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An Agricultural Law Research Article

Intra-Family Land Transfers

by

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INTRA-FAMILY LAND TRANSFERS

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In March, 1963, there were approximately 51,500 farms in North Dakota, a decrease of about three per cent from the 53,000 farms reported in 1962, and the smallest number since the turn of the century.[1] This steady decrease in the number of farming units within North Dakota illustrates the fact that some of the most difficult farm-ownership problems involve the transferring of farms within the family from one generation to the next. The average midwestern farm family operates one farming unit which cannot be divided amoung several children without disrupting its operation, yet the same family is likely to contain several children, all of whom are prospective heirs of the farming unit.

In order to develop a broad study of farm tenancy arrangements in North Dakota, the Agricultural-Law Research Program jointly conducted by the University of North Dakota School of Law and the Department of Agricultural Economics of North Dakota State University has undertaken studies of problem-solving in the area of intra-family farm transfers. In undertaking a project of this type, primary consideration must be given to the basic legal concepts and issues which constitute a vital part of all land transfers.

In considering the problem of intra-family farm land transfers it is necessary to re-evaluate the basic legal aspects of various relationships which exist in farming operations. For most practitioners these basic concepts may be only too familiar; yet a general discussion of them seems appropriate since these concepts form the foundation of all tenancy arrangements.

It is necessary to realize the probable variance in personal circumstances encountered in planning farm transfers. Therefore, no single suggestion as to problem-solving can possibly encompass the great range of circumstances experienced by a cross-section of clients. The desirability of transferring the

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1. N.D. Crop and Livestock Reporting Service, NDSU News Release, March, 1963.

family farm to other members of the family is a question that must be answered by each family, and therefore one cannot recommend, as a matter of course, that a particular form of intra-family transfer would be in the best interest of all parties.

Each farm family has three basic choices in making a determination of the manner in which farm property is to be distributed. The property may be transferred by will at the death of the father; by failure to provide a will and allowing state laws of descent to operate and distribute the property; or by carefully planned property transfers which are effective prior to the death of the father by sale or gift. In considering a course of action which will effectuate the wishes of the parties to an intra-family transfer of property, certain goals should be considered:

1. Security must be provided for the parents in their remaining years.

2. Security must be provided for the son and his family.

3. Other heirs should receive equitable treatment.

4. Efficient farm-unit operation must continue while implementing the transfer plan.

Essential pre-requisites to a successful transfer have been suggested as: [2]

1. A farm large enough for both the parents and the children, or the child who will assume the farm operation.

2. Adequate housing for all concerned.

3. Satisfactory retirement for the father as his ability and desire for management decrease.

4. Adequate financial aid for the son.

In determining the proper agreement upon which an intra-family farm transfer might be predicated, one must consider the legal relationship which will arise. Generally four different types may be considered. They are landlord-tenant, employer-employee, partnership, and the corporation. North Dakota's long standing anti-corporate legislation is, of course, a factor in our consideration; however, alternative enactments are being studied and may be adopted within the next few years.

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2. Elton B. Hill & Marshall Harris, Family Farm Business Agreements N.C. 17 Pub. draft, Jan., 1962.

LANDLORD AND TENANT

The relationship of landlord and tenant derives from the English feudal system. Prior to the famous statute of *Quia Emptores*,[3] all land being derived from the Crown, a grantee of land could further grant portions of his property to others, thereby creating a sub-tenure accompanied by the requisite feudal obligations. *Quia Emptores* halted the practice of sub-infeudation by requiring that the grantee hold of the individual from whom his grantor held.[4] Early lessees were, for the most part, without remedy against the lessor or third person who violated their interest in the property, as the term for years was not recognized as an estate or interest in land. Those lessees who held property under a sealed covenant, however, in the case of wrongful ejectment by the lessor, could recover damages for the breach.

Quite unlike the feudal landlord-tenant the modern lessor or lessee may rely on a well developed body of law to guide his action in entering this fundamental tenancy relationship. Today it is most common to rely upon the printed lease form and its variations for differing circumstances. It must be remembered that no form can adequately meet the needs of all clients and it is generally necessary to vary the printed form according to the particular conditions encountered.

An 1897 North Dakota decision, *Angell v. Egger*,[5] caused great confusion in the fundamental distinctions normally noted in the landlord-tenant, master-servant relationships. In that case a leasing agreement, containing a clause whereby the title and possession of all crops raised should remain in the landlord until division, was construed under the laws of master and servant rather than landlord and tenant. It was not until 1917 and the decision reached in *Minneapolis Iron Store Co. v Branum*[6] that the controversy was finally resolved and the relationship between landlord and tenant explicitly defined. This decision stressed that the period of the lease may be from year to year, for a term of years, for life, or at will. The lease gives the tenant a right to possession and free enjoyment of

3. 3 Statute of Westminister, 1290, 18 Ewd. 1, chs. 1-3.
4. **Ibid.**
5. 6 N.D. 391, 71 N.W. 547 (1897).
6. 36 N.D. 355, 162 N.W. 543 (1917).

the property, subject to the lessor's right to demand ordinary care in the possession of the property.[7] Since the time of the decision in *Minneapolis Iron Store Co.*, the statutes define most of the rights and liabilities of all the parties to the lease.

In considering this relationship in the light of intra-family farm transfers, it should be noted that the most usual use of this relationship arises where the father retires from farming and then leases the farm to his son for cash-rent or crop-shares. In this situation the son would normally assume full managerial responsibility. However, it is frequently necesary for the father to exercise a degree of management where the youth or inexperience of the son demands guidance. Often the father finds it necessary to contribute to expenses in those cases where the son begins with inadequate capital. In those situations, unless the leasing agreement explicitly mentions such an occurrence, it is possible that a master-servant situation could arise. The fact that a contract is termed a lease by the parties does not conclusively establish that it is a lease, and it is necessary to look to the terms, conditions and actions of the parties in order to determine the nature of the agreement. In the light of increasing capital expenditures, tax and probate problems, and complexities upon the death of one of the parties, it is necessary clearly to delineate the intended relationship.

The lease or tenancy for years contains inherent features which have in the past tended to create serious difficulty when one attempts to determine the rights of the parties and their corresponding duties. Usually, difficulties arise as to the respective liabilities and duties of landlord and tenant concerning condition, use, repair, and improvement of the leased property. The importance of the written lease cannot be diminished. The relationship of landlord and tenant is based on an agreement between one who owns the land and the other who wishes to have its use and possession. This agreement may be either oral or written.[8] Should the agreement be oral, certain difficulties immediately arise; e.g., in case of disagreement the dispute cannot be litigated according to what the parties actually agreed, but often are settled by local custom

7. **Ibid.**
8. **Supra,** note 6.

and tradition. The courts look to the intent of the parties.

The North Dakota Statute of Frauds provides that an unexecuted oral lease for a period of longer than one year is invalid.[9] The impact of the statute is felt when the lease of land is for a period longer than one year, with the result that the agreement does not become effective until the tenant enters into possession. Therefore, either party may discard the contract at will until the tenant actually takes possession of the property. The oral lease, except in unique situations, often is the prelude to serious misunderstandings and grievances which can, and often do, result in costly and unnecessary litigation.

Two provisions of the North Dakota Code limit the use of the lease to a degree. The first concerns the involvement of corporations in farming and states that corporations, other than co-operatives having seventy-five per cent of their members residing on farms, or depending principally on farming for their livelihood, may not engage in farming for a period longer than ten years following the date of their acquisition of any land.[10] The second provision relates directly to the length or term of the lease and provides that "No lease or grant of agricultural land reserving any rent or service of any kind for a longer period than ten years shall be valid."[11] However, it has been held that a lease of indefinite length containing the phrase "shall continue so long as any one of the owners is still alive" did not exceed the ten year reservation of the statute and that it was valid for the life of the surviving lessor or at least ten years from the date of complete execution.[12]

North Dakotans allude primarily to four basic types of farm lease agreements. They are the crop-share lease, the share-cash lease, the livestock-share lease and the cash lease.[13] The crop-share lease appears to be the most popular form in use today. This type of lease usually provides that the tenant, in consideration of his farming the land, providing the ma-

9. N.D. Cent. Code § 9-06-03 (1961).

10. N.D. Cent. Code Chap. 10-06. See McElroy, **North Dakota's Anti-Corporate Farming Act,** 36 N.D. L. Rev. 96 (1960).

11. N.D. Cent. Code § 47-16-02 (1961).

12. Anderson v. Blixt, 72 N.W.2d 799 (N.D. 1955).

13. See White & Skjerven, **A survey of Laws Affecting Farm Tenancy in North Dakota,** 37 N.D. L. Rev. 158 (1960).

chinery with which to farm, and paying either all or a portion of the expenses, receive a one-half to two-thirds share. On the other hand, the landlord in addition to providing the land, assumes an agreed portion of expense for what is normally a proportionate one-third to one-half share, depending upon the arrangements made in each particular agreement. This arrangement, especially in the long-term lease situation, has proven to be quite satisfactory.

The share-cash lease is generally used in the more highly diversified farming situation and is useful to those landlord-tenant relationships where livestock and growing crops constitute the main source of income. This arrangement generally demands cash payment by the tenant for the use of facilities and crops in the livestock operation while the landlord accepts a share of the growing crops not used in the livestock operation.

The livestock-share lease is the third type in use to any great extent in North Dakota today. The terms of this lease may generally vary more than the other types of lease arrangements due to the fact that the relative contribution of landlord and tenant in buildings, equipment, labor and material may generally very greatly from operation to operation. The tenant and owner generally share equally in stock increase but the agreement must contain positive reference to labor, material, and realty contribution in order equitably to set the proportionate shares in the distribution of net income.

The fourth and final type of leasing arrangement to be considered here is the straight cash lease. In this situation, the parties agree to the amount per acre to be paid yearly for the use of the real estate by the tenant. This lease generally pre-supposes greater risk due to the high variability of crop yields in this area. Most tenants are unwilling to stake an explicit amount per year, per acre in the face of high farming expense and the relatively high hail and drought risk. Therefore, the cash lease has not proven extremely popular. Where it has been used, it has generally been only for relatively long periods of time.

In family farm planning the lease, coupled with the option to purchase at the death of the owner-father, proves to be a

highly effective arrangement. This situation allows the farming son to operate the farm as he desires, making necessary improvements, secure in the knowledge that the cost of improvements will be returned when the option is exercised. Often lease-gift opportunities occur where the father wishes to give a portion of the property to the son and thereby afford the son the further opportunity to farm the remainder of the property either for a definite time or with an option to purchase from other heirs at the time the father dies.

Obviously there are many lease variations which can be used effectively in planning successful farm family transfers. While there is no standard plan which can be utilized as a basic estate planning tool, farming operations must be considered in devising the most suitable plan for great diversity of each case.

EMPLOYER AND EMPLOYEE

In most factual situations this relationship is easily discernible; however, in the farming operation it may be somewhat more difficult to determine the status of the parties. This is especially true where, in the earlier stages, the son works for the father for nominal wages or an allowance. However, as the son begins assuming more responsibility, he begins receiving a substantial salary for his contributions. Moreover, the son may often, in addition to his salary, begin receiving a share of livestock or crops and eventually have a degree of authority in directing the farm operations. As the son assumes more responsibility and receives more remuneration, his relationship with his father often takes on all the aspects of a partnership even though that may never be intended.

The North Dakota Century Code offers the following definition:[14] "A servant is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independant calling and who, in such service, remains entirely under the control and direction of the latter, who is called his master." In the face of this definition it is apparent that as the employed farm son begins assuming more responsi-

14. N.D. Cent. Code § 34-04-01 (1961).

bility, more control and more authority, he ceases to be an employee or servant within the strict definition of the term. Were all situations as easily determinable as those in which the son receives a straight cash wage and nothing more, there would be few problems concerning this particular relationship. It becomes exceedingly difficult to make a clear determination of the basic issue as the son naturally increases his responsibility and authority.

PARTNERSHIP

At an early date the relationship between the owner of land and a person farming the land on shares was construed as being a tenancy in common.[15] It has also been construed as creating a landlord-tenant relation,[16] or an employer-employee relationship.[17] It is the view of a contemporary authority on partnership that "There is no other relation known to law which, in its nature, is so complicated as is partnership."[18] Since other operating arrangements, such as the hiring or leasing agreement, may take on the appearance of the partnership without the parties actual knowledge or intent, it is particularly important to recognize the more important aspects of this popular relationship.

Often a partnership agreement provides the necessary means by which individuals with limited resources may form a productive farming unit by pooling their respective assets to finance a successful farming enterprise. Thus, a farmer owning land may combine with a farmer owning machinery and/or livestock with the result that both share in a productive, resourceful enterprise. Also, a farmer owning land and machinery might exchange for the labor and management of another to produce a successful agricultural enterprise.

Partnership, by the terms of the North Dakota Code, is defined as "an association of two or more persons to carry on as co-owners a business for profit."[19] Since joint tenancies, tenancies in common and tenancies by the entirety resemble

15. Stewart v. Young, 212 Ala. 426, 103 So. 44 (1925).
16. Nelms v. McGraw, 93 Ala. 245, 9 So. 719 (1891).
17. Mingus v. Bank of Ethel, 136 Mo. App. 407, 117 S.W. 683 (1909).
18. ROWLEY, PARTNERSHIP § 13 (2d ed. 1960).
19. N.D. Cent. Code § 45-05-05 (1961).

the partnership in many respects, the absence of a specific partnership agreement often causes difficulty when determining whether a partnership actually does exist. Therefore, it is imperative that a partnership rest upon an agreement, whereas it is not particularly necessary in the case of the various co-tenancies. A good farm partnership agreement might contain some of the following clauses:

(1) A caption stating that it is a partnership agreement.

(2) An introduction giving the date, names of the parties and place where the agreement is made.

(3) A clause stating the name, place, term, and purpose of the business.

(4) A statement of initial capital contributions which would include the amount of cash, property and labor contributed or to be contributed by the respective parties to the agreement.

(5) A statement concerning the leasing or rental of any property to be used in the partnership business.

(6) A statement concerning the further contribution of capital by the partners whether it be from profits or other sources.

(7) A statement concerning withdrawals from the partnership or loans to the partnership, which specifies interest rates and general policy concerning these matters.

(8) A statement concerning the accounts and books which must be kept in the business. It may be necesseary to specify when the fiscal year for accounting purposes begins, plus the date that accounting and distribution of profits should be made.

(9) A statement concerning management responsibilities, i.e. whether each partner shares this burden equally or whether a managing partner is to be named.

(10) Salaries should be specifically enumerated, and the amount of time each partner will contribute may be added.

(11) Each partner should be listed according to the percentage of profits due him from the business, plus withdrawals allowed.

(12) Partnership checking accounts should be listed and agreement made as to withdrawals for personal expenses. Further agreement should be reached as to ability to encumber or assign or sell partnership property and the ability of the partners to release debts or act as a guaranty or surety for another.

(13) Finally, provisions should include conditions and circumstances which would warrant termination or dissolution of the partnership and methods of settlement.

The partnership is distinguishable from the corporation in that the corporation is "an artificial person created by law as the representative of those persons who contribute to or become holders of shares in the property entrusted to it for a common purpose."[20] In comparing the structure of the corporation and the partnership, certain advantages in the partnership might be noted. Partners may agree on any partnership structure and operation without resorting to any governmental agency, unlike the corporation which is subject to strict regulation and control by the state. Partnership organizational changes and dissolutions may take place at any time without securing permission from any agency or authority other than the partners themselves.

Difficulty is often encountered in determining the existence of a partnership. Under the Uniform Partnership Act[21] the receipt by a person of a share of the profits is *prima facie* evidence that he is a partner in the business. This is tempered by certain well-recognized exceptions.[22] To establish proof of a partnership as between the partners, greater proof is required than in an action brought against the partners by a third person.[23] In an Oklahoma case[24] it was stated: "No definite rule has ever yet been laid down which can be said to be a conclusive test as to whether or not a partnership exists *inter se* from a given state of facts, but there must be, to constitute the same, (a) an intent on the part of the alleged partners to form a partnership; (b) participation generally in both profits and losses; (c) a community of interest

20. 40 Am. Jur. **Partnership** § 6 (1938).
21. N.D. Cent. Code, §§ 45-05 to 45-09 (1961).
22. N.D. Cent. Code § 45-05-06 (1961).
23. Curry v. Fowler, 87 N.Y. 32, 33 (1881).
24. Municipal Paving Co. v. Herring, 150 Pac. 1067 (Okla. 1915).

such as enables each party to make contracts, manage the business, and dispose of the whole property." However, one noted authority has stated that "the only absolute essential, the only one that must in all cases be present, is the sharing of profits."[25] In the case of *Weber v. Bader*,[26] plaintiffs alleged that they, with others, jointly held a half-section of school lands upon which they pastured stock. The lands came up for sale and it was alleged that defendant, one who had formerly been associated with plaintiffs, was to purchase for the use of all. Defendant purchased the land and later refused plaintiffs' request for a beneficial interest in the property on the basis of an implied partnership. In a decision for the defendant, the court stated that while the parties were engaged in a tenancy in common for pasturage purposes, the lack of a written agreement conveying an interest in the land voided any oral contract of partnership. Thus without any evidence of a partnership, none could exist.

The doctrine of ostensible partnership, which rests on the concept of estoppel, exists in North Dakota. By this doctrine a partnership may in fact exist although none is intended. Where a person, knowingly and negligently, holds himself out to others to be a partner, when he is not, and permits others to rely on his misrepresentations to their detriment, the doctrine arises in favor of him who acts on the misrepresentation. A 1943 North Dakota decision, *Oelkers v. Pendergrast*,[27] was the first instance in which the doctrine of ostensible partnership was recognized in this jurisdiction. In that case three brothers lived on the same farm jointly farming 1,500 acres and all using the same farm buildings. However, each owned his own land, machinery, feed, crops and apparently did not use the others'. Plaintiff sued on two promissory notes given when defendant purchased goods and machinery from plaintiff. Defendants alleged that only one of their number made the purchase, therefore, the others should be released from liability on the notes. Plaintiff testified that he thought that the brothers were partners since they lived together and farmed together and that their purchases were made in a manner which indicated that they were partners. In holding that no

25. ROWLEY, PARTNERSHIP § 7.6 (2d ed. 1960).
26. 42 N.D. 142, 172 N.W. 72 (1919).
27. Oelkers v. Pendergast, 73 N.D. 63, 11 N.W.2d 116 (1943).

partnership existed the court stated that had the brothers held themselves out as partners, had there been a statement of partnership communicated to plaintiff, the doctrine of ostensible partnership could have been applied. However, since none of the foregoing occurred, the court could not imply a partnership.

There are certain important factors which surround the formation and use of the partnership, all of which are necessary to a consideration of this subject. All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.[28] Every general partner is the agent for the partnership in the transaction of business and has authority to do whatever is necessary to carry on such business in the ordinary manner and for this purpose may bind his co-partners.[29]

Partners do not have the authority, unless authorized by all the parties, to assign partnership property in trust, dispose of the good will, do an act which would make it impossible to carry on the business, confess a judgment, submit claims to arbitration, or dispose of all partnership property unless it is merchandise.[30] Any act done by a partner must be done apparently in carrying on the business or it cannot bind the partnership.[31] Any partner violating a partnership restriction cannot bind persons with knowledge of such restriction without authorization.[32] Formerly, the liability of partners was joint, and not joint and several.[33] All partners are of equal liability, jointly and severally, for everything belonging to or chargeable to the partnership, including all debts and obligations of the partnership; however, any may separately contract.[34] A partnership is bound by an admission of a partner,[35] liable for a partner's wrongful act,[36] and

28. N.D. Cent. Code § 45-05-07 (1961).
29. N.D. Cent. Code § 45-06-01 (1961); Engstrom v. Larson, 79 N.D. 188, 55 N.W.2d 579 (1952).
30. N.D. Cent. Code § 45-06-01 (1961).
31. N.D. Cent. Code § 45-06-01 or § 45-06-05 (1961).
32. N.D. Cent. Code § 45-06-02 (1961).
33. Continental Supply Co. v. Syndicate Trust Co., 52 N.D. 209, 202 N.W. 404 (1924).
34. N.D. Cent. Code § 45-06-07 (1961).
35. N.D. Cent. Code § 45-06-03 (1961).
36. N.D. Cent. Code § 45-06-05 (1961).

liable for a partner's breach of trust.[37] Further, an incoming partner is liable for all partnership obligations arising prior to his admission except that such obligations can be satisfied only out of partnership property.[38]

Unlike co-tenancy wherein each co-tenant buys, sells or encumbers his interest at his discretion, it is not possible to do so in the partnership, as such an act would work the dissolution of the partnership.[39] A temporary right of survivorship attaches to partnership interests, thus the partners remain in sole possession of partnership assets upon the death of one of the partners.[40] Also partners have a joint interest in the assets of the partnership and are required to sue and be sued jointly.[41]

A partnership may be dissolved by a change in the relation of the partners when any partner ceases to be associated in the carrying on of the business.[42] The partnership may be dissolved without violating the terms of the agreement, under the North Dakota Century Code, by, (a) the termination of the agreement, (b) the express will of one of the parties, (c) the express will of all the parties, (d) any event where the partnership business becomes unlawful, (e) by the death of a partner, (f) the bankruptcy of a partner in the partnership, and (g) by the decree of a court.[43]

The partnership, under most circumstances, would seem to be a valuable method of bringing land, labor and capital together to form a successful farm business. It would appear that more farmers would resort to pooling their resources in the face of rising land and machinery prices and lowered farm income.

The most important prerequisite to the formation of a farm partnership would be the existence of a cooperative and harmonious attitude between the parties to a prospective partnership agreement. Since management is shared by the partners a co-operative attitude seems imperative. Disadvantages do

37. N.D. Cent. Code § 45-06-06 (1961).
38. N.D. Cent. Code § 45-06-09 (1961).
39. Rocky Mt. Stud Farm Co. v. Lunt, 46 Utah 299, 151 Pac. 521 (1915).
40. Zuilkowski v. Kalodiziej, 119 Conn. 230, 175 Atl. 780 (1934).
41. **Supra** note 39.
42. N.D. Cent. Code § 45-09-01 (1961).
43. N.D. Cent. Code § 45-09-03 (1961).

exist, however, and should be given careful consideration prior to entering this relationship. Included among the disadvantages is the unlimited personal liability of the partners for their business acts; however, one of the major hazards of a partnership is the unlimited liability resulting from personal injury and property damage to a third person caused by partnership activities. Loss from such liability can and should be protected by adequate insurance. A further disadvantage is that the partnership is of unlimited and speculative duration, since the death or withdrawal of one partner works the dissolution of the partnership. This is especially important when consideration is given to the cost of dissolution and the fact that most farm capital is in use and not available to purchase a terminating partner's interest. Nonetheless, the partnership provides a valuable device for intra-family farming arrangements. Its flexibility provides great freedom of choice for members of the farm family and it may be easily adapted to changing family circumstances. It is usually possible to mold the partnership to fit any number of varying agricultural operations and to provide a convenient and economical basis for successful intra-family farm transfers.

CORPORATIONS

Since 1933 the law of the state of North Dakota has severely limited the right of corporate farming. The North Dakota Century Code states, "All corporations, both domestic and foreign, except as otherwise provided in this chapter, are hereby prohibited from engaging in the business of farming or agriculture."[44] This does not absolutely preclude corporate acquisition of realty, but seems only to require the disposition of acquired realty within a prescribed period of time.[45]

In 1959, a bill[46] was introduced in the Legislative Assembly of North Dakota in the House of Representatives which may indicate the changes which may be made in the future, if any. The bill provided, in essence:

1. The Stockholders shall not exceed ten in number.

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44. N.D. Cent. Code § 10-06-01 (1961).

45. Loy v. Kessler, 76 N.D. 738, 39 N.W.2d 260 (1947).

46. H.B. 724, N.D. Leg. Assembly, 1959 Sess. Similar bills were introduced in both the 1961 and 1963 sessions of the Legislative Assembly but also were not enacted.

2. Only trusts, estates or natural persons may be stockholders.

3. Non-residents may not hold stock.

4. One class of stock only may be issued.

5. An officer must supervise the farming operation.

6. Eighty percent of gross income must come from farming.

There are distinct advantages for the corporate farm structure. It seems to lend itself readily to farm distribution since the capital assets involved in the farming operation are converted in transferable certificates representing ownership in the business entity. Thus ownership is readily and easily transferred, although rather drastic ownership and management changes occur. In the father-son farming arrangement, a corporate farm is a valuable tool in gradually transferring the management and ownership of the farm from the father to the son. Initially, the father would own the bulk of the shares and receive a salary as manager. The son could also be hired by the farm corporation and gradually increase his share holdings as his earnings increase and as he develops a greater degree of managerial ability. An example of the flexibility of the farm corporation can be seen by a simple illustration. Suppose that the farm was initially incorporated by the father who held all the stock, 100 shares. The son then began helping his father, and soon, through increased earnings, purchased 20 shares. Later it would be possible for the son to enter into a purchase agreement with the father where he could purchase an additional 40 shares at the father's death. The funds from this purchase could be used for the support of the mother or for bequests to other children in order to accord equal treatment to all heirs. The remaining shares could be transferred to the mother to insure her well-being and independence during the remainder of her life. Upon her death the son could arrange a purchase of these shares and become sole owner of the farm assets, as his father had been upon initial incorporation. This indicates the great flexibility of the corporate farm and its value in father-son farming agreements.

OTHER RELATIONSHIPS

The joint tenancy relationship may be used for transferring the father's interest in his farm to his son. A joint interest is defined as "one owned by several persons in equal share by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."[47] The unique characteristic of the joint tenancy is the right of survivorship.[48] Joint tenancy is not an estate of inheritance and on the death of the joint tenant, the property descends to the survivor or survivors, and finally to the last survivor.[49] The right of survivorship terminates only where the entire estate, in those instances where the original tenants have not disposed of their interests, comes into the hands of the last survivor, who takes an estate of inheritance free and exempt from all charges made by his deceased co-tenants.[50] The inevitable consequence is that a joint tenant cannot devise his interest in the property so held. This concept derives from the theory that a devise does not take effect until the death of the devisor and since the claim of the surviving tenant also arises at the death of the co-tenant, the courts have generally preferred the claim of the surviving tenant over that of the devisee.[51] In order to create a joint tenancy the unities of time, title, interest and possession must exist.[52] Any property subject to individual ownership may generally be held in joint tenancy. This applies to corporeal or incorporeal goods.[53] A joint tenancy may be of an estate in joint tenancy for years, or at will.[54] An estate in joint tenancy arises solely by grant or devise and never as the result of descent or an act of law.[55] Therefore, a joint tenancy never arises except by an affirmative act of the parties and it is necessary that some sort of express or oral grant or devise be made in order to effect the creation of this estate.

47. N.D. Cent. Code § 47-02-06 (1961).
48. **In re** Kasparis Estate, 71 N.W.2d 558 (N.D. 1955).
49. **Supra** note 48 at 564.
50. Stombough v. Stombough, 288 Ky. 491, 156 S.W.2d 827 (1941).
51. Bossler v. Rewodlinski, 130 Wis. 26, 109 N.W. 1032 (1906); Echardt v. Osborn, 338 Ill. 611, 170 N.E. 774 (1930).
52. Greiger v. Pye, 210 Minn. 71, 297 N.W. 173 (1941).
53. 14 Am. Jur. **Co-Tenancy,** § 10 (1938).
54. Duncan v. Forrer, 6 Binn. 193 (Pa. 1813).
55. Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928).

While the early common law favored the creation of the joint estate, the later decisions have been unfavorable to the right of survivorship, and as a consequence the acts of the parties must expressly state or show a positive intent that a joint interest was intended.[56] As an alternative to the joint tenancy the courts now uniformly favor the creation of the tenancy in common.[57] The North Dakota Century Code states "Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint tenancy."[58]

A joint tenant may destroy or "sever" his relation with the other tenant or co-tenants. Therefore, one of two joint tenants can convey a half interest to a third party, who holds with the original tenant as a tenant in common since unities of time and title are lacking. However, where a joint tenant decided to sever the tenancy relationship by conveying away his interest, it must be remembered that a subsequent re-conveyance back cannot restore the original joint tenancy,[59] but creates a tenancy in common. The theoretical anomaly of treating the original joint tenants as each owning the whole for purposes of survivorship, but permitting each to convey an individual part interest, was concealed by the concept that joint tenants held "*per my et per tout.*"[60]

Each joint tenant has undivided possession of all the property owned by all co-tenants. No tenant owns a specific or specified share and all shares are presumed to be equal.[61] In the absence of a contract to the contrary,[62] each co-tenant has a complete right of possession with other co-tenants to the extent of his interest.[63] The problem of compensation for repairs or services rendered by co-tenants, in and out of possession, is a knotty one; however, certain general princi-

56. Armstrong v. Hellwig, 70 S.D. 406, 18 N.W.2d 284 (1945).
57. **Ibid.**
58. N.D. Cent. Code § 47-02-08 (1961).
59. See Portridge v. Berlinger, 325 Ill. 253, 156 N.E. 352 (1927).
60. "Under common law the joint tenants were seized **per my et per tout** by the half and by the whole, that is, each has entire possession of the estate." State Board of Equalization v. Cole. 122 Mont. 9, 195 P.2d 989, 994 (1948).
61. Duncan v. Suhy, 328 Ill. 104, 37 N.E.2d 826 (1941).
62. State v. Roby, 43 Idaho 724, 254 Pac. 210 (1927).
63. Swartzbough v. Sampson, 11 Cal. App. 2d 451, 54 P.2d 73 (1936).

ples and rules may be stated. A joint tenant, in sole occupation of the property, generally may receive reimbursement for improvements made, provided an accurate accounting of said improvements is made.[64] Ordinarily, however, one joint tenant may not demand compensation for services or repairs made without the other's consent;[65] nor can he claim a lien on the co-tenant's portion of the property until reimbursement is made;[66] nor can he compel a co-tenant to make improvements on the jointly-held property.[67] A joint tenant may generally contract[68] with his co-tenant concerning the use of the property. Joint tenants must have an authorization from their co-tenants in order to lease, mortgage, pledge, sell, convey, or otherwise act in respect to the property.[69]

It is possible to draw general conclusions as to the relative advantages and disadvantages of joint ownership in intra-family farm planning. The major advantages are: (1) delay and expense are absolutely minimized at the death of one of the co-tenants, (2) the reltationship generally promotes harmony among the co-tenants, and (3) freedom from unsecured claims against a deceased co-owner is insured. On the other hand, major disadvantages include: (1) co-ownership is less desirable than a carefully drawn will, (2) a joint tenancy lacks flexibility, (3) it lacks management provisions, (4) all liquid assets may be lost to meet estate and inheritance taxes and other expenses upon death, and (5) it fails to provide for disposition should joint tenants die simultaneously.

TENANCY IN COMMON

The tenancy in common is a useful tool in planning intra-family farm transfers, in that portions of the farm land may be passed on to a son or sons without disturbing the operation of the unit to an extent which would hinder the operation as a whole. Tenancy in common or an interest in common is "one owned by several persons not in joint ownership or partner-

64. Miller v. Prates, 267 Ky. 11, 100 S.W.2d 842 (1937).
65. **Ibid.**
66. Cain v. Hubble, 184 Ky. 38, 211 S.W. 413 (1919).
67. Ward v. Ward, 40 W. Va. 611, 21 S.E. 746 (1895).
68. Tindall v. Yeats, 392 Ill. 502, 64 N.E.2d 903 (1946).
69. 48 C.J.S. **Co-Tenancy** § 14-17 (1947).

ship. Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership for partnership purposes, or unless declared in its creation to be a joint tenancy."[70] Tenants in common hold distinct titles with no privity of estate existing between them, therefore, since no agency relationship exists between them, one owner cannot dispose of the interest of another unless he is duly authorized to do so.[71] As opposed to the joint tenancy and its four "unities", only one unity is necessary to the tenancy in common, that being possession.[72] The tenancy in common, while normally thought to apply mostly to realty, can exist in every form of property whether real, personal, or mixed,[73] corporeal or incorporeal.[74]

The tenancy in common may be created either voluntarily or involuntarily. Thus it may happen, and often does, that persons believe themselves to be creating a joint tenancy when in fact they are creating a tenancy in common.[75] It seems generally held that, unless a contrary intent is shown, a grant to two or more persons generally creates a tenancy in common. This results usually from the enactment, in many states, of statutes limiting the creation and existence of joint tenancies.[76]

Each tenant in common is equally entitled to a share in the rents and profits resulting from use and occupation of the common property.[77] As a general rule it may be said that a tenant *in possession* of common property, using and enjoying that property, and who has not an express or implied agreement to the contrary with his co-tenants out of possession, may keep the rents and profits accruing from his use and occupation without incurring a liability to pay his co-tenants.[78] It is generally held that a co-tenant, under the above described circumstances, who fails to exercise his rights by allowing another to use and occupy land relinquishes

70. N.D. Cent. Code § 47-02-08 (1961).
71. Bower v. Western Livestock Co., 103 N.W.2d 109 (N.D. 1960).
72. Jones v. Shrigley, 150 Nebr. 137, 33 N.W.2d 510, 516 (1948).
73. Kruna v. Malloy, 22 Cal. 2d 132, 137 P.2d 18 (1943).
74. Warner v. Warner, 248 Ala. 556, 28 So. 2d 7 (1946).
75. Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928).
76. N.D. Cent. Code § 47-02-08 (1961).
77. Flynn v. United States, 205 F.2d 756 (8th Cir. 1953).
78. Spew v. Shipley, 85 P.2d 999 (Kan. 1939); Winn v. Winn, 131 Neb. 650, 269 N.W. 376 (1936).

his right to do so.[79] On the other hand, a tenant in common, who receives rents and profits *from a third person* must account to his co-tenants, in proportionate shares, all rents and profits so received.[80] However, where a tenant in common occupies no more than his share and receives rents or profits from no more than his share, it is not necessary that he account to his co-tenants for such receipts.[81]

A tenant in common who commits waste upon the common property, or commits any act which destroys or does permanent injury to the property will be liable in an action at law for the value destroyed.[82] The North Dakota Century Code provides that any tenant in common who commits waste upon common real property may be held accountable for treble damages, evicted from the premises, and divested of his share.[83] Generally, actions which may constitute waste are: failure to make necessary repairs, removal or destruction of the soil, timber, buildings, and so forth.

Since the tenancy in common is not a partnership and the various co-tenants are not in a principal-agent relationship, it naturally follows that a co-tenant cannot bind each other's interests, but only their own as it relates to their undivided portion.[84] However, it has been held that where the benefit of an act inures to all the parties or where an act is done to prevent the imminent destruction of the common property that all co-tenants may be bound by the act of one of their number.[85]

Finally, the rights of co-tenants to alien or encumber the common property must be considered. The cardinal point is that a co-tenant may freely deal with his own moiety or interest in the property; but, without ratification or authorization from all other interested parties, he cannot affect the whole interest. Any transaction made by a single tenant, affecting the whole tenancy without such authorization, is a mere nullity and will not be recognized or honored by the

79. Thompson v. Flynn, 102 Mont. 446, 58 P.2d 769 (1936).
80. See Stevahn v. Meidinger, 57 N.W.2d 1 (N.D. 1952).
81. Scontleen v. Allison, 32 Kan. 376, 4 Pac. 618 (1884).
82. Whitehead v. Whitehead, 21 Del. 436, 181 Atl. 684 (1935).
83. N.D. Cent. Code § 37-17-22 (1961).
84. **Supra** note 80.
85. Crary v. Campbell, 24 Cal. 634 (1864).

courts.[86] This doctrine applies to a sale of the property (except where a tenant, under color of title resulting from said sale, affects title by adverse possession), lease, mortgage, judical sale, trust deed, easement, or profit. Thus, the action of one without the consent of the others affects only the undivided interest of the actor.

TENANCY BY THE ENTIRETY

The Supreme Court of North Dakota has not had occasion to examine fully all aspects of the problems arising from tenancy by the entirety. This doctrine in North Dakota has been only casually mentioned in dictum. This would seem to indicate that this form of tenancy has affected our legal system, only slightly.

A tenancy by the entirety is closely akin to the joint tenancy as we know it in North Dakota. The estate arises by a conveyance to a husband and wife by reason of the marriage relationship.[88] Husband and wife take the estate as one person, and therefore the right of survivorship, as in the joint tenancy, attaches to this relationship.[89] The main characteristic of this estate is that each spouse is seized of the whole or entire estate, not *"per my et per tout"*, *"per tout et non per my"*.[90]

The estate is distinguishable from the joint tenancy, in which innumerable persons may be invested with an interest in the property, unlike an estate by the entirety, where the interest may be invested only in husband and wife.[91] North Dakota has adopted legislation commonly known as Married Women's Acts or Property Acts,[92] which are generally construed as allowing separate estates for married women without abolishing estates by the entirety. Where recognized, the estate by the entirety arises out of a conveyance to husband

86. **Supra** note 80.

87. See 14 Am. Jur. **Co-tenancy** § 84-89 (1938).

88. United States v. Jacobs, 306 U.S. 363, 386 (1939).

89. Schrone v. Burt, 111 F.2d 557 (6th Cir. 1940).

90. Presidential Ins. Co. of America v. Bickford, 179 Misc. 303, 40 N.Y.S.2d 376 (1943).

91. Deslauriers v. Senesac, 331 Ill. 437, 163 N.E. 327 (1928).

92. "Except as otherwise provided by section 14-07-03, neither the husband nor the wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." N.D. Cent. Code § 14-07-04 (1961).

and wife;[93] thus it naturally follows that the estate, in order to exist, must follow the marriage relationship.[94] The unities of time, title, interest, and possession are as essential to an estate by the entirety as to a joint tenancy;[95] and the estate may exist for life, in fee, or as a term for years, whether in possession, as a reversion or remainder.[96]

The estate may be severed or terminated by joint conveyance, death of one of the parties, or absolute divorce.[97] In considering the respective rights of the parties, differing theories exist as to division of rents and profits. The better view seems to be that during marriage each spouse holds one-half of the estate in common with the other,[98] and is entitled to one-half of the income, rents, and profits.[99] This view takes into consideration the Married Women's Act which, when construed, would give the parties an equal share of the proceeds as though it were a tenancy in common. Broadly stated, it might be said that neither spouse has such right, title or interest as would allow separate sale, mortgage, or encumberance of the property without the consent of the other.[100]

LEASE WITH A CONTRACT TO MAKE A WILL

This unique method contemplates a lease of the family farm by the father to the son, plus a contract whereby the father contracts to will the farm to the son in consideration of the son's promise to support the parents during their lifetime. This method was apparently first suggested in two New York decisions, *Stephens v. Reynolds*[101] and *Parsell v. Stryker*.[102] In these cases, the lease provided that the son would work the farm, share the expenses, divide the profits, and house and support the parents. As consideration for this agreement to support, the father contracted to will the land

93. **Supra** note 88.
94. Schafer v. Shafer, 122 Ore. 620, 260 Pac. 206 (1927).
95. Pegg v. Pegg, 165 Mich. 228, 130 N.W. 617 (1911).
96. Dows v. Bass, 188 N.C. 200, 124 S.E. 566, 571 (1924).
97. Kilgore v. Temple, 188 Ind. 675, 125 N.E. 457 (1919).
98. Nobile v. Bartletta, 109 N.J. Eq. 119, 156 Atl. 483 (1931).
99. Cornell v. Golden, 179 Misc. 757, 39 N.Y.S.2d 957 (1934).
100. Tyler v. United States, 281 U.S. 497 (1930).
101. 6 N.Y. 454 (1851).
102. 41 N.Y. 480 (1869).

to the son free of all incumbrances except those necessary for the support of the father and his wife. The court subsequently held that the son was entitled to the farm under the terms of the contract.

Difficulty in making the foregoing type of arrangement may be encountered in the provisions of the North Dakota Code limiting the length of leases of agricultural land to periods of no longer than 10 years.[103] But in view of the decision rendered in the case of *Anderson v. Blixt*[104] holding that a lease for an indefinite period of time did not exceed the ten year provision of the statute, it may be that the lease with a contract to will may be valid and enforceable in this jurisdiction. Further support for this position may be found in the case of *Wegner v. Lubenow*,[105] a 1903 North Dakota decision, which held that it is competent to make a grant for life upon a money consideration.

The New York court in *Parsell v. Stryker*, by way of dictum, suggests remedies for breach by either of the parties. In the case of breach by the son, it is suggested that the parent could bring an action to void the agreement, and recover possession with damages.[106] Should this course be pursued, it is possible that the son could seek relief against foreclosure in equity, thereby preserving his rights in the property.

DEED TO SON FOR PROMISE TO FURNISH PARENT'S SUPPORT

In this situation the son is deeded the farm property upon a covenant or condition annexed to the deed whereby the son promises to furnish all or part of the parents' support during the remainder of their lives. This arrangement generally raises serious problems in determining the respective rights of the parties upon default. A study conducted under the auspices of the Agricultural Experiment Station of the University of Wisconsin suggests that land conveyances made by parents to children in exchange for a promise of support may be a part of the solution to the problem of ac-

103. N.D. Cent. Code § 47-16-02 (1961).
104. 72 N.W.2d 799 (N.D. 1955).
105. 12 N.D. 95, 95 N.W. 442 (1903).
106. **Supra,** note 102.

quiring early farm ownership without outside credit and precluding the partition of the farm through the necessities of descent and distribution.[107] However, a subsequent work[108] expresses serious reservations as to the feasibility of this arrangement, principally because of the family controversy which often results from these arrangements. In the case of *Hartstein v. Hartstein,* the Wisconsin court refers to support contracts as "one of those unwise contracts often entered into between parents and child."[110] A North Dakota decision analogous to the situation here presented was *Coykendall v. Kellog,*[111] a 1924 decision, in which the grantee of a warranty deed agreed to support the grantor and his wife during their lifetimes. The pertinant covenant stated that the "granted lands shall stand as security therefor."[112] The court held that the grantor had a valid lien upon the lands conveyed to insure performance of the contract for support. The principal difficulty encountered in this situation arises when the legal effect of the covenant or condition must be determined. A prospective purchaser may be deterred from acting by the possibility of a defeasible interest, or that a subsequent encumbrance may cloud the title. A better method might be to have the parents transfer the land to the son, reserving a life estate in themselves and embodying in the terms of the agreement with the son the aforementioned terms regarding the parents' support. This would give the parents a clearly retained interest in the land, while the son would have all the benefits of ownership and full management.

CONCLUSION

Consideration must also be given to various problems of taxation and estate planning problems in determining modes of intra-family farm transfers. Rising land values, greater mechanization of the farming operation, the cost of mechanization and the resulting growth in the average size of farms have combined greatly to increase the capital investment

107. "Your Property—Plan its Transfer," University of Wis. Extension Service, Circular 407, April, 1956.
108. BEUSCHER, LAW AND THE FARMER, (3d ed. 1960).
109. 74 Wis. 1, 41 N.W. 721 (1889).
110. **Ibid.**
111. 50 N.D. 857, 198 N.W. 472 (1924).
112. **Ibid.**

which a farming operation requires. Parallel to the development of these phenomena in agriculture has been an increase in taxation and a resulting greater complexity of the various taxing laws and regulations. The family farm unit has been forced to examine the possibility of organizing itself into some type of an arrangement to facilitate intra-family farm transfers and to secure more easily the capital which large-scale farming requires and to alleviate, as much as possible, some of the tax laws and regulations which affect the family farming unit in an unfavorable way.

This discussion has considered and re-evaluated the basic legal aspects of the various relationships which exist in farming operations. A future discussion will consider the tax aspects of intra-family farm land transfers.