred by a three-year statute of limitations. Once administration is barred, creditors are also barred. Thus, an estate is seemingly settled by the heirs at law by three years of inaction. The major reason why this process may not be practicable is that during the three years, the property will be unmarketable because it may be possessed at any time by a personal representative who may be appointed at the request of any interested person (e.g., an unsecured creditor). However, if the heirs assume and pay all known debts of the decedent, are willing to assume the risk that a disinheriting will may be found and probated, and are content to simply possess and enjoy the decedent's estate without marketing it, they may find settlement by inaction useful.

The informal proceeding also uses the three year statute of limitations for protection against other beneficiaries, heirs, or creditors. This proceeding can probate a will and appoint a personal representative. The will is final if it is not challenged during the statutory period, and good title for any assets passes to the devisees. The informally appointed personal representative has all the power and authority of one formally appointed but his or her right of appointment could be challenged in a later formal proceeding.

The informal proceeding can be started within five days of death by filing an application with the probate court to appoint a personal representative and by filing the will as a public document. The surviving spouse or close kin may become the personal representative, who then collects the assets, sells the assets or distributes them to heirs, and passes a valid title or deed with the property. These acts can be challenged by creditors or heirs, so liability to the personal representative and heirs could be created. The personal representative can obtain legal protection for all parties and assure marketable property titles by obtaining a formal closing proceeding.

The legislature intended the informal proceedings for small, undisputed estates. The owner who plans his estate well with the help of his attorney, accountant and financial advisers, and helps his family understand his estate plan is more likely to achieve his estate planning goals. The attorney should help both husband and wife understand the estate settlement options and steps in each while formulating the estate plan. A well-planned estate should be easy to settle at a reasonable

cost. The UPC permits the survivors to use only as much court administration as they feel necessary. They can use a formal probate closing to terminate the informal procedures to obtain legal protection for all parties and to assure marketable property titles.

The closing may be initiated by a personal representative to obtain protection by obtaining court approval of his or her administration, accounts, and/or distribution of assets. This action is a separately authorized proceeding, although it can be a part of either informal or formal proceedings.

Some factors to consider in determining which procedure(s) to use in settling an estate are: (1) the value of the decedent's estate; (2) the applicable statute of limitations; (3) the degree of trust, cooperation, and agreement among the persons interested; (4) the decedent's expressed testamentary wishes; (5) the complexities of administration; (6) the degree of protection from liability needed by the successors and by the personal representative; and (7) proof of title to property requirements.

Competent legal advice is necessary to select the proper procedure to ensure that the best alternative is followed to protect all the interests and to eliminate any procedural steps not necessitated by the particular estate. Both the cost and time that a settlement proceeding will require decreases the more a decedent has planned the estate before death. A person can do much before death through estate planning to eliminate possible legal contests between relatives which would require continuous court involvement in the probate proceedings. Also, when an estate requires a federal tax return, administrators often keep the estate open until the return has been audited and the taxes finally agreed to by the government. This can delay final distribution by several years.

B. What the Personal Representative Does

The Uniform Probate Code (UPC) permits estate settlement with or without administration. Probate with administration involves appointment of a personal representative (PR) and probate without administration does not have one appointed. A personal representative is a person or legal entity appointed by a court either in informal or formal proceedings to administer an estate. The term personal representative includes "executor" who is a personal representative indicated by the decedent in a will.

The UPC substitutes an unsupervised personal representative instead of the close supervision previously required. It assumes that the PR will honestly administer the estate because of being selected by the decedent, or by those who control a majority of the estate or by the creditors of an insolvent estate.

The court could formally or informally appoint a special administrator of the estate. The duties of an informally appointed administrator include collecting and managing the assets of the estate, preserving, and delivering them to the PR. The power of an informally appointed special administrator is the same as a PR. A formally appointed special administrator has similar powers to a PR except as they are limited by the court and in an emergency he or she can be appointed without notice and a hearing.

A PR must be appointed by a court with the UPC setting the following priorities among persons seeking appointment: the person nominated in the will, the surviving spouse who will receive via the will, other devisees, surviving spouse (not a devisee), other heirs, and any creditor if no PR has been appointed after 45 days of death of the decedent. The PR must be at least age 18.

The PR must execute an acceptance of his appointment. No bond will be required unless specified in the will or by the court. The PR must notify all heirs and other interested parties within 30 days of his appointment, indicating the name of the court appointing him, his or her name, address, and whether a bond has been filed.

The PR is required to inventory the property of the estate and report a fair market value within three months of appointment. Appraiser(s) may be used. The inventory and appraisement may be filed with the court or sent to all heirs and devisees, and others requesting a copy. The PR is expected to take possession or control of the decedent's property, except as provided in the will. The PR shall pay any taxes due and take all steps reasonably necessary in the management, protection, and preservation of the estate. The PR should publish a notice(s) to inform creditors to present their claims within three months or to be forever barred. Otherwise, such claims against the estate are barred by the statute of limitations within three years of the decedent's date of death.

The PR has the same power over the title to the estate property that an absolute owner would

have, however, in trust for the benefit of the creditors and others with interests in the estate. This power may be exercised without notice, hearing, or order of court. The breadth of power is accompanied by the absolute responsibilities of a fiduciary. If any one is hurt by his stewardship, such party can petition the court for an order to remove the PR.

The PR pays taxes, creditors, and prepares the distribution of the remainder of the estate. The PR may prepare the distribution plan and notify the distributees, and if there is no objection within 30 days, can so distribute the residue. Or, the beneficiaries may suggest a plan and the PR may follow that plan.

The PR after completion of his duties may present a final account to the court, fully reporting all his actions and intended final distribution. This report can be part of the closing proceeding either formally or informally. The informal closing proceeding uses a verified report, and if one objects within a year, the matter is closed and the appointment is terminated. The formal closing proceeding shows the intended final distribution, and directs the court to approve the accounts and approve or order the final distribution and discharge the personal representative from further claims or demands by heirs or creditors.

C. Settling Small Estates

Estates of $5,000 or less, consisting solely of personal property, may be collected by affidavit 30 days after death without court action. If the inventory and appraisal show that the value of the estate, less liens and encumbrances do not exceed the homestead, plus exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and the expenses of last illness, the PR may distribute the estate to those entitled without giving notice to creditors. The PR can file a verified statement of his actions. If no action is pending a year after filing the closing statement, the PR's appointment terminates.

D. Time to Settle

It takes several months to settle or administer an estate through the settlement procedure. The time required should be considered in planning for the needs of the family following the death of the estate owner.

The time period required varies by type of estate being settled, age of decedent, desire of family to continue farming the estate property or to immediately settle it, and so forth. In joint tenancy estates, the family often sees no reason to settle the estate immediately. This is reflected in the average number of months to settle joint tenancy estates found in the 1975 eastern North Dakota study of 996 selected estates; overall average of 17.4 months from date of death to the start of settlement procedures and 20.3 months from date of death to final settlement. The shortest period from date of death to settlement was one month and the longest in the survey was 198 months. One-fourth of the estates were settled within 4 months of death, one-half within 8 months, and three-fourths were settled within 14 months of date of death.

The average time for probate estates from date of death to entering probate was 5.3 months and from date of death to final settlement averaged 17.5 months with a range of one month to 16 years and 5 months. Nearly one-half entered probate within one month of date of death, 70 percent within two months of death, and about 95 percent within one year of death. Only 10 percent were fully settled within 7 months from date of death, 39 percent within one year, 71 percent within 18 months, and 87 percent within two years of date of death. The settlement period was longer in the more rural areas of the study. Settlement costs are usually higher with the cases of longer settlements, but often the farm is the only earning asset of the estate, and the survivors may prefer to operate it instead of selling it to pay the costs or to make distribution to individuals.

The statistics were gathered for estates settled under North Dakota law which has been superseded by the new Uniform Probate Code that went into effect July 1, 1975. It is expected that both the cost and time required to settle estates have been reduced by the new procedures.

A growing trend in estate settlement is probate in more than one state because the decedent owned property in more than one state at the time of death. Most property owners do not settle their ownerships in one state before moving to another state. This situation is probably more expensive to the estate than if the situation had been avoided. The situation may be avoided through the timely use of the methods of property transfer presented above. The result will be to maximize the net amount of property passed.

E. Estimating Estate Planning and Settlement Costs

Estate planning and estate administration and settlement require the skilled services of an attorney. His role in our society is to provide these needed services. The compensation paid reflects the special training he has acquired and the special efforts he puts forth for his clients. The attorney must fully inquire into the nature and form of assets, the family situation, and the wishes of the individual. The amount of time required is largely determined by the size of the estate and the complexity of questions involved.

The attorney's fees listed here should only be taken as a rough indication of what these minimum costs might be. Each lawyer must be consulted to find out what he would charge and this should always be settled first:

1. Performing legal services in estate planning for a:
   a. Simple will . . . . $ 35
   b. Simple will with trust for minor children . . 60
   c. Complex will 75
   d. Will with trust provisions 150
   e. Will with two trusts 200
   f. Establishing single trust during lifetime of testator 150
   g. Simple will modification (codicil) 30
   h. Complex codicil 50
2. Performing estate administration and settlement legal services:
   a. Estate administration and settlement costs:
      (1) Probating estate is based on 4 percent of the first $25,000 of taxable value; 3 percent of taxable value between $25,000 to $200,000; and 2 percent of value in excess of $200,000. Normal fee where taxable value is less than $8,850 is $350.
      (2) Summary administration, with or without will where estate value is under $5,000 . . $250
      (3) Summary administration by affidavit where estate value is under $500 . . . . $ 50
   b. Handling estate tax proceedings on joint tenancy transfers, and on lifetime transfers and trusts which are effective and/or taxable at death:
      (1) Where appraisement and federal estate tax returns are necessary, use percentages for probating estate but applied to one-half the taxable values.
      (2) Where no federal estate tax form is needed $300
   c. Fees of an executor or administrator: In 1970 the law stipulated these charges at 5 percent of the first $1,000 of value, 3 percent of next $5,000, 2 percent of the next $44,000, and a fee not in excess of 2 percent of the value above $50,000 as allowed by the court; plus charges for extraordinary services and out-of-pocket expenses as allowed by the court. Current law provides only that "reasonable compensation" will be provided for such services. The supervising court may look to previous statutory guidelines in determining whether the fee is reasonable.
3. Guardianships:
   a. Securing appointment and filing inventory . $200
   b. Sale of real estate 150
   c. Filing of annual or final account, hearing and its approval 100

Transferring assets from one generation to the next can be costly. Estate planning can reduce these costs, but more importantly, yield more retirement income and achieve your other goals. To avoid probate is not by itself necessarily good estate planning. Probate is concerned with ownership and to avoid probate requires prior setting up of the correct title to your assets, naming a beneficiary, or creating a living trust. Yet each of these takes careful planning and not only the services of an attorney to set them up but also to see that certain documents are prepared to meet state and federal tax laws.

Our goal in this bulletin is to help you achieve your retirement income and estate planning objectives. One aspect is to help you become aware of the need to plan, to prepare a will, and to openly inform your family of your estate plan. Another is to prepare you to better use your attorney and your team of estate planning experts. They will treat your affairs confidentially. But they can only best serve you if you are fully honest with them. Start now to prepare your "Family Financial Report," for which an outline is presented later.

Combined retirement income and estate planning is financial planning, with the emphasis on the investment specialist. He may need the help of your accountant and your insurance agent to bring about the best financial plan to achieve your goals, and your attorney to put your estate plan into the framework of the law. Expect to change your financial plan from time-to-time, and update your estate plan as situations change. Plan to enjoy your well-earned retirement. Now is the time to start planning.

VIII. A STUDY OF RECENT ESTATE SETTLEMENTS IN EASTERN NORTH DAKOTA

A study of court records of 996 recently settled estates was completed to obtain trends expressed

in recent dollar values. Estate settlements were surveyed in the counties of Richland, Ransom, Sargent, Barnes, Cass, Traill, Steele, and Griggs. The January-June, 1975 period provided enough cases in Cass County, while it required records of two or three years in some counties to obtain at least 50 cases. However, the survey is not a statistical sample, but only an indicator of recently settled estates.

The estate data were coded in numerical form on tabulating sheets to prevent disclosure of the confidential information and the computer prepared all averages or percentages by gross estate groups, as shown in Table 4. The percentage distribution of estates by size measured in gross values was 5.1 percent from $0 to $2,499; 8 percent from $2,500 to $4,999; 12.1 percent from $5,000 to $9,999; 11.5 percent from $10,000 to $14,999; 17 percent from $15,000 to $24,999; 22.7 percent from $25,000 to $49,999; 16.3 percent from $50,000 to $99,999; and 7.2 percent had gross estate values of $100,000 and over.

Joint tenancy estates accounted for 50.6 percent of the 996 cases examined with their size distribution shown as Item 1. Other characteristics of the estates are reported as averages or percentages per estate for each gross estate size shown. There were only 72 estates in the $100,000 and over gross estate value size group, so these averages are not based on a large number of cases.

Only 40.2 percent of the 996 estates examined had wills; the percent of estates with wills increased as gross value of estate increased, as shown in Item 2. Only 21.2 percent of the joint tenancy estates had wills, while 60 percent of the probate estates reported having wills.

The average length of time to settle the estates is reported in Item No. 3 in two parts—the time from date of death to start settlement procedures and date of death to final settlement and distribution.

The average gross estate value by size classes is reported as Item No. 4. The average percent of the gross estate in liquid assets is presented as Item No. 5. Liquid assets are reported on the tax forms to include mortgages owed to the decedent, plus insurance and cash items. Life insurance was reported by 26 estates with an average value of $20,326. Stocks and bonds were reported by 199 estates with an average value of $7,970, but ranged up to $115,250. Mortgages, notes, and cash items were reported by 336 estates, with an average value of $15,020 and a maximum value of $114,000.

The average net taxable estate was $33,540 for the 671 estates reported. The size distribution is shown as Item No. 6.

The average total expenses for the 879 estates reporting were $33,540 with a high of $70,170. The joint tenancy estates showed higher average costs for most size classes than the probate estates, which is a reflection of the estates selected, and possibly better estate planning as indicated by the higher percent of wills for the probate group.

Personal debts owed by the decedent were reported for 410 estates, and averaged $1,040, with a high of $32,490. These are often medical expenses associated with the final hospitalization.

Attorney fees were reported for 810 estates, with an average of $982 and a high of $8,450. The distribution is shown as Item No. 11. Average attorney fees as a percent of the average gross estate value ranged from nearly 24 percent for smaller estates to less than 2 percent of the largest estates.

TABLE 4. SELECTED CHARACTERISTICS OF 996 SELECTED ESTATES SETTLED IN EASTERN NORTH DAKOTA, CLASSIFIED ACCORDING TO VALUE OF GROSS ESTATE AND TWO TYPES OF ESTATES, 1972-75

Item	Type of Estate	Unit	0-2,499	2,500-4,999	5,000-9,999	10,000-14,999	15,000-24,999	25,000-49,999	50,000-99,999	100,000 & Over
1. Percent of Estate by Value Groups	All	%	5.1	8.0	12.1	11.5	17.0	22.7	16.3	7.2
	J. T.	%	61	61	68	69	59	44	32	15
	Probate	%	39	39	32	31	41	56	68	85
2. Percent with Wills	J. T.	%	23	2	11	24	28	23	26	54
	Probate	%	25	32	34	57	52	64	75	73
	All	%	24	14	18	34	38	46	59	70
3. Average Time to Settle										
3a. Death to Start of Settlement	J. T.	Months	35.7	31.3	35.5	12.4	11.1	6.6	3.9	6.8
	Probate	Months	33.0	6.3	9.9	8.6	3.6	2.5	1.5	1.6
3b. Death to Final Settlement	J. T.	Months	37.3	32.9	38.6	14.6	13.5	10.2	8.4	12.8
	Probate	Months	38.1	15.2	19.8	18.9	15.5	15.3	14.7	17.2
4. Average Gross Value	J. T.	$	1,241	3,738	7,491	12,266	19,578	34,658	70,504	152,212
	Probate	$	1,112	3,956	7,264	12,625	19,498	37,055	69,893	189,354
5. Average Percent in Liquid Assets	J. T.	%	100	58	15	40	19	20	12	2
	Probate	%	77	55	62	47	54	40	42	22
6. Average Net Taxable Estate	J. T.	$	520	2,337	4,435	8,532	11,640	15,085	35,146	85,794
	Probate	$	413	1,923	4,568	7,356	11,455	23,513	47,099	138,389
7. Average Total Expenses	J. T.	$	2,751	1,653	2,310	2,626	14,280	4,323	38,147	93,783
	Probate	$	2,944	1,584	2,408	2,448	2,993	4,369	22,764	29,704
8. Average Federal Estate Tax Paid	J. T.	$						967	1,612	14,197
	Probate	$						3,086	1,423	8,032
9. Average North Dakota Estate Tax Paid	J. T.	$	11	47	84	179	221	317	988	3,876
	Probate	$	8	38	91	147	229	541	1,533	5,176
10. Average Personal Debts Owed	J. T.	$	1,813	1,100	2,752	932	765	781	2,085	1,020
	Probate	$	5,482	853	2,727	712	843	1,067	1,189	2,076
11. Attorney Fees	J. T.	$	133	245	199	222	388	462	1,188	1,929
	Probate	$	270	309	369	443	711	1,149	1,900	3,439
12. Average Funeral Expenses	J. T.	$	1,178	1,260	1,369	1,504	1,626	1,799	1,840	2,292
	Probate	$	1,168	1,155	1,255	1,463	1,519	1,619	1,683	1,855

FOR ADDITIONAL INFORMATION

Additional information on estate planning may be found in the following books. These books may be in your local public library or may be purchased from the publisher cited. Books like these are updated frequently to reflect changes in the law. Always ask for the most recent edition. Some of the specific books listed here, for example, may not contain the 1976 changes in the federal estate tax law.

Ashley, Paul P., *"You and Your Will - The Planning and Management of Your Estate,"* 1975, McGraw-Hill Book Company, 1221 Avenue of the Americas, New York, New York, 10036.

Clay, William C., Jr., *"The Dow Jones-Irwin Guide to Estate Planning,"* 1976, $9.95, Dow Jones-Irwin, Inc., 1818 Ridge Road, Homewood, Illinois, 60430, Telephone - 312-798-3100.

Commerce Clearing House, Inc., *"Federal Estate and Gift Taxes Explained, Including Estate Planning,"* 1975, $5.50, 4025 W. Peterson Avenue, Chicago, Illinois, 60646.

Doane Agricultural Service, *"Estate Planning for Farmers,"* 1976, $7.95, 8900 Manchester Road, St. Louis, Missouri, 63144, Telephone - 314-968-1000.

Editorial Staff of Panel Publishers, *"The Estate Planner's Complete Guide and Workbook,"* 1976, $75.00, Panel Pubs., 14 Plaza Road, Greenvale, New York, 11548, Telephone - 516-484-0006.

Frye, Phillip, *"How to Disinherit the Internal Revenue,"* 1973, $9.95, National Council to Eliminate Death Taxes, Inc., Route 2, Bovey, Minnesota, 55709.

King, Stanley G., *"An Estate Planning Questionnaire,"* 1975, $.95, Lawyers & Judges Publishing Company, Division of Communications Skill Builders, Inc., 21 North Tyndall Avenue, Tucson, Arizona, 85719.

Lasser Tax Institute, *"How to Save Estate and Gift Taxes, 1974,"* $12.50, Simon & Schuster, Inc., 630 Fifth Avenue, New York, New York, 10020.

Pinto, Robert J., *"How to Save Taxes Through Estate Planning,"* 1976, $6.95, Dow Jones Books, P. O. Box 300, Princeton, New Jersey, 08540, Telephone - 609-452-2000.

Spinney, William R., *"Estate Planning Quick Reference Outline,"* 22nd Edition, 1975, $3.00, Commerce Clearing House, Inc., 4025 West Peterson Avenue, Chicago, Illinois, 60646.

Zeigler, Richard S., and Patrick F. Flaherty, *"Estate Planning for Everyone, 1974,"* Paper - $2.50, Funk and Wagner, 666 Fifth Avenue, New York, New York, 10019.

RETIREMENT INCOME PLANNING

Buckley, Joseph C., *"Retirement Handbook,"* Revised Edition by Henry Schmidt, 1974, Paper - $2.50, Barnes & Noble, Inc., Division of Harper and Row Publishers, Inc., Keystone Industrial Park, Scranton, Pennsylvania, 18512.

Otte, Elmer, *"Pre-Retirement Planning System,"* 1975, $19.95, Retirement Research, P. O. Box 401, Appleton, Wisconsin, 54911, Telephone - 414-734-6610.

"Retirement Dollars for the Self-Employed," $3.95, Dun & Bradstreet, Inc., c/o Dun Dunnelly Publishing Corporation, 666 Fifth Avenue, New York, New York, 10019.

Schwartz, Melvin Jay, *"Don't Die Broke! A Guide to Secure Retirement,"* 1975, The Macmillan Co., 866 Third Avenue, New York, New York, 10022.

Smith & Thune, *The Uniform Probate Code: The Way to Probate in North Dakota*, 50 N.D.L. Rev. 593 (1974).

Ohustad & Rosewold, *North Dakota Estate Planning Under the Tax Reform Act of 1976*, 54 N.D.L. Rev. 7 (1977).

BASIC REQUIREMENTS FOR ORDERLY ESTATE SETTLEMENT

Location of Valuable Family Records - Prepare an inventory of all valuable family records and make sure that your survivors know where these records are kept. Include such documents as deeds, wills, leases, marriage and birth certificates, citizenship papers, social security records, nonfarm investments, stocks, bonds, insurance policies, and so forth.

List of Valuable Consultants - Prepare a list giving the name; purpose or use; and telephone number of people usually consulted on legal, personal, and business matters. These should be people whom your survivors may turn to for assistance in times of stress and in family estate planning in your absence.

Discuss Your Family Estate Plan With the Persons Concerned - These proposals affect the interest and the welfare of the entire family and, therefore, should be discussed with those involved. It is important that if the child is to take over the family farm that he understand your plans, and that other members of the family also are aware of these plans.

Provide Your Estate with Liquid Reserves - It takes money to settle estates and debts, and taxes must be paid. On the average, plan that it will take one-fifth of the gross value of the estate for estate settlement expenses.

Provide for Your Survivors During Estate Settlement - It requires money for your survivors to live during the estate settlement period. It takes several months to more than a year to settle an estate; and depending upon the size of your family, the amount of money necessary to live in this period will vary.

Keep Your Family Estate Plan Up to Date - The estate plan should be revised due to changing family composition, in-laws, changing financial conditions, changes in the name of the administrator, changes in beneficiaries, and so forth.

Keep Your Financial Affairs in Order - Many estates studied have had large unpaid taxes due, mortgages due, and other financial obligations that seriously reduced the amount of assets available for transfer. These substantial obligations or debts sometimes require the sale of the estate assets to pay them or impose financial hardship upon the survivors, which could have been avoided by using term insurance and/or keeping things in good order.

GLOSSARY

Administrator - A person authorized to manage and distribute the estate of an intestate; a person appointed by the court to manage and distribute the estate of one who has not appointed an executor or whose executor has not qualified.

Beneficiary - One who receives something, such as the income of a trust.

Codicil - An amendment to a will. It is treated as a part of the will. An addition to a will executed with traditional formality.

Conservator - A person appointed by the court to manage property and affairs of another person who is unable to do so.

Decedent - A deceased person.

Distributee - A person entitled to share in the distribution of an estate.

Donee - A recipient of a gift; one to whom a gift is made or bequest is given.

Donor - One who makes a gift or voluntary transfer.

Equitable - Just; conforms to the principles of justice and right.

Estate - One's property; also, specifically, the interest which anyone has in real property.

Estate Tax - A "death" tax payable by the estate of the decedent, not by the heirs.

Executor - A person to whom a testator by his will commits his last will for execution.

Fiduciary - (Person of trust or faith) executor, trustee, guardian, conservator. The trustee named in the will or trust agreement.

Forced Share - A percentage of an estate which must be given by law to the spouse if the spouse wants it.

Gift - A voluntary transfer of personal property or the conveyance of real property without consideration.

Half Blood - A term indicating the degree of relationship which exists between those who have the same father or the same mother, but not both parents in common.

Heir - The person who, by law, is declared to be the person who will take the property of the deceased if the deceased makes no other provision. Also, the person who does, in fact, succeed to the decedent's property.

Holographic Will - A will written by the testator in his own hand.

Inheritance Tax - A "death" tax assessed against the heir(s) or person(s) inheriting the assets.

Intestacy - The state of having died without making a will.

Intestate - Having no valid will.

Joint Tenancy - When two or more people hold undivided interest in the same property which was conveyed under the same instrument at the same time; a joint tenant can sell his interest, but he cannot dispose of it by will; upon his death his undivided interest is distributed among his surviving joint tenants.

Lifetime Gift - A gift properly delivered during the lifetime of the donor and donee.

Liquid Assets - Assets readily converted into cash.

North Dakota Century Code - Name given to the 1960 codification (classification) of the North Dakota statutes (laws) and amendments thereto.

Personal Representative - Refers generally to the person who carries out the duties of an executor or an administrator, in the distribution of property via a will or under the laws of intestacy. The appointment of a personal representative is made by the court. If a specific person is named as the personal representative (executor) in the will, the court will usually agree to appoint that person.

Per Stirpes - (By branches of families) by right of representation. Example: father had three children. One child has died leaving two sons. Father dies leaving his estate to be divided per stirpes, so that his two surviving children each receive one-third share, and the two orphaned grandsons each a one-sixth share.

Probate - Action to establish that a will is genuine and valid. The procedure by which the property of a decedent is passed from the estate to his heirs in the general sense.

Probate Courts - County court that handles estates and guardianships and sometimes other duties.

Real Property - Land and things that are attached thereto.

Tenancy-By-The-Entirety - A type of cotenancy between husband and wife, in some states, which is characterized by the fact that neither party can sever it and destroy the other's right of survivorship. Upon the death of one, survivor acquires title to the property. It does not exist in North Dakota.

Tenancy-In-Common - Two or more persons holding undivided interest in the same land as tenants-in-common with no right of survivorship, but each tenant-in-common can sell or divide his share. A tenant's portion passes to his heirs upon death.

Testate - Deceased leaves a valid will.

Testator - One who makes or has made a will.

Testatrix - A woman who makes or has made a will.

Trust - A property interest, real or personal, held by one person for the benefit of another.

Trustee - A person to whom property is legally committed in trust with the understanding it is to be administered for the benefit or use of another.

Trustor (Settlor) - The person making a trust.

FAMILY FINANCIAL REPORT

Net Worth Statement as of ______________________________, 19__

	Husband's Name	Wife Name	Held Jointly	Annual Income
Assets		Dollars		
A. Fixed Dollar				
1. Cash: a. on hand				
b. in checking accounts				
c. in savings accounts				
2. U.S. Savings Bonds				
3. Other bonds and preferred stocks				
4. Cash value of life insurance				
5. Money owed you				
B. Equities (assets whose value is subject to inflation)				
1. Farm real estate (current market value)				
2. Other real estate (rural and urban)				
3. Business interests				
4. Common stocks				
C. Other Assets Owned				
1. Household furnishings				
2. Farm personal property				
3. Other personal property (car, boats, jewelry)				
4. Current cash value of pension plans				
TOTALS				
Liabilities				Annual Interest Charges
1. Amounts owed to banks				
2. Mortgages and land contracts payable				
3. Loans on life insurance				
4. Installment payments				
5. Other loans and notes payable				
TOTALS				
(assets minus liabilities)				
Net Worth				