

# Planning the Future of Your Farm The Legal Architecture

Andrew Branan

Lawyer

The Branan Law Firm, PLLC

[www.brananlaw.com](http://www.brananlaw.com)

andrew@brananlaw.com



# This Lawyer's Observations

- Try not to give your heirs undivided interests in land
- Forget about the Estate Tax, use your exemption where needed to reduce cap gains
- Forget about the Estate Tax Pt 2, focus on management and distribution
- Successor must have mechanism for control of the LAND
- If you have a likely “farm successor”, use life insurance if you can get it
- There must be an exit vehicle (and a controlled ‘deal’) for title (ie. options)
- Your Lawyer is a Counselor, Not a Plumber

You can't make it perfect, so make it flexible

The E. rayan L. v P. v. PLC



# Process Flexibility

- Willing to establish a timeline for events
- Able to adjust the timeline due to changing circumstances and laws
- Legal decisions are less complex than farming decisions
  - Recognize tension between ‘old time simplicity’ and ‘comfort zone’
- Scrapping an idea doesn’t mean it was wrong
- Focus first on where to easily manage the “D’s”

# Estate Tax vs. Capital Gains Tax

- Federal Estate = \$5.34 million per individual
  - Estimated to \$6.58 in 10 years
- Portable between spouses = \$10.68 million
- No reversion date (ie. to \$1M)
- Capital Gains top rate of 23.8%
- At death which properties best for step up?

# Step Up in Basis

- Must pass through a taxable estate
- Gift = carryover basis = higher capital gains
- Land needed for farm vs. land needed for liquidity
- Real Property (what I want to know)
  - In what counties do you own real property
  - Farm or non-farm
  - Timber or non-timber
  - How and when acquired
  - Legacy “value”

# Active Planning vs. Passive Planning

- Passive Planning: Keep “protected” assets
  - Retirement plans (designated beneficiary)
  - Real Property jointly titled (operation of law)
  - Life Insurance (designated beneficiary)
- Active Planning
  - Involves decisions and transfers/changes in ownership
    - “early” transfers (gifts)
    - wills
    - Revocable/Irrevocable trusts
    - Limited liability company

# Active: No Strings Attached

- Give property away
  - Carryover basis
  - ~~Life Estate~~
- Sell property for liquidity
  - Capital gains
- Distribute property to heirs by will
  - Share and share alike
  - Specific distributions





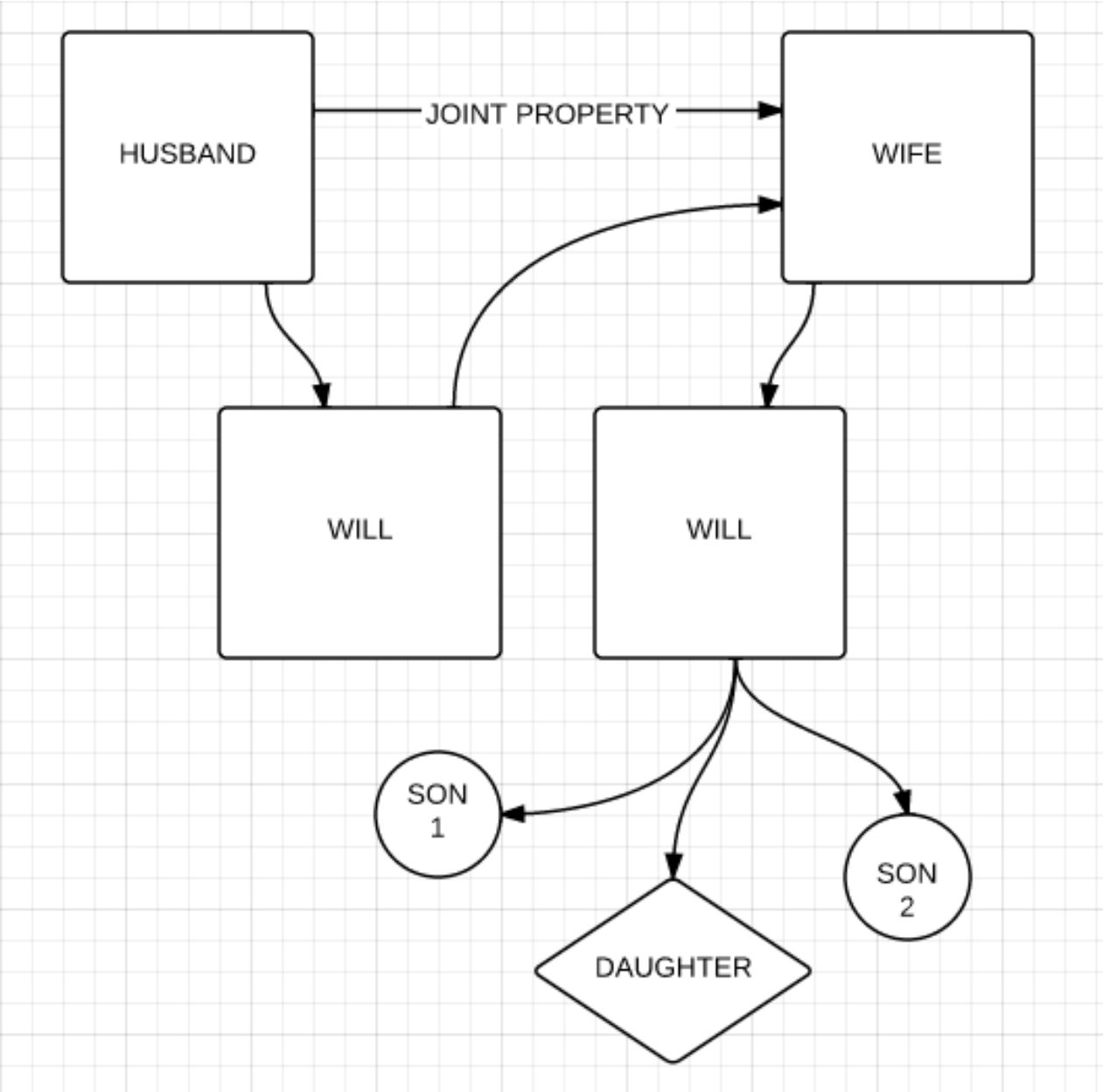
# Active: Strings Attached

- Transfer property to a Trust
  - During life
  - At your death
- Transfer property to a “Business Entity” (ie. Limited Liability Company)
  - Contract governs
  - Cannot “paper over” humans



# The Will

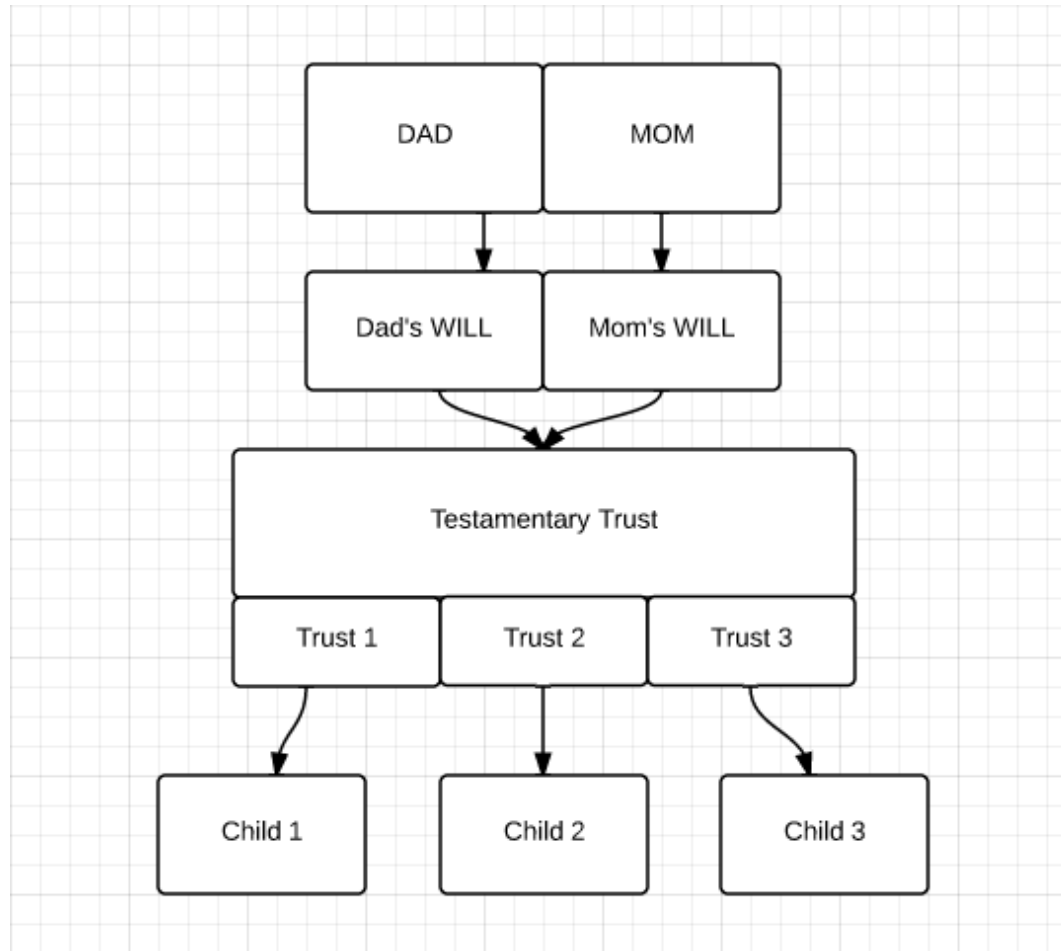
- Simple and done
- Properly executed with 'self-proving affidavit', shouldn't be a problem
- Distributes property through probate
  - Public process
  - Distribution is public
- Can use to distribute to Trust
  - Assets in public view
  - Ultimate distribution is private



# Trusts

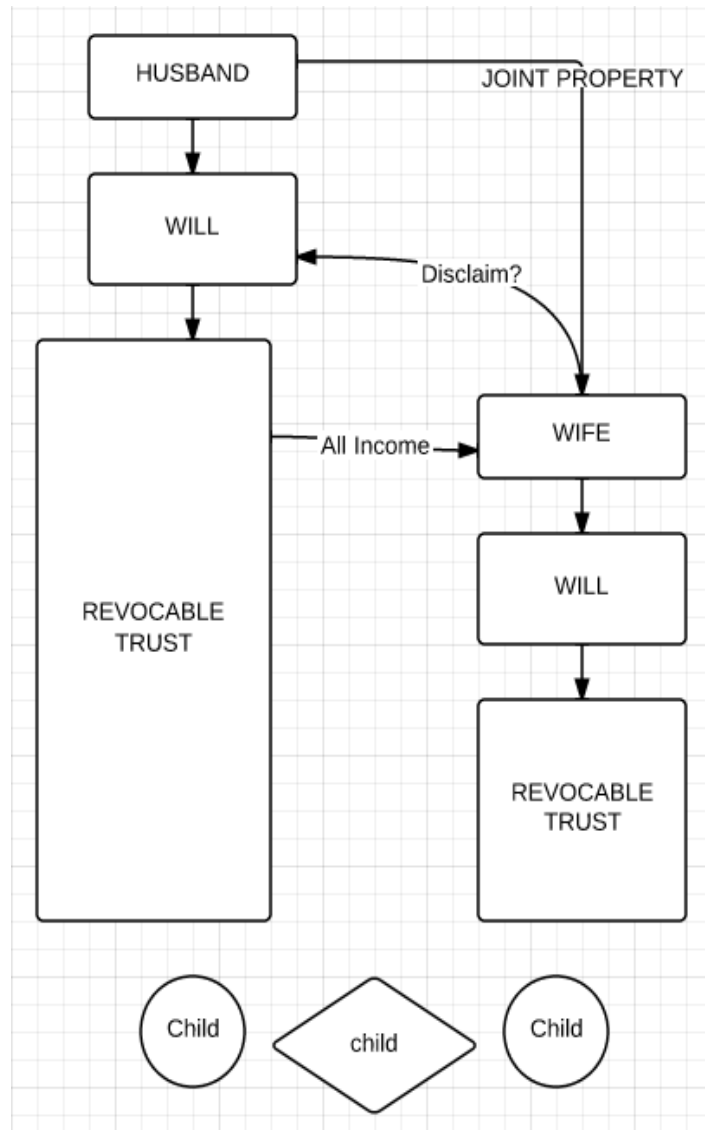
- Trustee holds legal title
- Beneficiary holds beneficial interest
- Revocable or irrevocable
- Testamentary
- **One Trust or Two?**
- Trustee to ‘wait and see’ (buys time)
- Trustee: Surviving, then designate
  - Balance of “executing creator’s intent” with “well-being of beneficiaries”

# Wills with Testamentary Trusts (simultaneous death)



# Trusts in Farm and Forest

- Surviving spouse control of assets?
- Distribution to ‘farming heir’ of assets and land
  - Options to purchase on specified terms
- Allow Trustee to operate a farm or manage land or be a member of LLC
  - Express intent to relieve Trustee of burden to maximize asset value
  - Express ‘no conflict of interest’
  - Authority superseded by LLC Operating Agreement
- Protect “against” spousal creditors
- Protect assets from “troubled” beneficiaries
- Assets must produce income, trust needs liquidity



# Trust Architecture

- Consolidate personal property farm assets into entity or to “farming heir”
- Specific property distributions (“Equal”)
  - More info the better: PIN, Deed Book & Page
  - Make it easier for the next lawyer
- Options to Capture Title (“Fair”)
  - Options in favor of “farming heir” generally
  - Options in favor



If my Trustee is unable or unwilling to serve,  
then...



# Trustee Selection

- Trustee is asset manager, fiduciary, mentor
- Considerations:
  - Value and liquidity of assets in the trust
  - Named Trustee: specific use of assets or family ‘heirloom’ assets (shorter term)
  - “Corporate” Trustee: longer term high value/liquid trusts
- Removal and Replacement
- Trust Protector

“Lineal descendants actively engaged in farming  
will have the option to...”



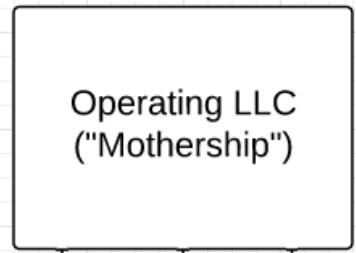
# Asset Management

- Operation LLC
  - Partners contribute their ownership interest in cattle and machinery
  - ownership becomes their contribution and thus % of ownership
- Land LLC?
  - Sibling owners transfer interest to the LLC
  - Children become members, equitable distribution



# The Operating Agreement

- A Contract between contributors of assets
- Dictates who can be members
  - Member vs. Assignee
- Dictates voting requirements for decisions
  - Level one: manager on his/her own
  - Level two: vote of 2/3 (3/4) etc.
- Dictates triggers for company purchase of interests
  - Appraisal procedure
  - Price and payment terms (seller finance option)



- Operating Bank Account
- Management and Marketing
- Livestock and Grain
- Assignment of contracts (use of DBA)

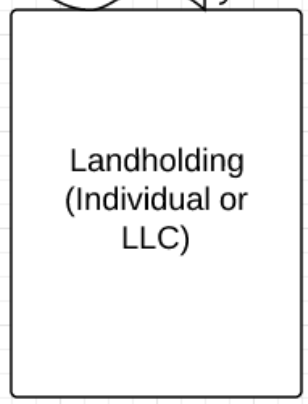
- Maintenance
- Insurance Expense
- Titling over-the-road vehicles
- Property Tax Payments



- Liability Protection
- Separate Purchase Arrangement



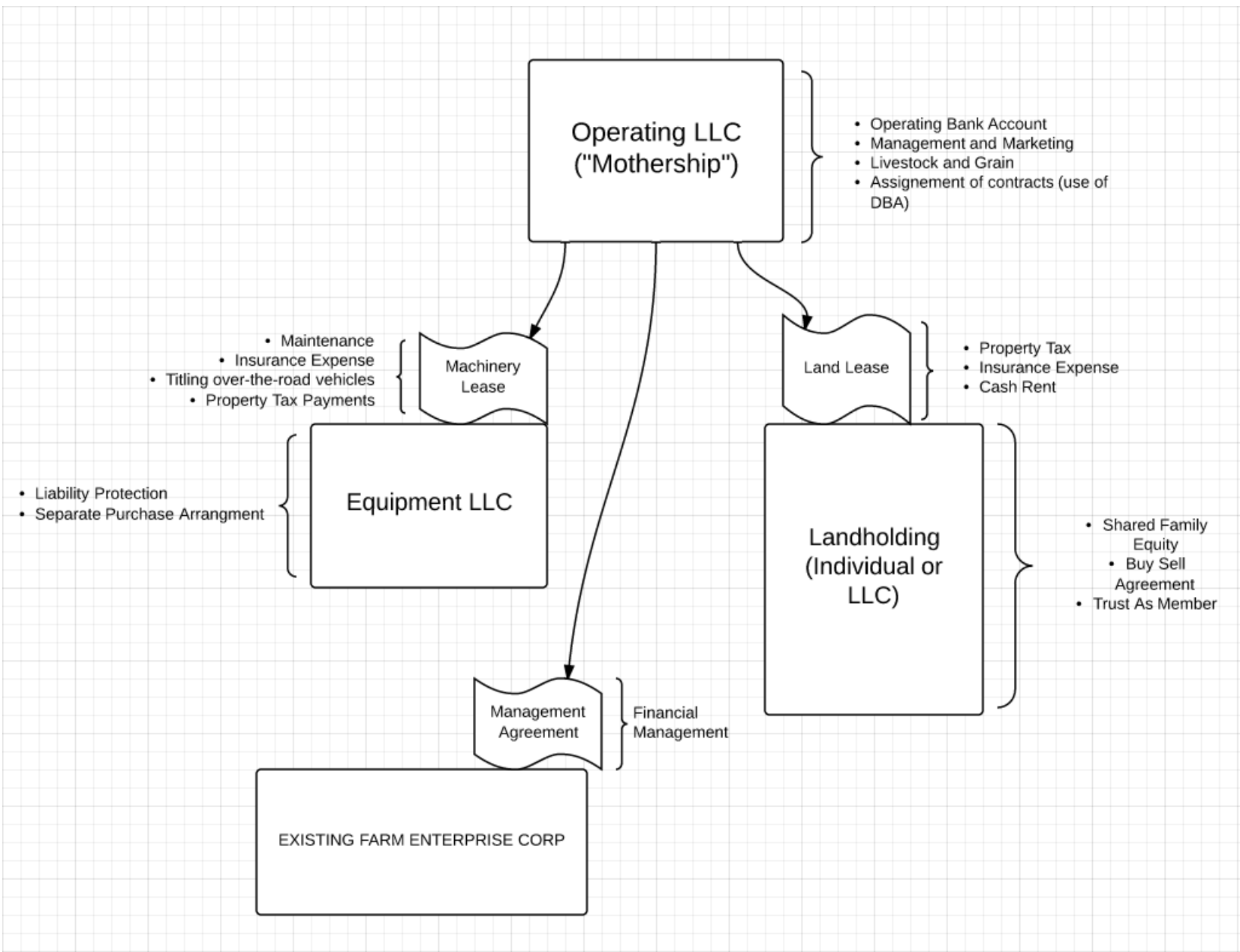
- Property Tax
- Insurance Expense
- Cash Rent



- Shared Family Equity
- Buy Sell Agreement
- Trust As Member



Financial Management



# LLC Set-Up Tasks

- Sketch plan based on circumstances, get accountant sign-off
- Form entity with Secretary of State
- Get EIN (tax ID)
- Open bank accounts
- Elect S form 8832 or otherwise 2553
- Share operating agreement with Lender (Farm Credit)
- Re-title over-road equipment with DMV
- Update Contracts
- For Land, update PUV within 60 days

Andrew Branan

Heather S. Kennealy

The Branan Law Firm, PLLC

919 245 8521

[andrew@brananlaw.com](mailto:andrew@brananlaw.com)

[hskennealy@brananlaw.com](mailto:hskennealy@brananlaw.com)



**Practice Service Area:** North Carolina and Virginia

**Client Focus:** Farm Operations, Large Acreage Owners, “Legacy Land Preservation”, “Heir Property Solution”

**Continuing Legal Education (CLE):** Estate Planning, Farm Taxation, Elder Care and Special Needs, Agriculture Topics (when I can find them!)

**The Branan Law Firm, PLLC**

[www.brananfarmlaw.com](http://www.brananfarmlaw.com)