

Farm Transfer Risks and Liabilities



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Continuity of Legal Authority

Authority to carry on business affairs for an entity/person - no waste or liability

Contractual authority - financing, vendor/vendees, leases, employment

Authority to access bank accounts, asset holdings, legal documents and professionals

Authority to enforce rights, file appeals, address regulatory filings and defend any enforcement actions

Identification of Successor

By Operation of Law - Joint tenancy with rights of survivorship; Tenancy by the entirety; automatic and no probate

Intestacy Laws - If held under individual ownership and no will

By Will - Executor/Executrix - only for purposes probate administration then will either go directly to beneficiary under specific bequest or as part of the residual estate to be divided between heirs; if property owned as tenants in common, ownership will pass through will to heirs or by intestacy

By operation of corporate documents - successor officer(s) under operating agreement - automatic upon expiration of requisite time; may need Court determination if an officer is presumed dead but not confirmed

By Court appointment - if no unopposed or clearly identified successor; Chancery action may appoint an interim manager pending final determination

Resulting Legal Action - Quiet Title

Legal action to determine rightful ownership against competing claims

Lis Pendens filing - puts third parties on notice of claims

Chancery Division matter not tried by jury

Other monetary claims can be brought along with the claims for ownership - typically rent or payment on sale

Injunctive or other equitable relief sought - ouster of occupant, turnover of equipment

May have Court appointed manager of property *pendente lite*

Generally based on an agreement of sale or some contractual document

Resulting Legal Action - Partition

Ownership held by multiple individuals, member, or shareholders

Physical partition or parties subject to forced buy out

Physical partition - each partitioned piece must be economically viable; real property is unique but appraisal will assist in equalizing

Buy out - need liquidity; number of ways to handle establishing amount and procedures for sale/purchase

Need to be able to transfer clear title - clear up any liens, satisfy judgments

Valuation experts needed - can agree to mechanism with one appraiser or other professional issuing a binding determination; each party can have its own

May need some other use/occupancy agreements - even post partition

May have Court appointed manager as well to ensure all obligations met and rights can be enforced - often one of the parties

Realities of Legal Proceedings

Take time - fair to assume an adjudicated resolution at least a year away; changes in valuation; issues of ongoing operations and opportunity losses

Take money - attorneys, costs and litigation expenses, experts; can dissipate assets to cover both sides; limited awards of counsel fees against the losing party

Issues of conflicts with representation - may take out desired counsel; may require conflict waivers for joint representation

Adjournments and rescheduling common; less common reassignment of judges- result is that you may have continuously shifting time frames

Risk attendant with the outcome - may be adverse or subject to appeal

Alternative Dispute Resolution Mediation

Can take many forms and have creative approaches to resolution

Court programs - County specific; limited pool of mediators; may opt out; pay for time beyond limited period

Private - will likely pay; mechanism to choose mediator; while typically lawyer, can be accountant or other trusted intermediary

Assigned Judge - Will always try to settle cases to move docket; some better settling skills than others; Chancery - trial judge can only mediate if both parties agree

Hallmark of a good mediated settlement - both sides are not happy

Typically approach at specific junctures: pre-suit; after some fact discovery; prior to incurring more significant litigation costs

Alternative Dispute Resolution Arbitration

Liken to a mini trial; will require testimony and evidential proffers

Format and procedures often follow AAA

Binding and non-binding; Court programs are non-binding but you must affirmatively reject the decision

Control over arbitrator limited in Court programs; private arbitrators can have more tailored experience and background

ADR generally more expedient and less expensive forum than pursuing adjudicated outcome

Decision embodied in binding and enforceable agreement - often includes enforcement remedies and continuing jurisdiction of the Court (with filed actions)

Anecdotal Observations

In larger scale farm operations that span generations, sometimes diverse ownership as between the real estate and equipment or questions as to joint ownership can create additional stressors if there are any underlying issues or tensions

Surveys may be a costly and time consuming factor - can try to reduce scope but may still want some key monuments especially with partitions

While farm parcels often valued on per acre basis, each parcel may have unique factors impacting an overall valuation - soils, easements, environmental constraints; assemblage to others - with most important generally being development potential (e.g. zoning, frontage, percolation, access to utilities)

More ownership interests typically generate additional cost and time/delay issues at all stages

Preservation through is a time consuming process and will require consensus at multiple junctures