2-1-1950

Abstract of Title to Keeping Your Farm in the Family

Max Myers

Abstract of Title

TO

KEEPING YOUR FARM IN THE FAMILY

Agricultural Economics Department
Agricultural Experiment Station
South Dakota State College - Brookings

BULLETIN 398
FEBRUARY 1950

Table of Contents

Keeping Your Farm
IN THE FAMILY

By Max Myers[1]

"I Haven't Thought About It..... But Maybe I Should"

That was the most common reply when almost two hundred farm families were asked about the disposition of their farms.

Entirely too many farm owners—most of them in fact—die before they get around to making a decision as to who gets the farm. The families, the farms, and the public will benefit if farm transfer arrangements are made more carefully, and sooner.

Many farmers want to keep their farms in their own families for future generations. There are sound reasons to support this desire for those on adequate and efficient farm units. One of these reasons is that a farm transferred within the family can more easily be transferred as a "going concern."

Family pride and sentiment are not the only reasons supporting a desire to keep the farm in the family. It has long been felt that the nation and the local community will be served best by farmers who are independent, who own and operate their land and pass it on to future generations of the same kind of farmers. It has been thought that such farm families will use the land carefully, maintain a stable agriculture, and produce desirable citizens. So the development of such a class of farmers has been a national goal, although one never completely attained.

If the foregoing reasons are taken with reasonable moderation and applied to successful farm businesses of adequate and efficient size, there is no inconsistency with other trends in agriculture. But it must be realized that there is a definite trend toward fewer, larger farm businesses and fewer, better-rewarded farmers. There is, and must be, a flow of farm people to other occupations. These trends are working toward the long-run economic advantage of the public and of the farm population.

It is not intended to encourage efforts to keep in the family a farm business which is not large enough or efficient enough to hold its own in modern competition. Nor is it intended to encourage efforts to hold young people on the farms, who should go elsewhere or who want to go elsewhere. Some farms can well be kept in the family. Other farms should not.

Some farm families will gain by discussing and planning farm transfer arrangements. This bulletin is for those who are considering the possibility of keeping their farm in the family and who want information concerning the various methods.

---

[1]Economist, South Dakota Agricultural Experiment Station. This study was made possible by the cooperation of more than 200 farm families, and 222 lawyers, members of the South Dakota Bar Association, Dean Marshall McKusick, South Dakota University Law School, and B. H. Schaphorst, Attorney of Brookings, South Dakota, contributed valuable advice and criticism.

Farm owners or family members interested in keeping the farm in the family can well afford to spend some time thinking about these questions:

Is your farm one which should be kept in the family?

Is there a son or daughter who wants to carry it on?

Can the members of the family discuss this matter and reach a workable decision?

What are the special needs of your situation?

What method of transfer will fit your situation?

What help should you get from a lawyer?

This bulletin will not tell you what to do with your farm, or how to do it. It is intended to show the importance of early planning and arrangements for the transfer of farms between generations. It does give a plain-spoken, general description of the methods available to the farm owner who is wondering how to turn over the home place to a younger man. And it indicates some of the details that a younger man should consider before he enters an agreement.

Many Farms Not Transferred Within Families as Going Concerns

One has only to look around the average farming neighborhood to realize that relatively few farms stay in the same family for successive generations, and that even fewer farms are transferred as complete, operating businesses. Generally the retiring farmer sells his stock and equipment at public auction, takes his valuable management knowledge off the farm and lets a new operator learn by trial and error.

Such informal observations are supported by tenure statistics for South Dakota. Despite the many laws and policies directed toward land ownership by farm operators, there has been a long-term decline in the percentage of owner-operators. This is pictured in Fig. 1, page 5. Although ownership of farms by farm operators has increased since 1940 this cannot yet be considered a change in the long-term trend.

More specific evidence as to the ways in which South Dakota farmers acquire and dispose of land was gathered during 1947-48 from a study of the tenure histories of 144 families who have operated or owned 130 farms in eight South Dakota counties.[2] Of these, 107 owned or had owned land, but only 20 owned land which had been acquired by an earlier generation of the same family, and none of these families had held land three generations. (See Table 1, page 22.) There are a small number of families in South Dakota which have held land for three or more generations, but none were found among the 144.

These families had acquired ownership of 248 tracts of land totaling 72,695 acres. The bulk of this land, 86 percent of the tracts and 91 percent of the acreage involved, was obtained from non-relatives. (See Table 2, page 22.) Inheritance clearly played a small part. However, in Lincoln County, which has been settled longest, 36 percent of the tracts and 26 percent of the acreage had been obtained from relatives. (See Table 3, page 22.) Most of the land acquired—more than three-fourths of the acreage—was purchased outright from non-relatives. (See Table 4, page 22.)

[2]Records were obtained in selected areas in the following counties: Beadle, Brookings, Butte, Harding, Lincoln, Meade, Sully, Tripp. These were block samples. There was no selection of cases.

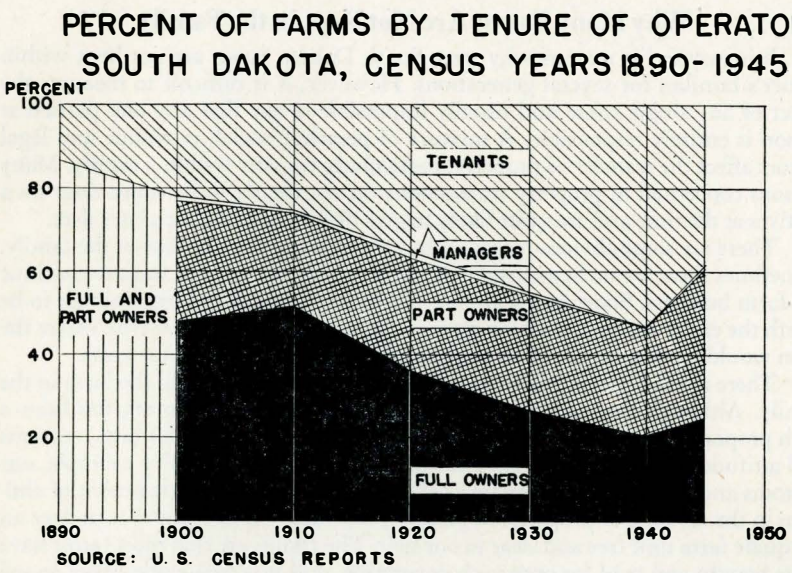


Fig. 1. The proportion of farm operators who were owners, part-owners and tenants, South Dakota census years, 1890–1945. The pre-1940 trend toward tenancy was reversed during the second World War. In considering the size of the farm, full-owner operators rank below part-owners and tenants. Part-owner farms are larger than those of either tenants or full-owners. Separate percentages for owners and part-owners are not available prior to 1900.

These same families had disposed of title to 92 tracts of land, including 25,855 acres. Just as most of the land acquired had come from non-relatives, so most of the land relinquished went to non-relatives. Actually, 71 percent of the tracts and 83 percent of the acreage were transferred to non-relatives. (See Table 5, page 23.)

On this particular survey, evidence was not gathered as to whether farms were transferred as going concerns. However, the impressions obtained during the visits with farm families and the inferences to be made from the data are that very few farm businesses were transferred intact. It has not been customary to do so.

In addition to the 144 tenure histories obtained in the eight selected areas, additional studies were made of a few families scattered about the state. These were families which had kept land in the family for three generations or more, or which had a definite plan for keeping land in the possession of the family from one generation to the next. Many of the ideas expressed here came from these three-generation farm families.

All the evidence supports the observations one might make in many farming neighborhoods. Relatively few farms stay in a family for more than one generation; few farmers have any definite plans for the disposition of their property; and even fewer farm businesses are transferred as going concerns. What are the reasons for the existence of this situation when many farm people want it to be otherwise and when there are good reasons for having it otherwise?

Why Many Farms Are Not Kept in the Family

It is easy to list reasons why most South Dakota farms are not kept within owner's families for several generations. However, it is difficult to measure the effect of any single cause and usually impossible to say that any one particular reason is entirely responsible. A mixture of personal, social, economic and legal factors affect the transfer of property, particularly transfer within a family. Many persons concerned in property transactions do not clearly understand their own motives at the time and are quite likely to give different reasons at a later date.

There are some obvious reasons why certain farms are not kept in the family. Sometimes there are no heirs to take the farm, or the heirs do not want to continue the farm business. Some farms are not productive enough or large enough to be worth the effort necessary to keep them in the family. This may be true where the farm would have to support two families, the parent's and son's, for years.

There are also general factors which render it difficult to hold the farm in the family. Although the national goal throughout the nation's history has been a high proportion of owner-operated, family-size farms, some of our laws, customs and attitudes have worked against the attainment of this goal. For example, our customs and our laws of inheritance call for equal or equitable treatment of children in the division of property. In practice, this makes it difficult to turn over an adequate farm unit free and clear to one heir. The results are that most farms have to be bought and paid for once each generation, and it is frequently easier to sell the farm to an outsider than to work out a land settlement among the heirs.

It has also been a general custom to leave the decisions concerning the distribution of property until the death of the owner and to shun the discussion of such matters within the family until approximately the same time.

Another general factor affecting the farm succession situation is the "age gap." Young Johnny Jones at 23 to 25 years of age is ready and eager to operate a farm, preferably the home farm, but Farmer Jones, Sr., at a husky, healthy 50 years, doesn't feel like stepping down. So Johnny generally has to go elsewhere. Ten years later when Farmer Jones wishes to retire, Johnny has established himself elsewhere and does not feel able to break off and return home.

The "age gap" problem is closely related to the inheritance pattern mentioned above. Johnny Jones is less likely to work for years at home, or to come back to the home farm if he knows that by the laws of inheritance, or by the terms of a will, he will get only one-third or one-fifth of the farm and the privilege of buying the shares held by other heirs.

It takes a lot of money to get started in farming in these days of large, mechanized farms. This is one factor which has influenced many young people to go into non-farm occupations even to the extent of leaving no one in the family to take over some of the farms. Increases in the size of farms have reduced the number of farmers and also reduced the chances for some families to keep their farm in the family. These trends toward a more efficient agriculture have been beneficial to the nation, as has been the shift of workers to other industries.

Uncertainties of prices and of weather have combined in South Dakota during some periods to make it difficult to maintain land ownership or to pass it on to a son as in the '30's. However, during the early 1940's it was relatively easy for farmers to acquire, hold and transfer land. For the individual this poses a question of being born at the right time.

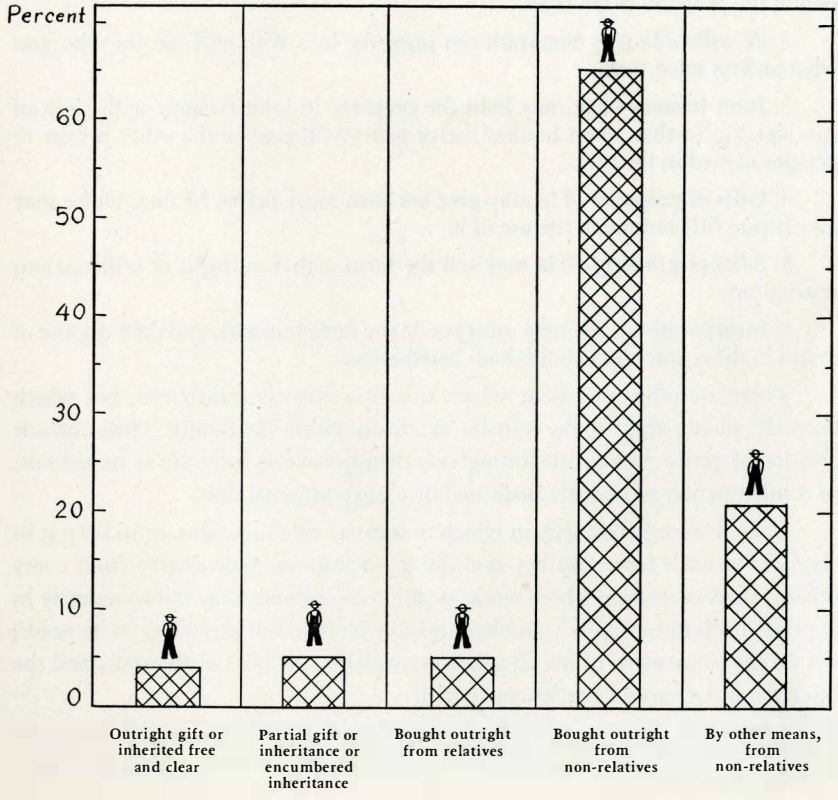
Combined with all these factors is a hesitancy on the part of most farm owners and members of farm families to come to a clear understanding of what can and ought to be done about the disposition of the farm business, and to take action on the matter.

Laws, customs and attitudes can be changed if necessary. Actually, the laws of South Dakota which pertain to transfers of property titles are sufficiently broad to permit a family to work out almost any desired arrangement. Competent legal advice is available in most towns in the state. The trend toward larger, more expensive farm businesses is likely to continue, but the family which wishes to do so can make arrangements to soften the impact of this on the young farmer.

Hesitancy to discuss such arrangements and to take action within the family can be overcome if the family members wish to do so. Early planning and arrangements can offset the effects of the "age gap" if other circumstances are favorable. However, the economic instability of American commercial farming and the weather of the Great Plains are still beyond the control of the farm family.

Assuming, then, that a particular farm family holds a successful farm business and includes a son or son-in-law who is interested in taking over the farm, what are the various ways in which the transfer can be handled?

Fig. 2. Ways in which 144 South Dakota farmers acquired land (248 tracts).



Ways In Which Title to Farms Can Be Transferred[3]

There are several methods by which a farm may be transferred to another owner. The more commonly used means are listed below and discussed in the following paragraphs. These are purposely discussed in everyday language and not in legal terms, because the objective is to present only a general view of the choices and their application.

A farm owner who is considering the transfer of his property will need detailed and specific information. For that he should obtain legal advice. One should never undertake as important a transaction as the transfer of title to real estate without the assistance of an attorney. The lawyer can provide valuable advice, the legal language and the technical details. That is his business. But it is the land owner's business to decide what it is that he wants to do with the property.

The principal alternatives which lie before the farm owner who is considering the disposition of his property are these:

1. **The laws of inheritance** (or Descent)—The owner may make no disposition or plans. After he dies intestate (without a will) the courts will make disposition of the property to the heirs.

2. **A will**—He may bequeath the property in a will, and specify who gets what and on what terms.

3. **Joint tenancy**—He may hold the property in joint tenancy with right of survivorship so that when he dies the property will pass to the other person or persons named in the title.

4. **Gifts of property**—He may give his farm away before he dies. Or he may give future title but retain life use of it.

5. **Sales of property**—He may sell the farm, either outright or with various restrictions.

6. **Incorporation**—He may incorporate the farm business, and then dispose of shares in the corporation by methods listed above.

There are other means by which title to a farm is transferred, but which normally do not apply to the transfer of a farm within the family. These include creation of a trust, loss of title through tax delinquency, foreclosure or forced sale, or condemnation procedures instituted by a governmental unit.

There is no one best way in which to transfer title to a farm, or to keep it in the family. Each farm family's case differs at least in some degree from every other case. A procedure which works well in one instance may fail completely in another. Each farm family's problem must be worked out according to its needs, within the framework of the alternatives available, the laws of the state, and the interests of the various parties concerned.

[3]This section is based upon information obtained from farm people and from lawyers. A brief questionnaire, prepared with the assistance of Dean Marshall McKusick, South Dakota University Law College, was mailed to each member of the South Dakota Bar Association. Two hundred twenty-two informative replies were received from the 643 letters sent.

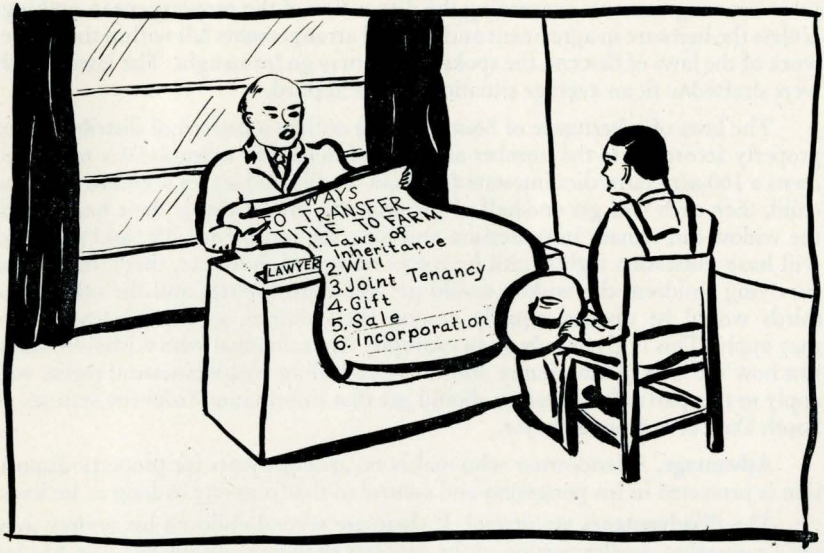


Fig. 3. It is up to the owner to decide what he wants to do with his property. A lawyer can provide valuable advice as to ways of making transfers.

Several sets of interests must be reconciled in order to accomplish a successful family transfer of a farm business. These interests include the following:

The needs of the parents (landholders) for security of income as long as either lives. This is particularly important when the farm is their only property.

The desire of the young man and his family for security of expectation, that is, the certainty that they will own the farm if they work on it and improve it.

The interests of other heirs in the family, who under the American way of doing things, expect to receive equal or equitable treatment.

The interests of the farm, which should not be deteriorated in the process of farming or of transferring the farm. The community and the general public also have an indirect interest in the farm—an interest in efficient, continuous production of foods.

The importance of each of these interests will vary from family to family and from time to time. The problem, then, is to select arrangements which will fit the particular combination of circumstances in the individual case. In the discussion of various methods of transferring property, the advantages and disadvantages of the methods are phrased, when possible, in relation to these differing interests.

1. Disposition of property through laws of inheritance:

The most common method of passing farm property from one generation to the next has been that of making no arrangements and letting the courts distribute the estate according to the laws of inheritance after the death of the owner. Oral

promises or agreements concerning the disposition of the property mean nothing. Unless the heirs are in agreement and the oral arrangements fall within the framework of the laws of descent, the spoken plans may go for naught. The laws, which were drafted to fit an average situation will be applied.

The laws of inheritance of South Dakota outline a pattern of distribution of property according to the number and type of heirs. For example, if a man who owns a 160-acre farm dies intestate (without a will) and leaves a widow and one child, then each will get one-half of his property. But if this is their homestead, the widow can remain in possession and have the income for life, and the child will have possession rights until he comes of age. If, however, there are several surviving children, the widow would get one-third interest and the other two-thirds would be divided equally among the children, and homestead rights may apply. This is given only as an example. An individual who wishes to know just how the laws of inheritance and the laws dealing with homestead rights will apply to this particular situation should get that information from the statutes of South Dakota or from a lawyer.

Advantage. A landowner who makes no arrangements for property disposition is protected in his possession and control of that property as long as he lives.

The **disadvantages** are several. If there are several children his widow may get a somewhat smaller portion of the property than he would have given her for her lifetime. The children may have less incentive to help care for and improve the property, or to take over the farm, during the owner's life because of the uncertainty of disposition. Finally, this kind of disposition can lead to bitter conflicts within families after the death of the owner, especially if some of the heirs have contributed heavily to the care of the parents and others have not, or if the parents have already made gifts to some heirs and not to others.

Despite these disadvantages, there are cases where lawyers recommend that an owner leave his property to be allocated according to these laws. The important thing to remember is that such a course of action should be a deliberate choice made because the laws seem to fit the particular situation and not, as so often happens, the result of thoughtlessness on the owner's part.

2. Disposition of property by will:

It is commonly assumed that everyone with any property should have a will. It is evident, however, that relatively few people do have wills. Of the 79 landowners studied only 7 reported having made wills, even though their average age was 53 years.[4] Research work in the county land record files of eight counties clearly indicated that the majority of farmers die intestate.

Of the lawyers replying to the mail questionaire more have advised the use of a will to distribute farm property than any other method. None of these lawyers reported that they had advised against the use of a will. (See Table 9, page 24.) Many of these mentioned the use of a will in conjunction with one or more other methods of transferring the farm, or to cover other property when the farm land was transferred by some other means.

[4]In 1946 about 15 percent of farm owners in South Dakota had wills covering the disposition of their land. This information was part of that obtained from a nationwide mail survey of a sample of farmers by the Bureau of Agricultural Economics, U.S.D.A. ("Farm Ownership in the Midwest" by John F. Timmons and Raleigh Barlowe, North Central Regional Bulletin No. 13.)

Advantages of using a will as the means of transferring title to the farm include the following:

a. It leaves absolute control of the property with the owner as long as he lives. As one lawyer wrote, "A will is the only safe and certain way whereby one may have and use his property during his life if he needs it for his own support or that of his spouse and other dependents."

Another reply was, "It (a will) is particularly advisable for persons of long life expectancy who want to retain the property and all of its benefits, including right of sale, but who want it to go to certain devisees at death."

b. Disposition by will permits the individual owner to fit that disposition to the situation within his family, subject, of course, to the laws protecting the interests of the widow and minor children. He can take into account assistance already given to some heirs, or assistance given to the parents by some heirs.

c. From the viewpoint of the heirs, transfer under a will now has substantial tax advantages under Federal Income tax. If property is sold, the tax must be paid on the basis of the selling price as compared with the cost, or value in 1913. If it is transferred by will or by inheritance the Internal Revenue Bureau considers the appraised value in the inventory as the cost to the heirs.

d. Creditors of the deceased owner must prove their claims, whereas under other types of transfers the recipients must prove that the debt was not owed.

The **disadvantages** of using the will as a means to transfer title to the farm include:

a. Parents may feel that it places the heirs in the position of "hoping for their departure."

b. The interests of a son, or daughter, (one of several children) who is to take over the home farm, or is perhaps already operating it, are not too well protected by this device. Promises can be broken and wills can be changed. There are cases in which a son or daughter stays at home, operates the farm and helps the parents on the promise of getting the farm, only to find that a last minute change in the will nullifies that promise.

A more important aspect of this uncertainty of expectation until the death of the parents is that it sometimes causes all the heirs to leave the home farm when one of them could have, and should have, taken it over to his own and the parent's advantage.

c. If there is uncertainty concerning the disposition, or if there is a long period of uncertain ownership during the settlement of the estate, the interests of the farm and of society will suffer along with those of the family. Farms tend to run down during the old age of the owner and during settlement of estates.

d. The cost of administering an estate and of probate may be rather heavy This disadvantage of using a will probably has been over-emphasized. Certainly it is no higher than the cost of settlement under the laws of inheritance. The cost of probate must be considered in comparison with the costs of alternative methods, including such items as Federal Income tax on transactions considered as sales, and gift taxes. The individual owner may, or may not, be able to use a more economical means than a will to accomplish his purpose.

In summary, the use of a will protects the interests of the owners as of paramount importance, but sometimes it does this at the expense of the interests of the younger generation. If the hard choice between them must be made this is probab-

ly the most humane choice. The lawyers made themselves very plain on this point, namely that the interests of the parents should have primary consideration and that many attempts to give the children certainty of expectation jeopardize that primary interest.

Nevertheless, many parents have recognized the need of their children for more certainty as to "who gets what" and have attempted to meet that need with combinations of a will and other means, or by the use of other alternatives. Some of the combinations found in the study or mentioned by the lawyers included:

A will with un-recorded deeds attached (page 14).
A will plus deeds in trust or in escrow (page 14).
A will plus a lease of the farm to the selected heir (page 15).

The first and third of these offer little more certainty to the heir than a will alone, but the second does take on the advantages and disadvantages of a deed in escrow.

3. Use of joint tenancy to transfer property title:

Joint tenancy, a method of holding title to property, has specific uses and hazards and is often misunderstood. In a true joint tenancy the title to the property reads as follows: "John Doe and Anna Doe as joint tenants with right of survivorship and not as tenants in common . . . ." This means that when one of the joint tenants dies, the other receives title to the property which does not become part of the deceased's estate or have to be probated, but such transfer is subject to inheritance tax in South Dakota. Joint tenancies are most commonly used by husbands and wives, but can be used by other individuals, as for example, a father and son. South Dakota law requires a decree of the Circuit Court to establish the fact of death of the deceased former owner.

There has been increasing interest in joint tenancies, particularly in the eastern counties of South Dakota. However, it has not been used as a means to transfer the farm within the family to the extent that wills and certain kinds of deeds and contracts have been used. Of the lawyers, 48 percent reported having advised the use of joint tenancies in specific cases, and 14 percent reported having advised against it, with 59 percent having drawn the documents. (See Table 9, page 24.) Of the 79 landowners questioned, only three had joint tenancies.

The chief **advantage** of using a joint tenancy as a means to transfer title to property is:

Under appropriate circumstances it is a less costly and a more rapid method of passing title upon decease of one of the owners, than the routine probate of an estate. It is particularly adapted to situations where the farm is the only major item owned, and where there are no minor children.

The **disadvantages** of joint tenancies are worthy of careful consideration. These include:

a. If the title to the property is already held individually by one of the intended joint tenants, or held as a tenancy in common, the procedure of converting it to a joint tenancy is neither simple nor free of cost. Title must be passed through a third party to the joint tenants with consequent transfer expenses.

b. For the person who owns the property, placing it in a joint tenancy means losing partial control of it. The act is revocable only with the consent of the joint tenant. The property will go to the surviving joint tenant not to anyone else.

c. Contrary to the opinion of many persons, transfer of title to the surviving joint tenant is not without cost. The survivor must present proof of the decease before circuit court and obtain court action to have a clear title.

d. If the existence of other property, owned by a deceased joint tenant, requires a probate, then the net result may be more expense and bother rather than less.

e. A joint tenancy may result in more taxes rather than less. This depends upon the size and nature of the estate and whether it comes under the South Dakota Inheritance tax and the Federal Estate tax. The state of South Dakota, for tax purposes, considers a transfer to the survivor under a joint tenancy to be the same as an inheritance. The income tax advantages of inheriting property mentioned under 2c (page 11) definitely do not apply to transfer through joint tenancy.

f. A joint tenancy with a second spouse by a person who has children from a first spouse may lead to the loss of a share by those children, or at least lead to family and legal complications. One young farmer stated, "No joint tenancies for me while my wife is young. If I died now and she got everything it might go to her children by a second marriage instead of to ours. When we both get to be about 60 a joint tenancy might be a good idea."

g. A joint tenancy with a spouse may not really settle the disposition of the property to the next generation without additional arrangements. Furthermore, it does not provide for the contingency of the simultaneous death of the joint tenants.

In view of the foregoing information, it appears that a joint tenancy with right of survivorship is a tool applicable to specific situations. It is one that should be chosen only after thorough and careful consideration and with competent legal counsel. One of the attorneys gave these opinions concerning this device: "Ideal under certain circumstances, dynamite in others . . . . has its place of course but like a powerful drug and you have to know what you are doing."

4. Gifts of property during the life of the owner:

Some farm owners wish to settle definitely the disposition of their property before their death. Some, realizing the interest of the younger generation in gaining certainty of possession of the farm, wish to satisfy that interest early in the life of the son or daughter concerned. One way to do this is to give the property to the individual concerned. Several different devices may be used, but before discussing the tools to be used it might be well to consider the general advantages and disadvantages of gifts of farm real estate.

The general **advantages** are two:

a. This is one way to insure that the farm will go to a young member of the family at an age when he or she is ready to take it over. In this way, there is no burden of debt, and the farm is transferred as a going concern before it has had a chance to deteriorate.

b. It avoids the necessity of probate of this property.

There are several general **disadvantages** to be considered:

a. A gift of the property is final. If the parents lack other income, or if they suffer financial reverses they may become dependent on children or public agencies to an extent that would not have happened if they had kept control of the property. One attorney wrote, "Remember that two parents can rear and support a

dozen children, but how often do you find an instance where 12 children will adequately support their parents in need?"

b. While the gift may avoid probate costs it may not escape taxation under income tax or gift taxes. These may amount to more than the costs avoided.

c. If there are several children, the matter of fair treatment is involved. Giving undivided shares to several may lead to difficulties, unless additional arrangements are made for the new farm operator to buy out the others. Giving the farm to one without equivalent gifts to the others will probably cause friction, although it may work out well enough for the farm and the favored child.

d. It is sometimes stated that a substantial gift of property at a rather early adult age may be harmful to the character of the recipient, and that it would be better if he had to work to pay for at least part of it.

Several different devices are commonly used to make gifts of property. These include a *warranty deed* without any restrictions, a *deed in escrow,* a *deed with a retained life estate* to the parents, a life estate to the grantee, and a trust arrangement.

The general advantages and disadvantages listed immediately above apply to the use of a simple, unrestricted warranty deed which can be immediately recorded so that the title passes irrevocably to the new owner.

The term *deed in escrow* is used to cover an arrangement where a deed is made out transferring title to the new owner but the deed, unrecorded, is placed in the hands of a third party for safekeeping, and delivery is not made until certain conditions are met or a specified time has passed. This device has valid uses in connection with sales on contract, and delayed sales of property, which are not discussed in this report. It is considered here only as a method of transferring title within the family, as an alternative to other methods mentioned.

Two of the 79 landowners questioned reported having placed deeds in escrow for all or part of their land. Fifty-two percent of the attorneys reported having advised this device and 13 percent having advised against it. There is some doubt that these replies referred specifically to the use of deeds in escrow for the purpose considered here. It is probable that the majority of cases in which this method was advised were cases of sales on contract.

It is somewhat difficult to find an advantage in the use of the *deed in escrow,* by itself, as a means of transferring a farm within the family, although it may have some infrequent applications. One attorney wrote, "Escrow deed is sometimes a solution for an old person wishing affairs settled in simplest way; and who has other means of livelihood so that circumstances will not make it necessary for him to sell the property."

The use of a *deed in escrow* for the purpose under discussion has several limitations:

a. If it is correctly and legally done the deed in the keeping of the third party cannot be returned to the grantor, or revoked, or destroyed without the consent of the grantee. This means that the grantor has lost control of his property.

b. A deed placed in escrow for delivery after the death of the grantor may not be legal if questioned. This, in itself, renders the device unsuitable for the purpose of guaranteeing ultimate ownership to the next generation on the farm. If title has to pass before death of the parent, then some other more satisfactory method might as well be used, and if transfer is to wait until after the owner's death it is

better to use a means which is less likely to be challenged on legal grounds.

c. In many instances a less formal type of *deed in escrow* is used: the deed is kept under control of the grantor, or he regains it. If placed with the right to retake it, no legal delivery has been made. If regained after legal delivery to the third party, the deed is valid even though destroyed. Many involved lawsuits have developed under such circumstances.

The comments of the lawyers indicated in general that they did not favor the use of *deed in escrow,* by itself, as a means of transferring title to a farm from one generation of a family to the next.

The *deed with a retained life estate* to the grantor avoids most, if not all, of the legal difficulties implied against the *deed in escrow*. The owner actually deeds the property to a son, for example, but reserves for himself and wife the use of and income from the property as long as either lives. The deed is recorded and ultimate title has passed. Although this method was not reported among the 79 landowners who were surveyed, it was found in use by families in the special group of three generation families. Forty-five percent of the lawyers reported having advised this method and 55 percent said that they had drawn the documents. (See Table 9, page 24.)

If used with a gift of property this device has the general advantages and disadvantages listed on pages 13 and 14.

Special **advantages** of this device include:

a. The parents have the income from the property and right of possession as long as they live.

b. The recipient (remainderman) knows that it is his property and he can improve it and take care of it.

Among the **disadvantages** or limitations of this method are these:

a. Conditions may change and the upkeep of the life estate may become burdensome to the parents, or they may have need for their capital. However, neither grantor nor grantee can sell or mortgage the farm without the consent of the other while the person or persons with the life estate live. One lawyer puts it this way, "No one can foresee future events. Changing economic conditions usually work hardship on either the grantor or the grantee."

b. The *deed with the retained life estate* is usually not the only tool needed to complete the job. Even if there is only one child and he is to take over the farm, there still may be need for a leasing arrangement or bond of maintenance during the life of the parents to provide them with income. If there are several children and the property is deeded undividedly then there is need for an arrangement to permit the operating heir to buy out the others. If one of several heirs is to be deeded the farm then he may have to assume the legal responsibility for the care of the parents.

c. It is sometimes felt that this sort of arrangement causes the remainderman to hope for the death of the person with the life estate.

d. If the remainderman dies before the grantor then the title to the property goes to the remainderman's heirs, subject, of course, to the life estate.

e. The life tenant may not maintain the property well.

f. On the death of the person with the life estate, that life estate must be declared terminated by a short court action.

The characteristics of this method can be summed up in quotations from two

of the lawyers. The first wrote: "Best method of disposing of property by deed and still retaining income. Must still pay taxes and provide reasonable upkeep. In years of bad crops and low prices the life estate might be very burdensome." The second stated: "Not bad for a few isolated cases, as when the grantor has but one child, a son, who wants assurance farm is to be his and on this basis makes substantial improvements. Grantor should be sure he has enough to live on."

An owner may deed only a life interest or life estate to one party and dispose of the title, subject to the life estate, to someone else. This is sometimes done to insure an income (but not the right to sell or mortgage the property), to some member of the family. For this purpose a deed may be made out to a grandson with a life estate to a son. The advantages of such measures are that they can be made to fit a particular family situation. The disadvantages are that this is usually an attempt to plan farther into the future than one can anticipate conditions, and that life tenants do not always maintain property well.

Another possible method is to place the title to property in a trust created to provide the income to a surviving spouse and to heirs. Someone must administer the trust and some eventual disposition of the property must be made according to terms of the law of the state. This is sometimes done when the owner feels that the family members are incompetent to administer the property. Ordinarily the property cannot be sold or mortgaged while in trust, and the capital value is not available to the beneficiaries. This method is infrequently used for farms and will not be discussed further in this report.

5. Sale of the farm within the family:

It is not necessary to give the farm to the next generation in order to keep it in the family. In fact, that is seldom done. A more common practice among those who wish to make the transfer before the death of the owner is to sell the farm to the one who is to take it over. This may take the form of an outright cash sale with the giving of a *warranty deed,* or of a sale partly on credit with a *warranty deed and a mortgage back,* or of a sale entirely on credit with a *contract for deed.*

The general **advantages** of selling the farm to an heir who wishes to operate it include these:

a. It permits the transfer of the farm as a going concern to the young farmer at an age when he is interested and before the farm has a chance to deteriorate.

b. It separates the problem of succession of the home farm and the problem of treatment of the heirs to the estate. The farm, if it is an adequate unit, can go to one son as a separate transaction. The money for the farm can be divided as the estate, or if used up by the parents in their late years can be assumed to have made unnecessary the equal contributions to their support by the heirs.

c. It avoids the expense of probating this part of the property, as part of the estate.

The general **disadvantages** of selling the farm to an heir include:

a. The parents lose control of the farm.

b. The seller may incur income taxation on the sums received for the farm. This may more than offset the cost of transferring the farm by inheritance.

c. The young man usually cannot raise the cash to pay for all, or even a considerable part, of the farm business. If the parents extend the credit by taking a

mortgage back, if they need the income for living expenses, or if economic or crop conditions become bad, they may lose their security. Since foreclosure is a slow process and parents would be reluctant to institute such proceedings against a son, this could lead to hardship for the older people. This can be avoided to some extent by the use of a *contract for deed* rather than the *deed and mortgage.*

Setting a price on the farm poses a special problem when the farm is to be sold within the family. If it is sold to an only heir and if the parents have other sources of income, some concessions can be made in order to ease the way for the young farmer. However, if there are several children, then an appraisal should be made which will result in equal treatment for the others when the estate is divided.

If the sale is carried out with the use of a *warranty deed* or a deed with a mortgage back, then the advantages and limitations that apply are those general ones listed above and on page 14. If, however, the young man is to buy the farm business mostly on credit, then, according to the comments from the lawyers, he probably should buy it on some sort of a contract and there are some special considerations which apply.

A *purchase contract,* or contract for deed, is a binding agreement which guarantees to the purchaser a valid title to the property upon the meeting of the conditions stipulated. A *deed in escrow* may be provided. Where this method is used to transfer a farm within a family the buyer may contract to make specified payments for a specified number of years, or he may pay the equivalent of rent and carrying charges, or his payments may be based on the needs of the parents for living rather than upon farm value or farm income.

Under some plans the contract calls for delivery of deed when a suitable equity is attained, at which time a mortgage is drawn for the balance of the debt. Other contracts provide for delivery of deed only when the complete debt is paid. Some such contracts call for cancellation of any payments outstanding following the death of the second parent; under other arrangements the unpaid balance will be owed to the estate on the same terms as before.

The principal **advantages** of the use of a contract where considerable credit must be extended to the son, is that the parents can reclaim the property quickly if the payments are not met and if they need the income from the property. It gives the parents more protection than a *deed with a mortgage back*. Of course, there is a corresponding **disadvantage** to the buyer. He does not have as secure a hold on the farm, but if he is getting it almost entirely on credit he has little reason to complain.

6. Incorporation of the farm business as a means of keeping it in the family:

Sometimes a large farm holding or farm business is incorporated. In such a case the matter of keeping the farm in the family becomes a matter of distribution of shares in the corporation rather than of acres of land. Under some circumstances incorporation will permit the continuation of a single successful operating unit even though the ownership is redistributed.

Incorporation is a rather complicated procedure and it usually involves changes in accounting and taxation. It has important advantages and disadvantages which concern other aspects than transfer within the family. It is used very little by South Dakota farmers.

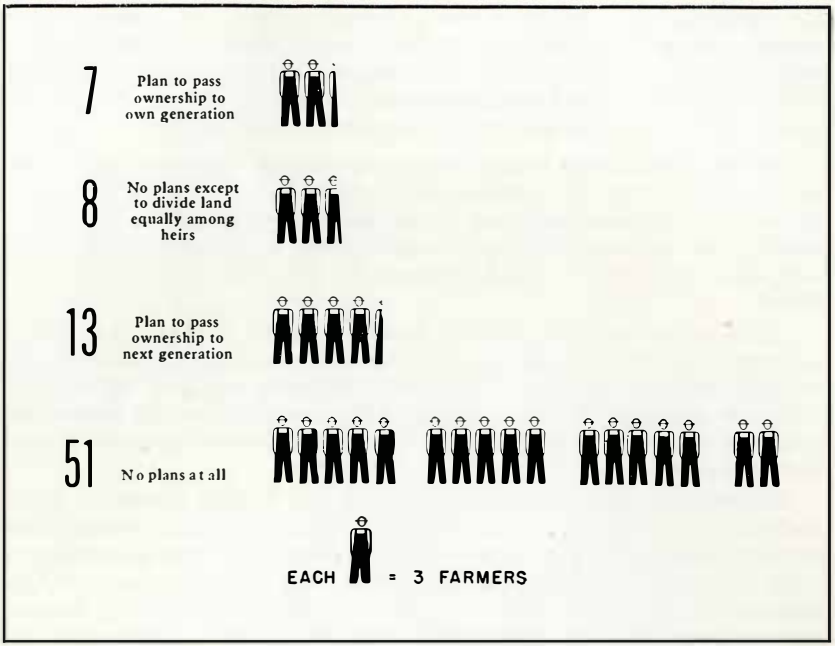


Fig. 4. Here are 79 South Dakota landowners. What will become of their farms?

Methods Favored by Farmers and by Lawyers

There are several ways in which the transfer of farm property can be handled. No one method stands out as clearly better than the others on the basis of advantages and disadvantages. This same situation was reflected by the information obtained from cooperating farmers and the lawyers. A variety of methods were reported in use, and recommended.

The 79 landowners in the group were asked concerning their plans or arrangements for transferring their land to another party. Almost two-thirds of these people had no plans whatever for such transfer. A total of 20 had some sort of plan for disposition, either to a spouse or to the next generation. (See Table 6, page 23.) The methods these men were employing are listed in Table 8, page 23. Only 13 had plans of any sort for the transfer of title to the next generation.

The landowners who had made plans were older, on the average, than those who had not. (See Table 6, page 23.) There was some indication that more of the landowners with children had given thought to the disposition of property than of those without children. Forty percent of those with children reported an idea or plan for disposition, whereas only 14 percent of the childless landowners reported any such arrangement.

Four of those landowners with a plan to transfer the land to their wives were using wills; two were using joint tenancies and one, a tenancy in common. Of those with plans to transfer the land to the next generation, three mentioned

wills; two, deed in escrow, and one each: oral arrangement, life estate, an unwritten plan to sell the land and divide proceeds, an unwritten plan for the wife to deed land to children, and an unwritten plan to sell the farm to a young tenant.

Those farmers who indicated that it was desirable to keep the farm in the family were then asked how it could be done best. Only 12 expressed an opinion. Of these, five said to sell the farm to one son, four mentioned using a will to designate the person to get the farm. Other means mentioned were: a partnership arrangement, the giving of a deed to one son, or letting the heirs decide it after owner's death.

A questionnaire sent to the members of the South Dakota Bar Association included the following questions:

"Have you advised clients who wished to transfer their farms or to insure transfer of same, to sons or daughters who were operating the farms, and where questions of income for the parents, security of anticipation of ownership for the sons or daughters on the farm, and interests of other heirs all had to be considered?

If so, what method did you recommend?

Did this method work out successfully?"

The replies indicated a rather general awareness of the difficulties of family planning and conflicting interests involved. It is not unlikely that some of these opinions were influenced by years of experience gained in unsnarling the tangled affairs of families whose arrangements did not work out.

One reply included this pertinent statement, "Security of anticipation (for the son operating the farm) attained only by the parents giving up some interest in the property." Another took a more pessimistic tone with, "Can do little to protect security of anticipation of ownership without purchasing much litigation."

Another consideration which was emphasized by the attorneys was the great and increasing effect of taxes, particularly the Federal Income tax, on the transfer of property. The present income tax regulations tend to favor transfer by will or inheritance and strike more heavily at transfers through sale, gift, or joint tenancy. This differential treatment occurs through calculation of depreciation and gains. Thus the farmer who sells a farm or farm equipment on which 100 percent depreciation has been taken over the previous years for tax purposes may have to pay a substantial tax on the sale price, which will decrease his estate. However, if the farm is willed to a wife or son, that person may not have to pay income tax even if the farm is then sold because the appraised value becomes the cost and a new depreciation schedule may be started.

Thirty-nine attorneys stated that they had not advised clients under the circumstances indicated in the questions. Sixty of the replies were to the effect that the method depended on the individual circumstances. One hundred sixty three specific cases were reported; some lawyers reported on more than one method. (See Table 10, page 24.) The use of a will was mentioned most frequently and the use of a deed with a retained life estate was second. The reports on the success or failure of the recommendations were too fragmentary to be significant, but the numbers reported are listed in the table. Probably the only conclusion which can justifiably be drawn is that a legal device can be found to carry out the desires and to fit the circumstances of most families in this regard, and that if the appropriate method is chosen and carefully applied with family cooperation it probably will be successful.

Suggestions Concerning Keeping the Farm in the Family

No two farm family situations are exactly alike. Therefore no one definite plan can be laid down for use by all farm owners. The study of many farm family situations and the experience of many South Dakota attorneys, as brought together in this report, seem to indicate that the following points are important:

1. It is rather generally believed that there are benefits to individuals, families, communities and the public if successful farm businesses are handed down as going concerns through the right kind of farm families.

2. Some farms probably should not be kept in the family. Unless the business is adequate in size and efficiency to support a family and sometimes two families, there is little reason to make the effort necessary to keep one of the children on it. To do so is to try to swim upstream against the current of a desirable trend toward fewer, larger farm businesses.

3. If a given farm business is adequate and if it is desired to keep it in the family, then the next question is that of deciding who is willing and able to take over from the present owner. For families with children this may raise the problem of creating in at least one of them an interest in farming and in continuation of the home farm business. This interest cannot be created overnight just when the parents wish to retire. It is something that starts in childhood, possibly with small shares in farming such as 4-H and FFA projects. It is frequently developed further with share operating agreements as the youngster reaches maturity.[5] The contin-

[5]See "Father-Son Farming Plans," C. R. Hoglund and A. W. Anderson, S. D. Agricultural Experiment Station Bulletin 390, June 1948.

Fig. 5. Two generations must be able to talk business together as well as work together for successful farm transfers within the family.

uation of such interest is frequently tied to an understanding by the young man or woman of how the home farm is to be passed on and to whom. Farm couples who have no child of their own to take over the business sometimes work out similar arrangements with other young people.

4. The family should be able to discuss future plans for the farm business and the eventual disposition of the property, to discuss this sensibly and with a realization that different members have different interests. This should be done early. Some decisions should be made before all the children choose other paths and leave home. It seems preferable that these decisions and the necessary legal arrangements be made long before the parents expect to leave this world or even to retire. This does not necessarily mean that title to property has to be transferred early, but some definite plans should be made. Such planning and action can forestall friction and uncertainty within the family. It can take into account the effects of taxation and make it possible to avoid losses to the family or the farm and unnecessary expenses to the future estate.

5. There are various alternative methods or legal devices which can be employed to put the family's plans into effect. These devices differ and are suited to different situations. (See pages 8 through 17.) It is difficult to rank one method as better than others, but certain generalizations can be made. For the farm owner who must depend on the income from the farm as long as he lives, the disposition by means of a will is probably most suitable. In situations where it is more important to give the next generation certainty that they will get the farm, it is probably most satisfactory to sell the farm to them when the owner is ready to retire. However, in both these situations a good case can be made for the use of a deed with a retained life interest to the parents. The land owner should decide what he wants to do.

6. A matter as important as the arrangements for transfer of farm property should never be undertaken without competent legal advice and assistance. A lawyer can advise the farm owner as to the effect of various plans and methods on the farmer's particular situation. Once the owner has decided what he wants to do the attorney can tell him how to do it legally.

Tables Showing How Farmers Obtained Land and Disposed of It

Table 1. Generations of Farm Ownership by Farm Operators. 144 Tenure Histories in South Dakota

Duration of ownership	Number of families	Percent
Land owned by third generation	0	0
Land owned by second generation	20	15
Land owned by first generation	73	56
Land not owned by operator (tenant)	37	29
Totals	**130***	**100**

*Where two case histories referred to the same farm and family they were combined and tabulated only as second generation.

Table 2. Means by which Owned Land Was Acquired. 144 Tenure Case Histories in South Dakota.

Means	Number of tracts	Total acres	Percent of: tracts	Percent of: acres
A. Land inherited, all or in part, received as a gift, or otherwise through relationship	23	4640	9%	6%
B. Land bought outright from relatives	13	2000	5	3
Total from relatives	**(36)**	**(6640)**	**(14)**	**(9)**
C. Land obtained from non-relatives	212	66055	86	91
Totals	**248**	**72695**	**100**	**100**

Table 3. Means by Which Owned Land Was Acquired from Relatives (A Breakdown of Part A. Table 2). 144 Tenure Case Histories in South Dakota, 1947-48

Means	Number of tracts	Total acres	Percent of: tracts	Percent of: acres
Land inherited, free, clear	9	2040	3.6%	2.8%
Land inherited with debt	4	720	1.6	0.9
A share inherited, but other heirs to buy out	9	1720	3.6	2.4
Life interest inherited	0	0	0	0
Land bought with money gift	1	160	0.5	0.2
Totals	**23**	**4640**	**9.3**	**6.3**

Table 4. Means by Which Owned Land Was Acquired from Non-Relatives (A breakdown of Part C. Table 2). 144 Tenure Case Histories, South Dakota, 1947-48

Means	Number of tracts	Total acres	Percent of: tracts	Percent of: acres
Homestead, Preemption or Timberclaim	24	4000	9.7%	5.5%
Purchased from non-relative	160	56295	64.5	77.4
Acquired through tax deed	21	3760	8.5	5.2
Mortgage foreclosure	6	1680	2.4	2.3
Traded other land for it	1	320	0.4	0.5
Totals	**212**	**66055**	**85.5**	**90.9**

Table 5. Means by Which Land Ownership Was Relinquished. 144 Tenure Case Histories, South Dakota, 1947-48

Means	Number of tracts	Total acres	Percent of: tracts	Percent of: acres
Title to relatives by:				
Gift*	8	960	8.7%	3.7%
Bequeath (will)*	5	840	5.4	3.2
Laws in inheritance*	10	1800	10.8	7.0
Outright sale	2	480	2.2	1.9
Other means	2	240	2.2	0.9
Total to relatives	**27**	**4320**	**29.3**	**16.7**
Title to non-relatives by:				
Sale	38	8615	41.3	33.3
Deed given to creditor	10	2640	10.9	10.2
Foreclosure, forced sale	14	9480	15.2	36.7
Tax delinquency	2	480	2.2	1.9
Other means	1	320	1.1	1.2
Total to non-relatives	**65**	**21535**	**70.7**	**83.3**
Totals	**92**	**25855**	**100.0**	**100.0**

*Included partial and encumbered transfers as well as free and clear titles.

Table 6. Landowners' Plans for Transfer of Land. 144 Tenure Case Histories, South Dakota, 1947-48

Type of arrangement	Number of cases	Percent of cases	Average age of owner
1. No plans for disposition of land	51	65%	49
2. No plans, but an idea of dividing equally among heirs	8	10	53
3. A plan for transfer to spouse or someone in same generation	7	9	54
4. A plan for transfer to next generation	13	16	68
Totals	**79**	**100**	**53**

Table 7. Opinions of Operators and Land Owners. 144 Tenure Case Histories, South Dakota, 1947-48

Question asked	Replies: Yes	Qualified yes	Qualified no	No	Don't know	No report
Is owner-operatorship desirable?	89	0	0	0	4	31
Is it feasible?	35	12	14	11	19	33
Is it desirable to keep farm in family?	20	15	0	1	52	36

Table 8. Method Used by Twenty Landowners with Plans for Disposition. 144 Tenure Case Histories, South Dakota, 1947-48

Method	Number using
Will	8
Joint tenancy	2
Deed in escrow	2
Life estate (to spouse)	1
Sell the farm	2
Tenancy in common with spouse	1*
Oral agreement (unspecified)	1
Claimed a plan—no information	3
Total	**20**

*The tenancy in common would give the spouse half-interest, but on the decease of the owner his half-interest would be included in his estate.

Tables Showing Recommendations by Lawyers

Table 9. Percent of Lawyers Who Reported Advising Clients Concerning Various Methods of Transferring Title to Farms.* 222 Replies from South Dakota Lawyers, 1948

Means of transfer	Percent who had: Advised for	Advised against	Drawn documents
Will, to pass title	68	0	66
Deed—no restrictions	62	4	64
Deed in escrow (or trust)	52	13	62
Deed—with retained life estate	45	13	55
Purchase contract, or special contract for deed	56	3	59
Joint tenancy	48	14	59

*All respondents gave comments concerning the various methods but not all specifically answered the questions as to whether they had advised for or against, or had drawn the documents. Thus 32 percent did not specifically report having advised on wills, yet all commented on wills and it can be assumed that practically all lawyers have drawn wills.

Table 10. Means of Transfer of Farms Within Families Recommended by South Dakota Lawyers. Mail Survey of South Dakota Lawyers, 1948

Method Recommended	Number listing	Percent of 163	Number reported: success	failure*
Will	61	37.5%	33	0
Deed with retained life estate	41	25.1	24	2
Purchase contract	15	9.2	11	1
Deed in escrow	14	8.6	6	0
Will—plus lease	8	4.9	5	0
Deed—no restrictions	7	4.3	2	1
Deed—plus a mortgage	7	4.3	2	0
Joint tenancy	7	4.3	3	0
Ordinary lease	3	1.8	2	0
Totals	**163**	**100.0**	**88**	**4**

*No definition was given as to what constituted success or failure of an arrangement. That was left to the judgment of the respondents.