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Factsheet, Series: 2019



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## Family Law Issues in Agriculture: Alternative Dispute Resolution

**Cari Rincker<sup>1</sup>**

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Those persons going through a divorce or separation should consider Alternative Dispute Resolution (“ADR”) as a way to help resolve issues outside of the courtroom, in whole or part. Litigation can be expensive and resolving matters through the help of an ADR professional can be cheaper and faster. There are also other advantages of ADR, including the preservation of the relationship, which may be especially important with some families.

Here are a few different forms of ADR which are applicable to divorce and separation, including:

1. Mediation
2. Arbitration
3. Early Neutral Evaluation
4. Conciliation
5. Collaborative Divorce

### Mediation

Mediation is the most common form of ADR in a divorce. A mediator is there to facilitate a conversation between the two of you to discuss the applicable issues. A mediation session is usually between 1.5 to 2.5 hours for each session and it can sometimes take about two to five (or more) mediation sessions to reach a global settlement. The role of the mediator is not to provide you legal advice--that is the role of the

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<sup>1</sup> Cari Rincker is the principal attorney at [Rincker Law, PLLC](#), nationally recognized law practice focusing on food, farm and family. Cari is a trained mediator and adjunct professor both at Vermont Law School and the University of Illinois, School of Law. She runs a small farm outside of Champaign Illinois.

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attorneys.

## **Arbitration**

Arbitration is akin to a trial wherein the arbitrator acts like a judge reviewing documents provided by both sides and making either a binding or non-binding decision for the two of you. In most states, an arbitrator can only be used for economic decisions for the divorce and can never be used for determining issues of child custody and visitation.

## **Early Neutral Evaluation**

Early Neutral Evaluation is a growing but more rare form of ADR. Like an arbitrator, a neutral evaluator is an experienced professional who reviews arguments and documents from each party. The neutral evaluator gives an opinion on what he/she believes an experienced jurist would decide. This can be particularly helpful if the parties are at an impasse.

## **Conciliation**

Conciliation is short for reconciliation. The role of the conciliator is to try to help the couple reconcile. In some situations, the conciliator is also a mediator. Once reconciliation is futile, then the conversation may shift to divorce or separation.

## **Collaborative Divorce**

Please note that a collaborative divorce is a different model. In this form of ADR, a mediator is used, while both parties are represented by their own consulting attorney. Both parties agree in writing that if either goes to court, they each will hire new attorneys. Other professionals are sometimes used in this model such as accountants, financial advisors and therapists.

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*For more information:*

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## Family Law Issues in Agriculture: Animal Law Issues

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Divorces among farm families often have animal issues – not only with live animals but also with genetic material (e.g., oocytes, embryos, semen). These are important property disputes for some farm families. Depending on the state, companion animals can be treated differently. It is important for divorcing farm families to think through issues with animals.

### Companion Animals

To begin, companion animals typically include dogs and cats, but can also include some exotic animals and horses. States typically take a property view when it comes to companion animals, but some jurisdictions note differences. Courts do not typically view 4-H/FFA projects as companion animals but it is important to understand that children will have a deeper emotional connection to these animals.

Some states allow for pet visitation, while others do not. Importantly, parties are welcome to have their own negotiated or mediated agreement with pet visitation, but it is important for them to understand that depending on the state, said agreement may or may not be enforced. For example, a divorcing couple in New York will follow the “best of all concerned” standard but will award the pet to either spouse, not allowing for pet visitation. Conversely, states like Illinois will order the “allocation of pet responsibility” and may order shared veterinary expenses and a visitation schedule.

Companion animals and pet visitation schedules may impact parenting plans in a divorce. For example, children may travel from house to house with the family dog or other companion animals. In such cases, it is prudent for families to share in veterinary expenses for the shared family pet.

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Farm and ranching parties negotiating companion animal issues may consider any utility that the animal may have. For example, perhaps the dog is a sheep or cow herder or plays other roles on the farm. Horses are a special class of animals – depending on the state, they are sometimes viewed as companion animals and other states view them as livestock.

## **Livestock and Horses**

Courts treat livestock and horses like any other type of property. The first step in the analysis is to ascertain if any of the animals are separate or nonmarital property. When doing so, take a look at the progeny of any gifts, inheritances or premarital animals. Was any property commingled? Were marital assets used to pay the feed bill?

Livestock and horses should be inventoried. Make a list, including the following information:

- Registered Name (if applicable)/Identified Name
- Sex
- Registration Number (if applicable)
- Breed Composition
- Color/markings (e.g., baldy)
- Identification Number (e.g., ear tag, brand, or electronic tag)
- Tattoo Number (if applicable)
- Ear notches (if applicable)
- Name titled in (or registered in)
- Location

Depending on the jurisdiction, marital and nonmarital property needs to be valued. Appraisers or sale consultants can be hired to help value the livestock and horses to help ascertain the value of the marital estate. Animals should be appraised individually, especially with higher valued animals such as horses or a donor cow. Market animals should be valued by market prices.

## **Frozen Genetics**

Eggs/oocytes, embryos and semen should also be inventoried and valued/appraised. Parties going through a divorce will not need to hire an appraiser if they can agree upon values based on industry standards; however, if the divorcing spouses cannot agree upon the valuation of frozen genetics, then an expert should be retained. In some cases, livestock auctioneers will value the inventory list for the divorcing couple.

## **Final Thoughts**

On a final note, it is important for couples going through a divorce to first inventory all of their assets,

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including farm animals and frozen genetics, and then consider if they are marital or nonmarital property. Properties should be cognizant of the inherent emotional issues affecting animals, especially companion animals and certain livestock.

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Factsheet, Series: 2019

## Family Law Issues in Agriculture: Child Support

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Child support in most states is largely formulaic (i.e., a math equation)—basic support is typically calculated by looking at the income and qualified deductions of each parent. However, for most involved in farming and ranching or other kind of agri-business, finding the numbers for the math equation is anything but straightforward. This figure is also used to help calculate child add-on expenses

such as:

### Calculating Support

The exact equation for calculating child support does vary from state to state. In some states like New York, an income cap is used. Nearly every state has “deviation factors” that allow the court to adjust basic child support either upwards or downwards based on the statutory factors (e.g., standard of living the child would have enjoyed had the household stayed intact; special needs/medical needs of the child; financial resources of the child).

Business owners, including farmers, ranchers, and food entrepreneurs, do not have straight-forward income. Accelerated depreciation, prepaids, and other deductions that support living expenses can be added back to the Obligor’s income for purposes of this equation. Courts typically have discretion on any such adjustments. If the farm or agri-business pays for living expenses, such as housing, mobile phone, vehicle expenses, food/entertainment, then the court can also input this as income for child support purposes.

*Example: Farmer John used accelerated depreciation for a \$100K combine over 1 year. The family farm also pays for Farmer John’s cellular phone bill, truck/ vehicle expenses and*

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*housing expenses. Farmer Susie can argue that said monies be added back to John's IRS income of \$25K when calculating child support – this is discretionary upon the court and varies from state to state.*

## **Emancipation**

The age of emancipation for child support purposes varies from state to state. Some states, like New York, choose an age of emancipation of 21 years, while most states choose the age of 18 or graduation from high school, whichever is later (but no more than age 19). Additionally, the child will also be considered emancipated upon marriage or entry into the military. This is a negotiated point with farm divorces as the parents may voluntarily agree to extend child support obligation through the age of 22 or through an undergraduate degree (or even graduate school, if applicable). Oftentimes, courts will allow parties to seek post-majority support if the child is attending college. Parents can also seek court intervention to extend the date of emancipation if the child is of special needs and is dependent on the parents.

## **Post-Secondary Expenses or Post-Majority Support**

College expenses are a hot topic in divorces. Sometimes divorcing couples choose to wait until the children are at the age of 16 or 17 and college feels more imminent while others want to address the issue at the time of the divorce. Courts will often cap required contributions to college to a cap based on tuition for the state university; however, parents can agree on a lower or higher cap depending on the circumstances and income of the parties.

## **Life Insurance**

Life insurance can be used as payment security for child support payments (including college expenses) in the event of death. This is usually a negotiated point; it can be ordered by the court, but it is typically voluntary. Term life insurance is used in these instances and the required amount can decrease each year and as the total child support obligation decreases. This may also be done for spousal support, if applicable.

## **Modification**

Importantly, child support can be revisited. Most states allow for child support to be modified when there has been a substantial change in circumstances (e.g., significant change in income). Some states specify that either party may revisit support after a certain number of years. Divorcing parents may choose to exchange tax returns every year to help ascertain if child support should be adjusted; some refer to this annual check-up as a "true up" and require the same in their divorce settlement agreement.

## **Conclusion**

As one can imagine, this can become a problematic math equation because it requires a thorough review of tax returns and other business financials. Farmers, ranchers, and agri-business owners are advised to

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consult an experienced family law attorney with a food and agriculture background to help negotiate a fair agreement for child support.

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## Family Law Issues in Agriculture: Community Property

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A handful of states, including Texas, California, Arizona, Washington, Idaho, Nevada, New Mexico and Wisconsin are considered “Community Property” states with the remainder being equitable distribution states. Alaska has an “opt-in” law as it applies to community property. In some ways, Connecticut is a quasi-community property state. It is important to confirm this with a licensed

attorney in the applicable jurisdiction as there are differences from state-to-state as there are no cut and dry rules.

In Community Property (“CP”) states, property fits into one of two categories: separate property or community property. All property acquired during the marriage is presumed community property and remaining property is characterized as separate property. Separate property is any property owned prior to the marriage, inherited property, and property that is gifted to one spouse. A spouse seeking to prove certain property is separate property has the burden to prove so through clear and convincing evidence.

Property that is characterized as CP must be divided upon divorce. While CP may often be split equally between spouses, it is a common misconception that people in a divorce always split property 50/50. The court may deviate from this standard using various factors to ensure the division is “just and right” which may not necessarily be an equal division. How community property is divided can be set forth in the nuptial agreement, if applicable (e.g., 50/50, pro rata based on income, or some type of agreed-upon equation or division). If there is no contractual agreement on how to divide CP, then courts divide CP. Trial courts typically divide CP equally between spouses unless a spouse proves that this equal division is not “just and right.”

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This Fact Sheet discusses 5 items that should be considered to determine what property is CP and how it should be divided upon divorce: (1) identification of separate and community property; (2) income from separate property; (3) valuation of property; (4) prenuptial and postnuptial agreements; (5) and division of community property and debt.

## **Step 1: Identification of Separate and Community Property**

Property acquired during the marriage is presumed to be CP unless the spouse claiming that it is separate property can prove otherwise through clear and convincing evidence. Therefore the first step in the analysis is to determine what property may be characterized as separate property and then all remaining property will be considered CP. Again, the law can vary somewhat from state to state on what property fits into each category, and there can even be sophisticated nuances in some areas in the same jurisdiction. A detailed property list should be drafted that includes grain inventory, farm equipment inventory, and livestock inventory. Debt acquired during marriage and prepaid expenses should also be on this list. Once a detailed list is generated, separate property may be identified.

Here are a few examples of property that is characterized as separate property:

1. Gifts (except for joint gifts or wedding gifts);
2. Inheritance (except if in joint name);
3. Premarital property, and;
4. Property from a personal injury award (excluding lost wages).

Keep in mind that the definition of property is broad. It can include intellectual property (e.g., trademarks), business interests, retirement/ pensions, animals, farm equipment, etc. The most overlooked property in a farm or ranch divorce is the business itself, and it is oftentimes forgotten as an asset that is either separate or community.

As a caveat, separate property can transfer to community property if funds are commingled or it is titled jointly in both spouses' names. This is called transmutation. For example, if a premarital piece of farm equipment was sold and deposited into the joint bank account, then those monies are now part of the CP. Livestock can also become community property absent detailed records identifying those that are separate property.

If Rancher John owned a herd of beef cattle prior to marriage that were commingled with cows purchased after marriage, the court may characterize all of his cattle as CP unless Rancher John produces clear and convincing evidence identifying which cows were owned prior to marriage.

Importantly, the burden of proof is on the person claiming separate property to show that property should

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be characterized as such. This person may use a method known as “tracing” and through “tracing” the spouse must determine the value of the property prior to marriage, any changes in value or character to property overtime including the sale of said property, use of proceeds from a sale of separate property to purchase community property, and changes in value of the separate property. For example, if a Farmer Jane had a \$200K retirement account at the time of the marriage and it increased to \$500K during the marriage, Farmer Jane would need to prove that the value at the date of the marriage was \$200K. It is difficult to obtain documentation more than seven years of age by subpoena to financial institutions, so hopefully Farmer Jane kept good records and can find this statement. If she cannot, then Farmer Jane can hire an actuary to do a sophisticated analysis with the known statements. The point is this: if Farmer Jane wants to keep the \$200K separate property (plus any appreciation thereof, depending on her state), then she has to do the work to find the proof.

Debt must also be characterized as either separate or community. If one person comes to the marriage with student loan debt or a mortgage on separate farm ground, then it is considered separate debt. When people walk down the aisle, their debt liability does not get “cut in half” as some people may joke about at the bachelor(ette) party. Although states differ in this regard, as a general rule, spouses are jointly and severally liable for debt during the marriage only. It is not unusual for people to think they are no longer responsible for the debt of their spouse once they “separate”; unfortunately for some, that is not the case. Of course, they may have wasteful dissipation claims or equitable arguments once divorce papers are filed, but parties should keep this in mind during the divorce.

## **Step 2: Income Separate Property**

Income generated from and the appreciation of separate property is typically considered CP, however states vary in this area. This is particularly important for agricultural assets such as land and livestock. For example, if a spouse inherited a farm during the marriage it is separate property, but the rents generated from that farm during the marriage are CP. Similarly, even if a spouse owned cattle prior to marriage all offspring born during the marriage are considered CP.

Farmer Jill owns 20 dairy cows prior to marriage. During the marriage, Farmer Jill’s cows raised 15 calves which were retained in the herd. The 15 calves born during the marriage are considered income and will be categorized as CP.

## **Step 3: Valuation of Property**

Property should then be valued, if appropriate. This is where appraisers can be used to appraise real property, farm equipment, art, or other valuable items. It may be difficult to find a livestock appraiser, but auctioneers may feel comfortable in doing so.

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Do not forget the value the business interest(s). Business evaluators should be used to value the farm/ranch/agri-business itself; in doing so, typically 5+ years of tax returns, bank statements, and other financial records are reviewed. If a farming enterprise has several entities, then each needs to be valued separately (e.g., sole proprietorship, family partnership, trucking company, restaurant).

#### **Step 4: Prenuptial or Postnuptial Agreements**

Prenuptial or postnuptial agreements can help identify the characterization of property. Absent a nuptial agreement, the definition of what fits in each category are different from state-to-state and can change over time. Specific rules to execute a valid nuptial agreement vary by state but most require that the document must include some or all of the following: (1) be in writing; (2) voluntarily signed by both parties; (3) both parties disclose all assets and liabilities; (4) and both parties waive right to any further disclosures. Each party should hire their own individual attorney to represent their interests and ensure all requirements are met according to their state's law.

A prenuptial agreement is executed prior to marriage and allows couples to identify and inventory all of their separate property. It also allows spouses to agree that income from separate property will also be separate property.

Rancher Joe owns 30 registered breeding ewes prior to marriage. Rancher Joe and his future wife draft a prenuptial agreement. The prenuptial agreement clearly identifies Rancher Joe's 30 ewes using registration numbers and ear tattoos. It also characterizes these ewes and all future lambs born after the marriage as separate property.

A postnuptial agreement is similar to a prenuptial agreement except that it is executed after the marriage has commenced. Unlike a prenuptial agreement, a postnuptial agreement allows spouses to characterize separate property as community property. This may be advantageous if the spouses wish for each other to inherit their separate property rather than other family members under state intestacy laws.

#### **Step 5: Distribution of Community Property and Debt**

The last and final step in the analysis is to decide how to divide community property and community debt. Note community property and community debt are generally split equally between the parties, but the court may deviate from equal shares if an equal split is not what is "just and right" under the circumstances.

There are a myriad of factors that are considered with this determination, oftentimes enumerated in the CP statute. Some factors include the differences in each spouses earning potential, the needs of each spouse and children, or if a spouse was at fault (adultery, cruelty, etc.) for the divorce.

Keep in mind that families do not have to liquidate assets in order to divide property. One spouse may

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keep the farmland, farm equipment, and cows, while the other gets the retirement, investment property, and farm vehicles, depending on the arithmetic. Spouses can “buy” each other out or negotiate long-term payment plans for farm business interests.

Furthermore, spouses can also decide not to break up the farm and keep it intact; in this scenario, the divorcing spouses remain business partners. Language should be carefully crafted on paying distributions to the owners, responsibilities of each owner and buy-out provisions in case one or both ex-spouses decide to go their separate way in business.

While CP is typically split equally between spouses in a divorce, litigation can become expensive if parties choose to attempt to deviate from this 50/50 split. To keep costs down, parties are encouraged to cooperate with discovery and consider Alternative Dispute Resolution (ADR) such as mediation or arbitration (economic issues only).

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## Family Law Issues in Agriculture: Equitable Distribution

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Equitable distribution (“ED”) is the allocation of the marital estate in a divorce. Importantly, not all states are equitable distribution states; instead, states like Texas and California are community property states. The majority of states are equitable distribution states, but it is important to confirm this with a licensed attorney in the applicable jurisdiction.

In way of background, property in a marriage fits into one of three buckets: two separate (or nonmarital) property buckets and the marital property bucket.

Spouse 1 Bucket	Marital Bucket	Spouse 2 Bucket

Prenuptial or postnuptial agreements can help identify what are in the various buckets. Absent a nuptial agreement, the definition of what fits in each bucket can vary from state-to-state and can change overtime.

The concept of “equitable distribution” means “fair and just” distribution--not “equal distribution.” It is a common misconception that people in a divorce split property 50/50. How marital property is divided can be set forth in the nuptial agreement, if applicable (e.g., 50/50, pro rata based on income, or some type of agreed-upon equation or division). If there is no contractual agreement on how to divide the marital state, then equitable distribution states set forth factors that the court is to consider when determining the fair division of assets. Trial courts have broad discretion on making this determination. Some judges have certain tendencies with equitable distribution (i.e., some are more attracted to 50/50 splits than others).

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This Fact Sheet discusses a simple 4 step analysis: (1) identification of separate property; (2) identification of marital property; (3) valuation of property; and (4) equitable distribution of marital assets.

## **Step 1: Identification of Separate (or Nonmarital) and Marital Property**

The first step in the analysis is to divide property in the three buckets. Again, the law can vary somewhat from state to state on what property fits into each bucket, and there can even be sophisticated nuances in some areas in the same jurisdiction. Here are a few examples of property that is in the separate property bucket:

1. Gifts (except for joint gifts or wedding gifts);
2. Inheritance (except if in joint name);
3. Premarital property; and,
4. Property from a personal injury award (excluding lost wages).

Keep in mind that the definition of property is broad. It can include intellectual property (e.g., trademarks), business interests, retirement/ pensions, animals, farm equipment, etc. The most overlooked property in a farm or ranch divorce is the business itself.

As a caveat, separate property can transfer to the marital property bucket if funds are commingled or they are in joint name. This is called transmutation. For example, if a premarital piece of farm equipment was sold and deposited into the joint bank account, then those monies are now part of the marital bucket. That said, some states allow for “separate property credits.”

If Farmer John had premarital farmland that was sold during the marriage and \$50K of the proceeds were used as a down payment on a marital residence in joint name, then Farmer John may have a claim to get his \$50K down payment back on a dollar-for-dollar basis.

Income and appreciation of separate property muddy the waters. States vary significantly in this area, and some jurisdictions look into whether the non-titled spouse had either active or passive involvement in the appreciation or whether the appreciation was strictly due to market forces.

Importantly, the person claiming separate property has the burden of proof. For example, if Farmer Jane had a \$200K retirement account at the time of the marriage and it increased to \$500K during the marriage, Farmer Jane would need to prove that the value at the date of the marriage was \$200K. It is difficult to obtain documentation more than 7 years of age by subpoena to financial institutions, so hopefully Farmer Jane kept good records and can find this statement. If she cannot, then Farmer Jane can hire an actuary to do a sophisticated analysis with the known statements. The point is this: if Farmer Jane wants to keep the \$200K premarital property (plus any appreciation thereof, depending on her state), then she has to do the work to find the proof.

A word on debt – it too fits into these same three buckets. If one person comes to the marriage with

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student loan debt or a mortgage on premarital property, then it is considered separate debt. When people walk down the aisle, their debt liability does not get “cut in half” as some people may assume. Although states differ in this regard, as a general rule, spouses are jointly and severally liable for debt during the marriage only. It is not unusual for people to think they are no longer responsible for the debt of their spouse once they “separate”; unfortunately for some, that is not always the case. Of course, they may have wasteful dissipation claims or equitable arguments once divorce papers are filed, but parties should keep this in mind during the divorce.

## **Step 2: Identification of Marital Property**

The work in this analysis is pulling out the separate property. Everything that does not fit into a separate property bucket is considered party of the marital bucket. These lists should be detailed and may include grain inventory, farm equipment inventory, and livestock. Marital debt and prepaid expenses should also be on this list.

## **Step 3: Valuation of Property**

Property should then be valued, if appropriate. This is where appraisers can be used to appraise real property, farm equipment, art, or other valuable items. It may be difficult to find a livestock appraiser, but auctioneers may feel comfortable in doing so.

Do not forget to value the business. Business evaluators should be used to value the farm/ranch/agri-business itself; in doing so, typically 5+ years of tax returns, bank statements, and other financial records are reviewed. If a farming enterprise has several entities, then each needs to be valued separately (e.g., sole proprietorship, family partnership, trucking company, restaurant).

Crops in the ground are difficult to value but are absolutely considered an asset for a farm divorce.

## **Step 4: Equitable Distribution of Marital Property**

The last and final step in the analysis is to decide how to divide the marital bucket fairly and equitably. There is a myriad of factors that are considered with this determination, often enumerated in the state statute. Some factors such as the “length of the marriage” may be weighed more heavily than other factors such as contribution to the marital estate, tax consequences, spousal support, etc. Courts look at the totality of the circumstances in deciding what is fair.

The longer the marriage, the more courts will lean towards a 50/50 split in equity. Even with long marriages, courts may decide to deviate and give one spouse more or less depending on the facts and circumstances. For example, the court may credit one spouse if the other spouse wastefully dissipated marital assets by gambling, drug or alcohol abuse, frivolous purchases, etc. Courts may also give more than 50% of the estate to a spouse with significantly less earning power than the other spouse.

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Keep in mind that families do not have to liquidate assets in order to divide property. One spouse may keep the farmland, farm equipment, and cows, while the other gets the retirement, investment property, and farm vehicles, depending on the arithmetic. Spouses can “buy” each other out or negotiate long-term payment plans for farm business interests.

Furthermore, spouses can also decide not to break up the farm and keep it intact; in this scenario, the divorcing spouses remain business partners. Language should be carefully crafted on paying distributions to the owners, responsibilities of each owner and buy-out provisions in case one or both ex-spouses decide to go their separate way in business.

There are no hard and fast rules with equitable distribution. Unfortunately, there are the shades of grey with equitable distribution that make divorce litigation expensive. After all, no two families are the same and neither are their asset distributions. To keep costs down, parties are encouraged to cooperate with discovery and consider Alternative Dispute Resolution (ADR) such as mediation or arbitration for economic issues.

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*For more information:*

Cari B. Rincker et al., ONWARD AND UPWARD: GUIDE FOR GETTING THROUGH NEW YORK DIVORCE AND FAMILY LAW ISSUES (2015) available at <https://www.amazon.com/Onward-Upward-Getting-Through-Divorce/dp/0692556540>

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Factsheet, Series: 2019

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## Family Law Issues in Agriculture: Farm Succession and Estate Planning Consideration

**Cari Rincker<sup>1</sup>**

*Rincker Law, PLLC*

It is uncommon for agriculture producers and business owners to consider estate planning and succession planning for their agriculture operation in the midst of a divorce; however, divorcing farm families should consider this while negotiating the division of marital assets. These assets may include the farm or ranch business and its assets. After all, divorce is one of the Big Ds that hurt family farms. Here are a few tips and tricks to consider for your negotiation:

### **Agreements on Inheritances**

Divorcing couples with children can agree that the farmland/ranch property plus any farm equipment will go to their children upon their death. The divorce settlement agreement itself can require each party to make provisions in their Last Will and Testament or Trust to this effect.

### **Agreements or Prenuptial Agreements for Future Spouses to Waive Inheritance Rights**

If the Parties chose to ensure children or grandchildren obtain certain farm or ranch property in their divorce settlement agreement, then there should also be a requirement that if either party remarries, then the parties will execute a prenuptial or postnuptial agreement requiring their future spouse to waive rights to such property. There is a separate Fact Sheet for Prenuptial Agreement, which discusses estate rights as they apply to nuptial agreements.

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<sup>1</sup> Cari Rincker is the principal attorney at [Rincker Law, PLLC](http://RinckerLaw.com), nationally recognized law practice focusing on food, farm and family. Cari is a trained mediator and adjunct professor both at Vermont Law School and the University of Illinois, School of Law. She runs a small farm outside of Champaign Illinois.

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## Agreements on Business

It is a misconception that all farm and ranch assets need to be divided in a divorce. To the contrary, divorcing couples can continue to operate the farm or ranch business together. In this scenario, their relationship shifts to a business relationship so there needs to be business planning involved, especially in light of the strained relationship (and perhaps distrust and acrimony).

In this situation, there is a myriad of issues for families to consider, such as what would happen upon the death of the other party. Do their shares go to the children? Should their shares belong in a trust that automatically transfers to the children upon their death? Similarly, buy-sell agreements should be considered in case one or both parties decide to leave the family business. It may not work being in business with an ex-spouse and this “exit plan” should be properly thought through.

## Agreements on Life Insurance

Life insurance can be used for several reasons with divorcing families, including security for child support and spousal maintenance. It can also be used to fund buy-sell agreements in the case of the death of a farm owner, like any other business entity, or can be used as security for payment of farm/ranch liabilities upon the death of either parent to aid in succession.

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## Family Law Issues in Agriculture: Keeping the Farm Business Intact

**Cari Rincker<sup>1</sup>**

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Most parties going through a divorce do not consider the option of keeping the farm business intact. Everyone's brains (including the lawyers') typically go to dividing the farm/ranch assets, along with its inventory. However, there is another option: keeping the business intact. This has several advantages, especially if this is a multi-generational farm family business.

This requires careful planning and is not for everyone. If one or both people now distrust the other party, or if there is a high level of acrimony, the parties should reality test this situation to be sure that they can shift to a business relationship despite those emotions.

In this scenario, focus is not just on the Marital Settlement Agreement, but it is also on the business formation documents – e.g., business operating agreement (if a limited liability company), bylaws (if a corporation), or general partnership agreement. In fact, once the divorce is complete, some judges will call future disputes a “business dispute” versus a post-divorce enforcement dispute. The business relationship should be carefully memorialized.

### Responsibilities and Equity

The responsibilities of each owner should be thoroughly noted. If one party has historically offered off-farm income and the other did not, then there needs to be a candid conversation as to whether this will continue and how his/her equity will be offset due to this capital investment. Similarly, perhaps one party historically did the work while the other invested monies. In this situation, the parties should ask themselves if they believe it is a fair trade for the equity promised. They, too, should memorialize what each party is willing to do to help ensure the viability of the farm or ranch business. For example, if one spouse historically kept the

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books, will he/she continue to do so post-divorce, or will an independent bookkeeper be hired?

Furthermore, it is not uncommon at this stage for the divorcing parties to give minority ownership to the child. To illustrate, they might give each of their three children 2% ownership in the company and divide the remaining 94% ownership between themselves; after all, the point of them staying in business together was to pass the farm business and its assets to the children gradually throughout their lifetime.

## **Decision-Making**

Decision-making is a key area, especially in post-divorce families that are still in business together. Will one party be the “manager” with the ability to make day-to-day decisions? What requires unanimous consent? What requires majority vote? This needs to be clearly spelled out or disagreements may ensue when one ex-spouse sells/buys a tractor or enters into a farm lease without notification or approval from the other party.

It cannot be stressed enough: fleshing out these details are paramount for divorcing parties. Without a proper roadmap, arguments will likely ensue, leading the family business to eventually dissolve or require a buy-out from one spouse or another.

## **Inventorying Business Assets**

It is mission critical for the divorcing couple to memorialize what the farm/ranch business owns versus what is owned individually. When doing so, it will be important to note the differing perspectives on this issue. One might view a set of cows as his/her own or inherited property outside the family business. These are discussions that should be had during the divorce negotiation process, not thereafter when the court documents have been signed and the two ex-spouses are running the business together. This is a requisite step to continuing business together. After all, what does the business own?

## **Shape of Business Organization**

Typically, the business organization itself will be discussed. For example, the parties may have run their farm business as a general partnership during the marriage; however, during this stage, they might wish to form a limited liability company. In fact, the divorcing couple may wish to form two LLCs – one for the land (holding company) and one for the farm entity (operating company) with a farm lease between the two entities. The ownership shares of both LLCs could be fed into a revocable trust for the benefit of the children upon death of either parent.

Careful thought during this process should be on federal farm programs. The farm business may benefit from a general partnership with the farm business itself, due to crop limitations. Nonetheless, this is a conversation that needs to be had alongside both divorce lawyers, the farm business/agriculture lawyer, and other members of the farm/ranch succession and the estate planning team (e.g., accountant, financial advisor).

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## Family Law Issues in Agriculture: Nuptial Agreements

**Cari Rincker<sup>1</sup>**

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Pre-nuptial agreements are oftentimes viewed as taboo; instead, farmers, ranchers, agribusiness owners, and food entrepreneurs should view pre-nuptial agreements like an insurance policy for a marriage. Nobody gets on an airplane thinking that it is going to crash, but you still go over the safety instructions. A pre-nuptial agreement simply notes the safety instructions in case the marriage terminates for whatever reason.

It is a common misconception that pre-nuptial agreements are only for the rich and famous; in fact, almost anyone entering a marriage can benefit from a pre-nuptial agreement. It allows the parties to put the law into their own hands and “create their own rules” for the division of property and other ancillary economic issues with a divorce or separation. Pre-nuptial agreements should be viewed as an empowering exercise, allowing the couple to have their own autonomy to dictate their own rules.

Arguably, the exercise of preparing and negotiating a pre-nuptial agreement requires couples to have tough conversations that may strengthen their bond. Both parties are forced to become financially naked and share intimate details of his or her finances prior to the wedding date; this alone can be a healthy exercise for most couples as each party must attach a Schedule of Assets and Debts to the pre-nuptial agreement. In some instances, parties may decide to exchange tax returns or limited financial documentation to support the figures. Clarity as to the financial picture of the soon-to-be spouse is oftentimes gained during this process.

Pre-nuptial agreements are typically enforced in most states if (1) both sides are represented by separate counsel, (2) the terms are fair and reasonable, and (3) there was not any duress or undue influence (i.e.,

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signed voluntarily). Furthermore, the prenuptial agreement should be properly signed and executed in accordance with state law.

Although the agreement should be specially tailored for each individual family, the purpose of this Fact Sheet is to discuss the major issues with prenuptial agreements, as they apply to the food and agriculture industry. Issues that cannot be discussed in the prenuptial agreement include provisions regarding children (except for religion in some states). Additionally, cheating clauses and lifestyle clauses (i.e., promises not to smoke or drink) are typically not enforceable.

## A. Identification of Separate and Marital Property

Property in a marriage fits into one of three buckets: two separate (or nonmarital) property buckets and the marital property bucket.

Spouse 1 Bucket	Marital Bucket	Spouse 2 Bucket

Prenuptial agreements always identify what is in each party's separate property bucket and what is in the marital bucket. Parties can decide to deviate from the law in this area on how they decide what fits in the three buckets. For example, property in joint name or property gifted to the parties in joint name are clearly marital property, but here are some other areas to consider:

### Property and Debt Prior to the Marriage

Generally speaking, all property acquired prior to the marriage is considered separate property. Prenuptial agreements will attach a Schedule of Assets and Debts for each party and usually (but not always) the prenuptial agreement will note that it is that person's responsibility. With a minority of prenuptial agreements, couples put certain accounts or property into the marital bucket.

Furthermore, what if one person enters the marriage with substantial student loans or other debts? The prenuptial agreement can include provisions if the other party helps pay down this separate debt during the marriage.

### Business Interests

With farmers, ranchers, agribusiness owners, and food entrepreneurs, this is perhaps the most important issue to focus on. In the laws in most states, businesses formed during the marriage are considered marital property. If the business was already in existence on the wedding day, then the appreciation of the business during the marriage can be considered marital property if the other spouse was either actively or inactively involved in the business itself. To illustrate, if Susie married Farmer Sam and the farm was owned in his individual name but Susie helped him for decades around the farm, then the court would look at her efforts and the appreciation of the farm enterprise during the marriage thanks, in part, to her involvement at home

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or in the farm business.

Therefore, the prenuptial agreement should clearly note whether any present or future businesses will fit in a separate or the marital bucket. There can be negotiation with this issue, especially for the non-titled spouse, so it is important that couples are on the same page. Parties can negotiate a clean walk away from one spouse, a vesting schedule in accordance with the years of marriage (i.e., after X years the spouse will own Y percentage of the business).

### Income

Income itself is typically a negotiated issue with a prenuptial agreement. By default in most states, income from wherever derived is considered marital property. Even if a spouse puts monies in an individual account, said income is still considered marital. This is an important point for agriculture couples to be on the same page and they should ask themselves how they view each other's income and how they plan to manage their finances as a married couple.

The prenuptial agreement should not only address whether income as an employee and independent contractor income is separate or marital, but it should also clearly identify how income derived from businesses, whether in salary, draw, and or profits, is handled. With business owners, such as farmers and ranchers, this is a hot issue as so much of the monies generated from food and agriculture operations are put back into the business itself. Spouses waiving his or her rights to the business itself may need safeguards on income requiring that the farm business pay the spouse a reasonable salary and that income be considered marital.

### Retirement and Investment Accounts

Retirement devices, including pensions and annuities, and investment accounts, including stocks and bonds, are an important topic to discuss with prenuptial agreements. This can be an emotional topic and oftentimes, but not always, goes hand-in-hand with how the couple views income. Self-employed farmers, ranchers, and agribusiness owners have a lot of control over what monies are put into retirement and investment devices.

### Down Payments and Contributions to Real Property

The law varies in this area from state-to-state, but couples entering into a prenuptial agreement can make their own rules. It is not unusual for the prenuptial agreement to note that if either party uses his or her separate property for a down payment of real estate, then that person will receive a dollar-for-dollar credit back if the marriage is dissolved.

*For example, Farmer Jane and John live together in a farmstead adjacent to John's family. The neighbor's farm comes up for sale. John takes \$50,000 from his premarital wealth to use for the down payment*

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*for the \$500,000 farm. Depending on how the prenuptial agreement is drafted, the new farm may be marital property and is jointly titled. If the couple dissolves their marriage 20 years later, John would receive back his \$50,000 down payment and the couple would split the equity 50/50 (or whatever rules the prenuptial agreement dictates).*

That being said, some prenuptial agreements take this concept one step further. Not only would John in the above example receive his dollar-for-dollar credit back, but he too would receive appreciation on that separate property down payment.

*To keep the math simple, this \$500,000 farm is now worth \$1 million 20 years later and the parties have a \$100,000 mortgage at the date of separation (i.e., whatever operative event language used in the prenuptial agreement). John would receive a \$100,000 separate property credit (i.e., \$50,000 plus 100% appreciation). The parties would then split the remaining equity of the farm after the payment of the mortgage equally (\$400,000 each) (or in accordance with the terms of the prenuptial agreement).*

### Gifts and Inheritance

The general rule is that gifts and inheritances during the marriage are considered separate property. Prenuptial agreements will typically note that gifts in an individual name are considered separate property, but gifts in joint name, including wedding and engagement gifts, are considered marital property.

### **B. Distribution of Marital Property**

The next issue usually (but not always) discussed in the prenuptial agreement is how the marital bucket will be divided in a divorce action. There are three options here:

1. Silence on the issue or defaulting to the law;
2. Splitting the marital bucket equally (50/50); or
3. Make your own rules.

This area can be as simple or complicated as the couple desires. Perhaps the farm couple wants all assets to be divided equally (50/50), but then has a certain vesting scheduling in accordance with the length of the marriage for the farm business and its assets.

*Example: Farmer Jane marries Farmer Fred, who comes from a multi-generational farm family. Farmer Fred owns a 20% interest in the family farm, which is identified as non-marital property in the prenuptial agreement. The couple agrees on a chart where based on*

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*the number of years of marriage that Farmer Jane would acquire an ownership interest into the family farm. After a 25 year marriage, she will have a 50% interest of the 20% shares (i.e., 10% ownership interest) based on her sweat equity and efforts during the marriage. The couple agreed, for illustration purposes, on the following vesting schedule:*

Length of Marriage	Husband's Ownership Interest	Wife's Ownership Interest
5 years	90%	10%
10 years	80%	20%
15 years	70%	30%
20 years	60%	40%
25 years	50%	50%

Furthermore, this section of the prenuptial agreement can include provisions relating to valuation of any farm, ranch, agribusiness, or food company. For example, it may specifically note that the parties will hire an agreed upon business valuator to value the company(ies) at two points of time -- (1) date of the marriage and (2) date of separation -- splitting the costs of same on an equal or pro rata (based on income) basis. The prenuptial agreement can then provide for the scenario if they aren't able to agree on a business valuator (e.g. each party hires their own valuator and averages the two).

### **C. Spousal Maintenance**

Spousal maintenance is almost always discussed in a prenuptial agreement in one shape or form. Here again there are three options:

1. Silence or follow the law in that state;
2. Waiver (or partial-waiver); or
3. Make your own rules.

Parties should be cautious to waive their right to support. Even though a party may be healthy and employed at the time of signing the prenuptial agreement, it may not always be the case. If one or both parties choose to waive their right of support, they should consider a limited exception if they are disabled and no longer employable or are out of the workforce for whatever reason for X number of years.

For couples that wish to "make their own rules," they should begin with the law in that state and determine the spousal maintenance calculations at that snapshot in time. Then the couple should consider how they wish to deviate from that formula in any way. For example, there can be income caps or a set formula for the number of years of maintenance. Couples may determine support based on the years of marriage. The sky is the limit on how the rules can be determined. What is important here is that the parties understand the inherent risks with these provisions in either direction.

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## D. Estate Rights

People oftentimes assume that all provisions in a prenuptial agreement are only applicable if you get divorced; estate rights are an example of provisions that come into play even if the couple decides to never divorce. Estate rights are usually (but not always) discussed in the prenuptial agreement.

As a general rule in most states, you cannot disinherit your spouse. Your spouse will be entitled to a certain percentage of your estate even if you do not include any provision in your Last Will and Testament for this person. With estate rights, the parties again have three options:

1. Silence or follow the law in that state;
2. Waiver; or
3. Make your own rules.

Waivers are more typical with parties with substantial premarital wealth or second/third/fourth marriages, especially when there are children of prior relationships that may receive the inheritance. Parties are free to give what they wish to their spouse in their Last Will and Testament, but the law's "security blanket" disappears. Thus, parties wishing to waive their right of inheritance in a prenuptial agreement should do so cautiously. People can change their Last Will and Testament on their death bed and the law will no longer protect the other spouse.

Couples that decide to make their own rules may come up with their own minimum guaranteed award in accordance with the years of marriage or contribution to the estate. There can be promises about bequeathing certain property. If the prenuptial agreement conflicts with the Last Will and Testament, then the prenuptial agreement will take precedence.

As a caveat, a party has the right to inherit from the other's estate even while the divorce is pending. It is recommended in most cases that the prenuptial agreement note a waiver of estate rights upon separation or the operative event in the agreement.

## E. Promises During Marriage

This is another example of provisions in the prenuptial agreement that are applicable even if the couple never divorces. This can include provisions regarding insurance (life, disability, or long-term care) or access to money.

If there is a waiver of estate rights as discussed above, financial security can be given to the other party with a promise to maintain life insurance to a certain amount. There could also be a promise to maintain life insurance to pay for any marital debt. Parties marrying farmers or those in other professions that are more physical could consider promises for disability insurance; similarly, parties who have health issues or are older may wish to promise to maintain long-term care insurance.

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Access to money or the promise to put X% of income in a joint account is an issue for some families. The couple should discuss how they wish to manage finances. This provision is rarely included in prenuptial agreements but can be added for couples that wish to have that structure.

Lifestyle clauses with promises not to smoke/drink, exercise each day, maintain a certain weight, go on a weekly date night, participate in couples counseling, help doing chores on the farm, or bring you lemonade in the field, etc. are usually not enforceable. Similarly, cheating clauses can be problematic and should be avoided.

## **F. Break-Up Procedures**

“Breaking up is hard to do...” but terms in the prenuptial agreement can help by providing some clear structure. Some couples do not wish to include these provisions, while others want the break-up instructions laid out. For example, there can be clauses on who will move out of the marital residence if the property is titled in the name of only one party or the procedures for buying out the other party if the marital residence is owned in joint name. Procedures for putting the marital residence up for sale, including an agreed-upon choice of a real estate broker, can also be spelled out.

Parties may also wish to include an Alternative Dispute Resolution (“ADR”) clause (e.g., mediation for economic issues) or promise to use a collaborative divorce process in the case of separation.

## **G. Miscellaneous Terms**

This includes a choice of law provision. Oftentimes, couples request a confidentiality clause so that terms of the prenuptial agreement are required to stay private, but for the exception of financial advisors, lawyers, and immediate family members.

Although you can see “sunset provisions” in any area of prenuptial agreement, the couple may choose to have an overarching sunset provision noting that the prenuptial agreement itself is not valid after they have been married for X number of years or if X event takes place.

## **Conclusion**

The prenuptial agreement process can be empowering for parties and requires the couple to have those tough conversations. This is an important liability protection device for farmers, ranchers, agribusiness owners, and food entrepreneurs because, if a divorce occurs, the parties understand the rules because they created them. Divorce is one of the Big D’s along with destruction and death that can harm multigenerational food and agriculture businesses. Every farm and ranch should have a business and succession plan, there too should be a game plan if relationships dissolve. Prenuptial agreements can be a helpful insurance policy for those involved in any segment of the food and agriculture industry and set forth a clear roadmap for both parties.

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*For more information:*

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Factsheet, Series: 2019

## Family Law Issues in Agriculture: Orders of Protection

**Cari Rincker<sup>1</sup>**

*Rincker Law, PLLC*



National Agricultural Library

This material is based upon work supported by the National Agricultural Library, Agricultural Research Service, U.S. Department of Agriculture

An Order of Protection is available for parties who are being stalked, harassed, or abused by their partner (physically, verbally, or sexually). It is available not only for romantic relationships (e.g., spouse, boyfriend/girlfriend), but also other family relationships (e.g., between a farmer landlord uncle and farmer tenant niece). Although the procedures for filing and defending against an order of protection vary from state to state, this Fact Sheet breaks down the general process.

### Step 1: Filing the Petition

The filing procedures themselves differ from state to state, so it is important to work with an attorney licensed in that jurisdiction. Litigants are encouraged to have a timeline prepared of all applicable events, including supporting documentation (e.g., text messages) to file along with the Petition.

Some localities have domestic violence organizations that will help victims file petitions by leading them through the process. Many states have self-help centers to help those without attorneys file a petition against their abuser.

The name of the petition itself can vary from state to state. In some states, the Petition is a Petition for an Order of Protection and in other states this may be called a Family Offense Petition. Typically, there is both a Petitioner and Respondent, but your state may refer to the parties as a Plaintiff and Defendant. If there is an ongoing divorce action, this matter may be consolidated into the matrimonial case for judicial economy.

### Step 2: Seeking Emergency Relief (If Applicable)

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<sup>1</sup> Cari Rincker is the principal attorney at [Rincker Law, PLLC](#), nationally recognized law practice focusing on food, farm and family. Cari is a trained mediator and adjunct professor both at Vermont Law School and the University of Illinois, School of Law. She runs a small farm outside of Champaign Illinois.

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Usually, but not always, the second step is for the litigant to seek emergency relief from the court. This is referred to as an Emergency or Temporary Order of Protection and is usually for a few weeks or up to 30 days, until the initial court appearance.

This proceeding is typically *ex parte* (i.e., without the presence of the other side). Testimony is not usually taken at this court date; as a general rule, the determination of whether to grant the emergency order is done on the paper. The claimant should be in court in case the judge has questions. The Respondent/Defendant is then personally served by the police with the Emergency/Temporary Order of Protection, along with the underlying Petition.

### **Step 3: Hearing on Petition for Order of Protection**

There may be a series of court dates, but eventually a hearing date is set. This is an evidentiary hearing with both direct and cross examination. One can bring exhibits and supporting evidence. Depending on the time allotted by the court, cooperating witnesses may appear and testify.

Depending on the state, an Order of Protection may be granted for a period less than five (5) years. This order usually includes a “stay away” of a certain radius (usually 500’) and a no contact order. Ancillary relief may also be sought, such as restitution. The court has discretion to other relief, such as anger management courses, exclusive occupancy, support issues (e.g., spousal support or payment of household expenses) or children issues (e.g., parenting time, support). Depending on the jurisdiction, attorneys’ fees may be sought. Please note that there can be carve-outs for exchange of children or communication about the children only.

### **Step 4: Ensuring Compliance with Petition**

At the end of the day, an Order of Protection is just a piece of paper. The onus is on the Petitioner/Plaintiff to enforce its provisions. If the Respondent/Defendant has violated the terms of the Order of Protection, then the police should be contacted immediately. Persons who have obtained an Order of Protection should always keep a copy of it on their person (e.g., in their purse) but also at their home and place of employment. Loved ones should be notified of the Order of Protection and, if appropriate, also have a copy of the Order of Protection.

### **Step 5: Considerations of Extensions**

Depending on the state, an extension of the Order of Protection may be sought for good cause shown, such as violations of the Order of Protection or continued threats. This area of law varies significantly from state to state and with certain localities, so please seek a family lawyer nearby for information.

### **Final Considerations**

Both parties to an Order of Protection should seek counsel to help them maneuver the process. Filing

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parties should consider safety when filing an Order of Protection, especially if that person lives with the alleged abuser. Persons defending against Orders of Protection should understand the inherent seriousness of the matter and potential impacts on employment in agriculture if an Order of Protection is issued against them. Terms of Orders of Protections, including emergency/ interim/ temporary orders, should be strictly followed by both Parties.

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Factsheet, Series: 2019



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## Family Law Issues in Agriculture: Spousal Support

**Cari Rincker<sup>1</sup>**

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Spousal maintenance in some states is formulaic, while others rely on case law. In either scenario, there needs to be a determination of income (not assets). For most involved in farming and ranching or other kinds of agri-business, determining income is anything but straightforward. Typically, a spouse is required to pay for his/her health insurance after the divorce, but if he/she has serious medical issues, then this can be a negotiated add-on.

### The Formula

The equation for calculating spousal support does vary from state to state. In some states, like New York, an income cap is used. Nearly every state has “deviation factors” that allow the court to adjust spousal maintenance either upwards or downwards based on the statutory factors (e.g., standard of living during the marriage, medical issues). Some states do not have a formula but looks at the circumstances in that case.

Business owners, including farmers, ranchers, and food entrepreneurs, do not have straight-forward income. Accelerated depreciation, prepays, and other deductions can be added back to the Payor’s income for the purposes of this equation. Courts typically have discretion on these adjustments. If the farm or agri-business pays for living expenses, such as housing, mobile phone, vehicle expenses, food/entertainment, then the court can also input this as income for spousal support purposes.

As one can imagine, this can become a problematic calculation for business owners because it requires a thorough review of tax returns and other business financials. Farmers, ranchers, and agri-business owners are advised to consult a family law attorney with food and agriculture background to help negotiate a fair agreement for spousal support to fit the specific circumstances.

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## Duration

Duration of spousal maintenance is also a negotiated point. Some states, like Illinois, have memorialized durations based on the number of years of marriage up to 20 years. At this point, the Payee should receive maintenance for the length of the marriage or for an indefinite term. Other states, like New York, have set forth ranges, giving the court discretion (e.g., if the marriage is less than 15 years, then maintenance will be between 15% to 30%, depending on the length of the marriage). Other states rely on case law and give the trial judge wide discretion. Importantly, permanent maintenance (i.e., alimony) is uncommon in most states with limited exceptions. Most states prefer durational maintenance (i.e., maintenance for a duration).

Spousal maintenance typically terminates in the following instances:

- Upon the death of the Payor;
- Upon the death of the Payee;
- Upon the end of the specified duration (e.g., 5 years, 10 years)

Cohabitation is more than just having a significant other. It is living with one another in a conjugal relationship and sharing expenses, much like a married couple would. There is a myriad of other factors the court considers and, again, this can vary from state to state.

## Using Life Insurance to Secure Maintenance

Life insurance can be used as payment security for spousal support payments in the event of death. This is oftentimes a negotiated point; it can be ordered by the Court, but it is usually voluntary. Term life insurance is used in these instances and the required amount can decrease each year and as the necessary maintenance decreases. This may also be done for child support, if applicable.

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Factsheet, Series: 2019

## Family Law Issues in Agriculture: Child Custody and Visitation

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Divorcing farm and ranch families with children invariably have to consider custody and visitation issues. This Fact Sheet first discuss custody and then visitation.

Importantly, the law varies from state to state on which factors the court considers when determining what is in the best interest of the children. Divorcing farm families should consult a lawyer in his or her jurisdiction to understand the list of statutory or factors established by case law. Such factors typically include the (a) wishes of the child (depending on age); (b) wishes of the parents; (c) historic caretaking and decision-making; (d) ability for a parent to facilitate a relationship with the other parent; (e) any history of abuse; (f) distance between the parents; (g) relationship between the parents, etc.

### 1. Custody

Importantly, there is a growing trend for states to move away from the term “custody” because the term sparks so much emotion. States such as Illinois have moved to calling it “allocation of parental responsibilities.” Regardless of the terminology, there are two types of custody: (1) residence; and (2) decision-making.

As for the primary residence of the children, if the children live with one parent 51% or more of the time, then that parent has primary residence (sometimes referred to as sole physical custody or primary residential custody). If the parents have a pure 50/50 arrangement, then there is no primary residence, and the parents have joint physical custody.

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With decision-making, this refers to major decisions, not day-to-day decisions such as brushing hair, doing homework, bedtime routine, etc. In most states, the applicable major decision applies to four spheres of influence: (1) non-emergency health; (2) religion; (3) education; and (4) extra-curricular activities. There are several choices with decision making and it is not related to physical custody. In other words, the parents can have joint legal custody even though only one parent has the primary residence with the children.

If the parents agree on joint decision making, then there are several options:

- a) Pure joint decision making;
- b) After good-faith consultation, then the custodial parent has the final say or tie-breaking vote;
- c) After good-faith consultation, the parents divide who has the tie-breaking vote 50/50 (e.g., the Mother has final decision making on health or religion while the Father has final decision making on education and extra-curricular
- d) After good-faith consultation, if the parents are still at an impasse, they agree to go to mediation (or possibly add a tie-break step if mediation is futile); and
- e) After good faith consultation, then a third party decides (e.g., a parent coordinator, general doctor for health decisions, school counselor for educational decisions, pastor for religious decisions).

Which option is chosen depends on the relationship between the parties and what is in the best interest of the children.

## 2. Parenting Time

Some parents prefer to have a loose schedule, which is referred to as liberal parenting time; however, most families prefer a dependable schedule. Parenting time is best to be broken up into (a) basic schedule; (b) school break schedule; (c) summer break schedule; and (d) holiday parenting time.

### A) Basic Schedule

This is when school is in session and while there are no major holidays or school breaks. It is the “default schedule.” It is suggested that parents think about this schedule over a few-week time period. Here is an example blank worksheet:

Week	M	T	W	R	F	S	S
W1							
W2							
W3							
W4							

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There are unlimited combinations with the basic schedule. Parents should “reality test” potential schedules by thinking about the age of the children, distance between the parents, school logistics, extra-curricular activities (such as 4-H including 4-H animals and sports), church, etc.

For those parents considering joint parenting time, here are some options for 50/50 plans:

### 2/2/3 (Rotation)

	M	T	W	R	F	S	S
<b>Week 1</b>	Dad	Dad	Mom	Mom	Dad	Dad	Dad
<b>Week 2</b>	Mom	Mom	Dad	Dad	Mom	Mom	Mom
<b>Week 3</b>	Dad	Dad	Mom	Mom	Dad	Dad	Dad
<b>Week 4</b>	Mom	Mom	Dad	Dad	Mom	Mom	Mom

### 2/2/3 Schedule (Same Parent with M-T/W-R)

	M	T	W	R	F	S	S
<b>Week 1</b>	Dad <sup>2</sup>	Dad	Mom	Mom	Dad	Dad	Dad
<b>Week 2</b>	Dad	Dad	Mom	Mom	Mom	Mom	Mom
<b>Week 3</b>	Dad	Dad	Mom	Mom	Dad	Dad	Dad
<b>Week 4</b>	Dad	Dad	Mom	Mom	Mom	Mom	Mom

### 2/3/2 Schedule – Alternating Wednesday’s and Weekends (Same Parent M-T/R-F)

	M	T	W	R	F	S	S
<b>Week 1</b>	Mom	Mom	Dad	Dad	Dad	Mom	Mom
<b>Week 2</b>	Mom	Mom	Mom	Dad	Dad	Dad	Dad
<b>Week 3</b>	Mom	Mom	Dad	Dad	Dad	Mom	Mom
<b>Week 4</b>	Mom	Mom	Mom	Dad	Dad	Dad	Dad

### 3/4 Schedule (Same Parent M-T-W/F-S-S with Alternating Thursdays)

<sup>2</sup> Mom and Dad are used here for illustrative purposes only. The family may have two Moms or two Dads.

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	M	T	W	R	F	S	S
<b>Week 1</b>	Mom	Mom	Mom	Dad	Dad	Dad	Dad
<b>Week 2</b>	Mom	Mom	Mom	Mom	Dad	Dad	Dad
<b>Week 3</b>	Mom	Mom	Mom	Dad	Dad	Dad	Dad
<b>Week 4</b>	Mom	Mom	Mom	Mom	Dad	Dad	Dad

### 3/4 Schedule (7 days in a row/split weeks)

	M	T	W	R	F	S	S
<b>Week 1</b>	Mom	Mom	Mom	Dad	Dad	Dad	Dad
<b>Week 2</b>	Dad	Dad	Dad	Mom	Mom	Mom	Mom
<b>Week 3</b>	Mom	Mom	Mom	Dad	Dad	Dad	Dad
<b>Week 4</b>	Dad	Dad	Dad	Mom	Mom	Mom	Mom

### Alternating Weekends Plus 2 Midweek

	M	T	W	R	F	S	S
<b>Week 1</b>	Mom	Dad	Dad	Mom	Dad	Dad	Dad
<b>Week 2</b>	Mom	Dad	Dad	Mom	Mom	Mom	Mom
<b>Week 3</b>	Mom	Dad	Dad	Mom	Dad	Dad	Dad
<b>Week 4</b>	Mom	Dad	Dad	Mom	Mom	Mom	Mom

### 4/4 Schedule

	M	T	W	R	F	S	S
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<b>Week 1</b>	Dad	Dad	Dad	Dad	Mom	Mom	Mom
<b>Week 2</b>	Mom	Dad	Dad	Dad	Dad	Mom	Mom
<b>Week 3</b>	Mom	Mom	Dad	Dad	Dad	Dad	Mom
<b>Week 4</b>	Mom	Mom	Mom	Dad	Dad	Dad	Dad

### 7/7 Schedule

	M	T	W	R	F	S	S
<b>Week 1</b>	Dad						
<b>Week 2</b>	Mom						
<b>Week 3</b>	Dad						
<b>Week 4</b>	Mom						

### B) School Break Schedule

Schools vary on their school breaks. Typically, there is a four-day weekend for Thanksgiving Break, a few weeks for Christmas/Winter break, and Spring Break (which is normally a long-week). Schools in some geographic regions like New York add a fourth school break in February on President's Day week (called the Mid-Winter Break). Schools that are year-long have their own unique calendar. Parents need to evaluate this in accordance with their children's calendar.

Here is an example worksheet with school breaks:

School Break	Description	Odd-Numbered Years	Even-Numbered Years
Thanksgiving	4-day weekend		
Winter/Christmas			
Mid-Winter Recess (President's Day) (some schools)			
Spring Break			

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### C) Summer Break Schedule

Farm and ranch families involved in 4-H, FFA, livestock breed organizations or other agriculture organizations require special attention for the summer schedule. Some parents decide to have a certain number of consecutive or nonconsecutive weeks' vacation in the summer while other parents may agree on alternating weeks or on following the basic school schedule. Agriculture parents should consider the summer routine of the children, especially if it applies to 4-H and other agriculture activities.

### D) Holiday Parenting Time

Finally, parents should think through holiday parenting time. Again, this schedule will supersede all the other schedules. The first step is for parents to think about what holidays they have observed historically. Typically, parents will alternate those holidays every other year, but some holidays may always be assigned to one parent (e.g., Mother's Day, Father's Day)

Here is an example worksheet on holidays:

#### Traditional Holidays

<u>Holiday</u>	<u>Odd Years</u>	<u>Even Years</u>
New Year's Eve		
New Year's Day		
Martin Luther King Jr. Day		
Easter		
Mother's Day		
Memorial Day		
Father's Day		
Independence Day		
Labor Day		
Columbus Day		
Halloween		

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Veteran's Day		
Thanksgiving		
Christmas Eve		
Christmas		

**Additional Holidays** (including religious holidays, birthdays)

<b>Holiday</b>	<b>Odd Years</b>	<b>Even Years</b>
Child's Birthday		

## Conclusion

This Fact Sheet just hit the tip of the iceberg on custody and visitation issues. Ancillary issues include, but are not limited to: information sharing; relocation provisions; telephone/video conference access; travel (including itinerary requirements); co-parenting applications (e.g., Our Family Wizard, Talking Parents); or using a shared calendar like Google Calendar, and Alternative Dispute Resolution (such as mediation). Grandparent or sibling visitation (if half-siblings) may also be discussed.

*For more information:*

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