

REASONABLE OPTIONS FOR THOSE WHO DO NOT  
WANT TO SELL THE FARM: FARM LEASES AND  
FARM MANAGEMENT COMPANIES

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I. INTRODUCTION

A. *Hypothetical*

Sam and Aimee were married for forty-five years and together they owned and ran a large farm. They had two children, one who died young in an automobile accident, and the other, grown and living in New York City as a theater owner. Sam and Aimee enjoyed being farmers and over the years acquired substantial amounts of farmland, but not more than they could farm by themselves. They produced corn and soybeans for the most part and always dealt with the issues of weather, farm loans, and equipment failure with enthusiasm and hope for an even better year to come. Farming was their life and as a unit they loved it.

Last year Sam passed away. Aimee was left with the farm and all the land to do with as she wished. Aimee suddenly felt tired and decided she did not want to farm the land alone, yet she had no desire to sell the land. Aimee is aware there are options for her to profit from the land and still maintain ownership through instruments such as a farm lease or a farm management company. Still she is concerned which is the best option for her needs. There are several issues Aimee will face and she will need to address each option to find the right choice.

### B. *Reasons to Use the Options*

The hypothetical gives one situation where the farm owner may want to explore the option of farm leases or employ the use of a farm management company: a widow who does not want to manage the farm alone.<sup>1</sup> There are other reasons one may want to consider a farm lease or farm management company.

One situation is retirement security.<sup>2</sup> Planning for retirement today inevitably must include something besides social security benefits.<sup>3</sup> Farm land and chattels purchased plus investments made can be rented upon retirement to provide an additional source of income.<sup>4</sup>

In connection with retirement plans, people of any age may simply want to invest their money to have additional income.<sup>5</sup> Robert Halderman, president of Halderman Farm Management Service Inc. and Halderman Real Estate Services Inc., says a growing number of individuals have money to invest although they may have no specific knowledge about farming.<sup>6</sup> This interest of people without a farming background could give a farm owner incentive to hold on to the farm. The farm owner can take the investment capital and continue to run the farm through outside facets and help generate profits for himself and the investor.

An additional situation which gives the farm owner motive to explore the farm lease or management company is to get new, perhaps younger, farmers involved.<sup>7</sup> Renting land rather than purchasing is a cheap route.<sup>8</sup> New farmers interested in starting a farm may not have the resources to buy and own a farm outright so they turn to renting and leasing farmland.<sup>9</sup>

These are only a few of the possibilities of why the farm lease or a farm management company may be a reasonable alternative to selling the farm. The farm owner must decide what option is the best by understanding what a farm lease or management company can do to help, and maybe even hinder, their intended purpose.

This note is designed to first explore both of these options and to present the pros and cons from an unattached view, and then to address specific concerns from the viewpoint of the farmer, landowner, and management company. The first issue is

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1. See Kathy Mayer, *Farms Are Us*, IND. BUS. MAG., Apr. 1997, at 28.

2. See Paul L. Wright, *Retirement Plans*, Reprod. (Paul L. Wright, Wright & Logan Co., L.P.A.) (1993) (on file with author). This is an article written by Mr. Wright in 1993 and was reproduced for an agricultural symposium. It has not been updated and though the concepts may apply, some of the tax issues have changed in recent years. See *id.*

3. See *id.*

4. See *id.*

5. See Mayer, *supra* note 1, at 28.

6. See *id.*

7. See Symposium, *Changing Structures and Expectations in Agriculture*, 14 N. ILL. U. L. REV. 807, 811 (1994).

8. See *id.*

9. See *id.*

a farm lease.<sup>10</sup> The farm lease will be distinguished from other types of similar arrangements and will describe what type of lease the farmer may want to create: the cash lease or the crop share lease.<sup>11</sup> Each of these has particular aspects and the risks are distributed in different ways. Next, the general rights and duties between the landlord and the tenant will be covered, showing how rent is paid and taxes are distributed.<sup>12</sup> The discussion of the farm lease will also address other substantive issues such as bankruptcy of either the tenant or landlord.<sup>13</sup>

The second issue is farm management companies.<sup>14</sup> This section will discuss what the management profession is and what services are available. The management company may offer different opportunities than the farm lease such as investments, saving the family farm, allocation of taxes, and the distribution of maintenance. Information about how the management company can get involved and what exactly they do and in turn, expect the farmers and owners to do, are important considerations that will be addressed.<sup>15</sup>

## II. FARM LEASES

### A. Agriculture Calls for Measures Such as Renting Land

Leasing real property used for farming is an important factor in farm operations.<sup>16</sup> Farmers are “independent producers who operate as small businessmen and have a vested interest in the land they farm.”<sup>17</sup> Through leasing, farmers have the ability to operate a larger farm business with essentially the same amount of capital.<sup>18</sup> Beginning farmers also may not be able to generate enough cash to acquire all the necessary resources they may need for farming.<sup>19</sup> In this respect, some leasing becomes essential to these farmers.<sup>20</sup> This view is prevalent as stated by a participant in a symposium discussion:

Agriculture in this country has had to rely on the non-farm ownership. So if I wanted to own 100 acres, the first thing I had to do was to earn the income, generate the dollars to buy the 100 acres, then rent the land. I then wanted to rent land greater than 100 acres—either economically I needed to, or I just wanted to—then I still had to rely on non-farm ownership for that

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10. See discussion *infra* Part II.

11. See discussion *infra* Parts II.B.-C.

12. See discussion *infra* Part II.D.

13. See discussion *infra* Part II.F.

14. See discussion *infra* Part III.

15. See discussion *infra* Part III.-IV.

16. See 13 NEIL E. HARL, AGRICULTURAL LAW § 121.01 at 121-2 (1998).

17. Symposium, *supra* note 7, at 808.

18. See HARL, *supra* note 16, §121.01 at 121-2.

19. See *id.*

20. See *id.*

land that's available, because it is a lower risk value. And that has been, in my opinion, one of the real pluses of agriculture in this country.<sup>21</sup>

A local Iowa farming couple expresses a similar view.<sup>22</sup> Tenant farming is necessary in many areas because owners are absent from the state or there are no family members willing and able to take over the management and production of the farm.<sup>23</sup> It is the essential need for leasing that makes renting a cheaper route than owning their own farm.<sup>24</sup>

In fact, the history of tenant farming can even be traced back further to the early Roman Empire where farm tenancy was “an institution of fundamental importance to the economy.”<sup>25</sup> Large numbers of upper-class landowners relied on farm tenancy in order to develop their varied estates.<sup>26</sup> “The classical Roman jurists were very much concerned with adapting private Roman lease law to an economy in which upper-class landowners depended on tenants with long-term leases who continually invested their own resources in maintaining the productivity of an estate.”<sup>27</sup>

The benefits of leasing farmland is not limited to the United States.<sup>28</sup> The United Kingdom pursued agricultural policies after World War II with the intent “to maximize production and to provide a reliable food supply at a reasonable cost.”<sup>29</sup> Through a series of Agricultural Holdings Acts, the United Kingdom developed a tenancy system which farm tenants could “enjoy considerable security of tenure, and additional statutory rights including rights to compensation for improvements, freedom of cropping, removal of fixtures, and rent review.”<sup>30</sup> These tenancy acts have been scrutinized and continuously updated, as recently as 1995, which created a new type of tenancy known as the “farm business lease.”<sup>31</sup> It is obvious now that

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21. Symposium, *supra* note 7, at 827.

22. See Interview with Bob & Betty Smith, Farmers, in Eldora, Iowa (Nov. 22, 1998) (on file with author). Although this account is based on actual opinions given in an interview, the names have been changed to protect confidentiality.

23. See *id.*

24. See Symposium, *supra* note 7, at 827.

25. See Dennis Kehoe, *Roman-Law Influence on Louisiana's Landlord-Tenant Law: The Question of Risk in Agriculture*, 70 TUL. L. REV. 1053, 1053 (1996). Mr. Kehoe compares how the classical Roman law was treated and merged into nineteenth-century Louisiana law and discusses the allocation of risks, which will be addressed later in this article. See *id.* at 1054; discussion *supra* II.C.2.

26. See *id.* at 1053.

27. *Id.* at 1054.

28. See generally Christopher P. Rodgers, *Diversifying the Farm Enterprise: Alternative Land Use and Land Tenure Law in the UK*, 45 DRAKE L. REV. 471 (1997) (discussing the changing priorities of agriculture in the 1990's, especially the need to address new problems that have developed after the war—specifically overproduction and the need for greater environmental controls over practices of agriculture).

29. *Id.* at 471.

30. *Id.* at 472.

31. See *id.*

leasing is very important to continuing agriculture and can be a valuable option for not only the tenant but the owner of the land.

B. *Distinguishing Farm Leases from Other Types of Arrangements*

It is important to distinguish between the different types of arrangements available in order to determine where and with whom responsibilities lie. Courts have considered whether an agricultural arrangement “providing generally for one party to furnish the land and the other [party,] the labor and for the parties to each receive a share of the crop grown thereon creates between the parties the relationship of landlord and tenant or of landowner and cropper.”<sup>32</sup> The legal relationship will determine the duties and rights between the owner and the individual who farms the land.<sup>33</sup> The relationship may be one of the following: lessor/lessee, landowner/cropper, landowner/licensee, bailor/bailee, partners, joint venturers, or tenants in common; each has a unique set of rules that govern them.<sup>34</sup> For purposes of this Note, only the distinctions between lessor/lessee and landowner/cropper are examined because they are the most frequently used and easily confused with one another.

Issues arise when the legal relationship is difficult to distinguish. “Whether a particular instrument is a lease of land or a cropping agreement is resolved by the rules of construction and a consideration of the distinction between a tenant and a cropper.”<sup>35</sup> The factors which the courts have utilized in making this distinction are those which indicate whether it was the intention of the parties that the “cultivator be merely a laborer, receiving as his compensation a share of the crops—that is, a cropper—or whether he was to have an estate in the land, paying a share of the crop as rent, and was therefore a tenant.”<sup>36</sup> General rules of construction to determine what type of relationship—a landlord-tenant or landowner-cropper—a farmland agreement creates depends on the actual intention of the parties as seen from the contract as a whole, the language used, and the circumstances surrounding its execution.<sup>37</sup> “The existence of a lease is primarily a question of fact.”<sup>38</sup> Courts emphasize the intent of the parties, which is revealed by examining the specific contract terms, the contract as a whole, and the facts surrounding its creation and execution.<sup>39</sup>

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32. James O. Pearson, Jr., Annotation, *Farmland Cultivation Arrangement as Creating Status of Landlord-Tenant or Landowner-Cropper*, 95 A.L.R.3d 1013, 1017 (1979).

33. See HARL, *supra* note 16, § 121.02, at 121-6.

34. See *id.*

35. Pearson, *supra* note 32, at 1017.

36. *Id.* at 1017-18.

37. See *id.* at 1017. See also 21A AM. JUR. 2D *Crops* § 38 at 625 (1998).

38. See HARL, *supra* note 16, § 121.02, at 121-7.

39. See *id.* § 121.02 at 121-7 to 121-8.

The most frequently litigated relationship is the distinction between lessor/lessee and landowner/cropper.<sup>40</sup> As there is no single factor which determines the disputes, there is some emphasis on the “presence or absence of terms of demise in the contract.”<sup>41</sup> “‘Demise’ refers to a conveyance or transfer of an estate in fee, for life, or for years.”<sup>42</sup> Courts will generally find a lessor/lessee relationship when nothing but terms of demise are found.<sup>43</sup> In contrast, courts have held that a landowner/cropper relationship existed where terms of demise were not used.<sup>44</sup>

The cases containing terms of demise “may be further separated according to what party under the contract has control of the premises, furnishes the needed supplies and equipment, or was responsible for dividing the crop.”<sup>45</sup> It should be noted that none of these provisions are determinative by themselves, but courts have shown a tendency to find a lessor/lessee relationship when the contract demonstrates that authority and responsibility were exercised through the presence or absence of the contract terms.<sup>46</sup>

In the absence of terms of demise, early cases had a tendency to find a landowner/cropper relationship, but there are instances noted where a lessor/lessee relationship was found in the absence of words of demise where the contract otherwise authorized the tenant to “mortgage the crop or the crop was security for a previous loan between the landowner and cultivator, both factors indicating that the landowner acknowledges that the cultivator held title to the crop.”<sup>47</sup> The point of

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40. *See id.* § 121.02 at 121-10.

41. *Id.* at 121-10. Pearson agrees saying although:

not conclusive, the presence or absence of words of demise is an important factor, as illustrated in the cases where words of demise were present, the courts have usually held that a landlord-tenant relationship existed, while in the cases which there were no words of demise the courts have usually held that the relationship of landowner-cropper existed.

Pearson, *supra* note 26, at 1018.

42. HARL, *supra* note 16, § 121.02[1], at 121-10. *See also* Warehouses, Inc. v. Weatherbee, 46 S.E.2d 894, 898 (Ga. 1948) (defining “demise” as conveyance, either in fee for life or for years and as lease or conveyance for years).

43. *See* HARL, *supra* note 16, § 121.02[1] at 121-11.

44. *See id.*

45. *Id.* § 121.02[1] at 121-11 to 121-13.

46. *See id.* § 121.02[1], at 121-13. Pearson goes into more detail and explains different scenarios with different combinations of factors. For example, in one scenario:

[C]ases containing both words of demise and an agreement specifically giving the cultivator actual control of the premises, the courts have held that the relationship of landlord and tenant was created, even though in these cases the duty to furnish the required supplies or equipment was on the landowner. However, where the same factors were present, with the exception of a provision giving the cultivator control of the premises, the courts have generally held that the cultivator was a cropper. . . .

Pearson, *supra* note 32, at 1018.

Pearson’s Annotation goes through all of the scenarios combining factors, examining every situation, and explaining how the courts have generally ruled based on the set of factors. *See id.* at 1017-20.

47. HARL, *supra* note 16, § 121.02[1], at 121-10 to 121-14.

these presence or absence of words and other factors is to see what level of duty each participant has to each other.

### C. *Deciding What Type of Lease to Create*

There are two types of leases: the cash lease and the crop share lease.<sup>48</sup> Each type of lease has its own benefits and risks that will be explained. A 1993 survey provided information from one hundred of the United States' largest farm management firms showing the extent to what types of leases the farmers are using.<sup>49</sup> The survey "indicates that out of the 15.3 million acres managed by the 100 firms, thirty-six percent or 5.5 million acres, are subject to cash lease agreements."<sup>50</sup> "Forty-seven percent, or 7.2 million acres, are subject to crop share agreements."<sup>51</sup> It is important to have a complete understanding of what is a cash lease and a crop share lease and how the risks are allocated in each type.

#### 1. *Cash Lease*

A cash lease is defined as "a lease in which the rent is established at a predetermined amount, without regard to the income or expenses of the farm and without regard to the production or success of the farming activity."<sup>52</sup> The tenant farmer is responsible for paying the items necessary to cultivate the crop, including fertilizer, seed, and other chemicals.<sup>53</sup>

The landlord in a cash lease receives as rent only the agreed upon cash amount that is decided and written in the lease and does not pay for the initial inputs.<sup>54</sup> This type of lease is ideal for the landlord who wants to be relieved of concern over price fluctuations and crop yield because the tenant bears all production risks, including cost and price.<sup>55</sup> The tenant in this situation realizes any fallen profits that result from variable increases in crop price or higher yields due to favorable growing conditions.<sup>56</sup> This may be considered too much burden on the tenant and the landowner may instead choose to share the burden of risk by using the crop share lease.

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48. See Ryan D. Downs, *A Proposal to Amend Section 2032A to Reduce Restrictions on Cash Leasing of Farm Property*, 73 NEB. L. REV. 342, 348 (1994).

49. See *id.* at 349.

50. *Id.*

51. *Id.*

52. *Id.* at 348.

53. See *id.*

54. See *id.*

55. See *id.*

56. See *id.*

## 2. *Crop Share Lease*

A crop share lease is distinguished from the cash lease by the landlord participating in the venture.<sup>57</sup> With a crop share lease, “the landlord normally receives as payment for use of his land a percentage of the profits or earnings from the farming operation or a percentage of the crops grown on the land.”<sup>58</sup> The landlord here provides the land and may decide to provide items such as fertilizer, seed, and other chemicals.<sup>59</sup> In this arrangement, the landlord shares the risks of crop production because the costs may be higher and market prices and crop yields may be lower at the time the parties entered into the lease agreement.<sup>60</sup> The landlord also “shares in higher profits resulting from any decrease in costs of inputs or any increase in market price or crop yield.”<sup>61</sup>

These two types of leases discuss the allocations of risk, but certain state law also addresses different types of risks that can or cannot be taken according to tenancy law.<sup>62</sup> The modern Louisiana Civil Code gives a farm tenant a legal right to a rent abatement because of destruction of crops, either unforeseen or accidental.<sup>63</sup>

Flooding is the primary hazard that farmers face in Louisiana.<sup>64</sup> The Louisiana courts have consistently interpreted flooding as an “eminently foreseeable risk, which the tenant would have to take into account when entering into a lease.”<sup>65</sup> This is not discussed in the two types of leases but one should pay attention to local law to see if there is anything else that would be a protection or a risk.

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57. *See id.* at 348-49.

58. *Id.* at 349.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See Kehoe, supra* note 25, at 1053. The essay compares how the legal systems of Roman law and later the Louisiana state law treat the allocation of risk in agriculture. *See id.* Early nineteenth-century Louisiana law of tenancy was actually based of Roman law, but the two systems are very different. *See id.* at 1053-55.

63. *See id.* at 1054. The code allows a tenant to claim an abatement of rent only if at least half the crop is destroyed by accidents “of such an extraordinary nature, that they could not have been foreseen by either of the parties at the time the contract was made.” *Id.* The origin of this principle and its legal basis has been debated, but the idea is explained by the Roman jurist Ulpian: “the tenant’s right as deriving from the lessor’s failure to provide him with a farm that he could cultivate . . . a poor harvest could be viewed as an impairment of the lessee’s use and enjoyment of the farm held under lease.” *Id.* at 1058.

64. *See id.* at 1059.

65. *Id.* at 1059. This interpretation was established by the Louisiana Supreme Court in *Vinson v. Graves*, 16 La. Ann. 162 (1861). The lessor sued to recover \$650 in rent from a tenant who had leased a 160 acre plantation in 1858. *See Kehoe, supra* note 19, at 1059. During the year, the land was flooded by the Mississippi River, completely destroying the crop, and because the land remained flooded until August, no other crop could be cultivated. *See id.* The lower court ruled in favor of the lessor, and the tenant appealed. *See id.* The Louisiana Supreme Court upheld the lower court’s decision based on a strict interpretation of the Code. *See id.* They said the Mississippi floods frequently; thus the flooding is not an unforeseen accident and the tenant is not entitled to rent abatement. *See id.*



#### D. Formation of Farm Lease

##### 1. General Rights and Duties Between Landlord and Tenant

When entering into a farm lease, the parties need to agree to the terms. A farm lease is an estate in land for a definite period of time that is fixed in advance.<sup>66</sup> One concern the landlord and tenant should address in the lease is the commencement, duration, and termination of the lease.<sup>67</sup> If these items are not specified to in a written lease, the lease's duration and the exact procedure for termination will be controlled by state law.<sup>68</sup> Additional information such as a description of the property, the time and method of payment, and operation and maintenance of the farm may also be included to make the agreement understandable to all parties involved.<sup>69</sup>

In written leases, it may be ideal to spell out in detail what the tenant agrees to do and what the landlord duties will be so there is no confusion.<sup>70</sup> As an example, the tenant may agree to provide the unskilled labor and equipment necessary to maintain the property and any improvements in the same condition as they were at the start of the lease term, with the exception of normal wear and possible damage beyond the tenant's control.<sup>71</sup> The landlord may in turn agree to replace or repair the house or any other building regularly used by the tenant that may be damaged or destroyed by flood, fire, or other factors beyond the tenant's control and to make rental adjustments in lieu of replacements.<sup>72</sup>

When dealing with improvements to the rented land, it is also sometimes necessary, in fact crucial for third party investors, for the parties to determine "the original investment, how a value will be determined upon the occurrence of a critical event and how to put potential third parties on notice."<sup>73</sup> General terms, typical of other types of leases, may also be included such as whether there will be any rights

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66. See ROGER A. MCEOWEN & NEIL E. HARL, PRINCIPLES OF AGRICULTURAL LAW § 7.02[2][c], at 7-6 (1998).

67. See *id.*

68. See *id.*

69. See, e.g., CBA AG COMMITTEE, FARM LEASE REVISION, 3 (1996) (on file with author). This is a sample cash farm lease in a form setting distributed at the 1998 American Agricultural Law Association Conference held in Columbus, Ohio. It is meant to serve as an example of the provisions involved in a cash farm lease.

70. See *id.* at 5-8.

71. See *id.* at 5.

72. See *id.* at 7.

73. Paul L. Wright, *Real Estate Improvements on Rented Land*, Reprod. (Paul L. Wright, Wright & Logan Co., L.P.A.) (1993) (on file with author). The tenant farmer was interested in protecting the value he had invested. See *id.* To accomplish this, potential third parties who may acquire an interest in the property, including beneficiaries of an estate, the IRS, creditors, or purchasers of the property, need to be put on notice. See *id.*

to sublease, if a partnership is intended to be formed, and whether there is any right of entry of the landlord.<sup>74</sup>

The lease can be in the form of a formal writing or it may be an oral lease.<sup>75</sup> Generally most states presume oral leases to be tenancies from year to year with automatic renewal for another one year period when no notice is given designating termination of the lease.<sup>76</sup> However, this presumption may be altered with evidence of the period of time for which rent is to be paid or the contrary intent through past practice or land custom.<sup>77</sup>

Termination of an oral agricultural lease must also follow state statutes.<sup>78</sup> State statutes will typically specify the procedure that should be followed for termination of an oral lease.<sup>79</sup> Notice should be sent by registered or certified mail addressed to the tenant, at the tenant's place of residence, requiring the tenant to sign a receipt upon receiving the notice.<sup>80</sup> If the landlord gives notice to terminate an oral lease after the tenant has prepared the ground to plant a crop, typically the landlord will be required to reimburse the tenant for "the fair and reasonable value of the tenant's services furnished."<sup>81</sup>

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74. See CBA AG COMMITTEE, *supra* note 69, at 5.

75. See Margaret Rosso Grossman & Thomas G. Fischer, *The Farm Lease in Bankruptcy: A Comprehensive Analysis*, 59 NOTRE DAME L. REV. 598, 601-02 (1984). The article discusses the issue of bankruptcy but establishes the importance of the formation of the lease to be in terms that the landlord and tenant desire:

A landowner and a farmer have complete freedom to choose the type of relationship that will govern their farming operation. Their contract can create a landlord-tenant relationship, an employer-employee relationship, a partnership, or a joint venture. The language of their written agreement will be important in determining which type of relationship they have created, and the parties should therefore draft their agreement carefully. Precise conformance with state law will ensure that the court interprets the document to create the type of relationship and corresponding legal results that the parties desired, should a bankruptcy or other legal action arise. If the lease is not drafted artfully, however, or if the parties, following common farm lease practices, have only entered into an oral agreement, the relationship may not be interpreted as they had intended.

*Id.*

76. See MCEOWEN & HARL, *supra* note 66, § 7.02[2][c] at 7-7.

77. See *id.*

78. See *id.*

However, state notice of termination statutes typically do not apply to a tenant that becomes a tenant from year to year by occupying the premises after the expiration of the terms fixed in a written lease. In this situation, the notice of termination of the tenancy usually must fix the termination to take place on the same day and month specified in the original lease under which the tenant first occupied the premises. However, the landlord will likely be required to give the tenant notice a prescribed amount of time before the termination date.

*Id.*

79. See *id.* An example given is from Kansas where written notice must be served to the tenant at least 30 days before the date of termination. *Id.*

80. See *id.*

81. *Id.*

This value of service provided by the tenant may include the cost of any fertilizers, herbicides, and pest control substances applied to the land.<sup>82</sup> To complicate things more, where the tenant has planted a fall seeded crop before receiving notice of the termination, the tenancy will end in the spring and the tenant is typically allowed to harvest the crop.<sup>83</sup> However, if the landlord provides timely statutory notice before the tenant plants the crop, the landlord is permitted to the entire crop.<sup>84</sup>

It is important for both the landlord and tenant to discuss and agree on terms and decide whether an oral lease subject to state law is appropriate or if having a formal written lease is the better decision. Written leases are advised in order to determine precisely the intent of the parties and the actual agreed terms in situations where disputes arise.

## 2. Taxes

The issue of tax in the farm lease context is difficult to explore. For purposes of this note, the specific benefits of an exemption and its problem areas will be the only areas discussed.

One benefit, particularly for the landowner, is the special-use valuation provided for in Section 2032A of the tax code.<sup>85</sup> In order to qualify a farm for special-use valuation under section 2032A, there must be "material participation" in the operation of the farm by the decedent or a family member in five of the eight years preceding the decedent's death.<sup>86</sup> Material participation is not necessarily defined in Section 2032A,<sup>87</sup> but the workable interpretation is spending thirty-five hours a week managing the operation of the farm (or spending less time as long as it constitutes full management of the farm).<sup>88</sup> If full time management did not exist, factors such as physical work and participation in management decisions then shall be considered.<sup>89</sup> As many farmers today do not farm their own small farms, but rather make their farm economical by sharecropping (or other arrangement), they

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82. *See id.*

83. *See id.*

84. *See id.*

85. *See* I.R.C. § 2032A (1994 & Supp. III 1997). This section:

enables a farmer's estate to value farmland at its actual use, not as its highest and best use as is otherwise required. [Congress'] intent was to protect the owners and operators of farms and their surviving families . . . [b]ecause Congress did not intend to benefit owners who were mere investors and did not operate the farm for their livelihood.

Jacques T. Schlenger et al., *Current Tax Developments*, 14 EST. PLAN. Nov.-Dec. 1987, at 364, 368.

86. *See id.* at 368. "Special-use valuation pursuant to § 2032A has proved to be a significant estate tax savings device for farming families." *Id.* at 369.

87. *See* I.R.C. § 2032A(e)(6) (1994) (defining material participation to be determined in a manner similar to the manner used in I.R.C. § 1402(a)(1) for self-employment tax purposes).

88. *See* Treas. Reg. § 20.2032A-3(e)(1) (1985).

89. *See* Treas. Reg. § 20.2032A-3(e)(2) (1985).

need to be aware and seek guidance on whether they qualify for Section 2032A.<sup>90</sup> Congress, federal courts and the Treasury Department, notwithstanding the extensive use of cash leases, have all expressed that “qualified use does not include cash leasing of the qualified property.”<sup>91</sup> Due to this interpretation, if the decedent, prior to death, “cash leases the property to anyone that is not a family member, no special-use valuation will be allowed.”<sup>92</sup>

Residing on the farm, physically inspecting crop operation on a continual or regular basis and directly participating with the tenant in management decisions (not through an agent) might mean the difference between the farm estate qualifying for special-use valuation or that farm being taxed at its highest and best use.<sup>93</sup> Tax at this level could cause a forced sale to pay estate taxes,<sup>94</sup> so one should consider the aforementioned factors if they want to avoid this.

Another issue for landowner<sup>2</sup>s to be aware of is possible eligibility to participate in the Installment payment of federal estate tax.<sup>95</sup> The basic question to ask is what constitutes an interest in a closely held business because only this intent is eligible for the installment payment.<sup>96</sup> A difficult determination of what is a “business” involves farmland leased to tenants.<sup>97</sup> First, property under a cash rent lease does not constitute a business interest for the purpose of the estate tax deferral.<sup>98</sup> However:

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90. See Schlenger et al., *supra* note 85, at 368. The article discusses *Estate of Ward v. Commissioner*, which is valuable to see what the Tax Court deemed to be material participation. See *Estate of Ward v. Commissioner*, 89 T.C. 54 (1987). Here Rebecca Ward lived on a farm with her husband from 1905 until her death in 1978. See *id.* at 54-55. Shortly before her husband’s death in the 1940s, he began sharecropping a portion of Rebecca’s farm, which she continued until her own death. See *id.* at 55. In the sharecropper agreement, Rebecca furnished the land and the “tenant” furnished the equipment and labor. See *id.* They shared equally the expenses and the income from the farming operation, although Rebecca paid for the liming of the soil and the upkeep of all the improvements on the farm. See *id.* at 56. Rebecca observed the operation from her home, walked the fields and inspected the plantings, discussed once or twice a week with the “tenant” specifically assisting in the decision-making as to whether to harvest and store the crops or harvest and sell the crops. See *id.* at 57. The Court held this constituted material participation and allowed her to qualify her farm for the special-use valuation. See *id.* at 65.

91. Downs, *supra* note 48, at 349.

92. *Id.*

93. See Schlenger et al., *supra* note 85, at 370.

94. See *id.* at 370.

95. See NEIL E. HARL, FARM ESTATE & BUSINESS PLANNING 124 (13th ed. 1996).

The basic requirement of the federal estate tax bill is:

If a closely held farm-or other business-makes up more than 35% of the adjusted gross estate, the federal estate tax on the closely held business part of the estate can be totally deferred for more than five years after death, with the tax paid in up to 15 equal annual installments thereafter.

*Id.* at 125.

96. See *id.* at 129.

97. See *id.* at 131.

98. See *id.* at 132.

in an Internal Revenue Service ruling in 1975, a crop share lease arrangement was held to be a business. . . Under this lease, the landlord received forty percent of the crops and paid forty percent of the expenses [while also participating] in important management decisions and made almost daily visits to inspect the farms and discuss the operations.<sup>99</sup>

There are many difficulties with the tax issues. Potential tenants and landowners should consult a practitioner for all the potential loopholes and problem areas involving farm leasing arrangements.

#### F. *Bankruptcy*

One issue to consider before entering into a farm lease agreement is what to do when either the landlord or the tenant is forced into bankruptcy. “The existence of a landlord-tenant relationship [can and] will often complicate the resolution of these farmers’ financial difficulties [if] they enter bankruptcy.”<sup>100</sup> Due to the number of types of farm leases and the varying types of leasing arrangements, bankruptcy courts must determine the rights of both the landlord and the tenant in crops and livestock, the status of their relationship, and the type of farm leasing arrangements involved.<sup>101</sup>

“It is difficult to argue that the [cash lease] agreement creates anything but a landlord-tenant relationship.”<sup>102</sup> In this situation, the court rarely faces difficulties dealing with the crops. If the tenant files bankruptcy and continues to farm the leased land, the landlord can make an administrative expense priority claim under section 507(a)(1) of the U.S.C. that protects the landlord’s portion of the cash rent that has accrued since the tenant’s filing.<sup>103</sup> The landlord also will “have an unsecured claim under section 502 for the portion of cash rent that accrued before filing.”<sup>104</sup> Under section 365(d)(2), the landlord may also request the court to order a trustee or debtor in possession to assume or reject the cash lease.<sup>105</sup> “When the trustee debtor in possession does assume the lease, he is [required] to pay the cash rent according to the terms of the lease.”<sup>106</sup>

In the event the trustee does not assume the lease, the landlord may re-enter the leased property and “will have an administrative expense priority claim under section 507(a)(1) for the portion of the cash rent that accrued after the filing and

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99. *Id.* at 131.

100. Grossman & Fischer, *supra* note 75, at 599.

101. *See id.* at 599-601.

102. *Id.* at 602.

103. *See* 11 U.S.C. § 507(a)(1) (1994); Grossman & Fischer, *supra* note 75, at 633.

104. *Id.* *See also* 11 U.S.C. § 502 (1994).

105. *See* 11 U.S.C. § 365(d)(2) (1994). “The debtor in possession will almost always assume the lease, unless he is certain the proceeds from the sale of the crops will not exceed the rent owed.” Grossman & Fischer, *supra* note 75, at 633.

106. *Id.*

before rejection of the lease.<sup>107</sup> In addition to having an unsecured claim for rent accruing before the filing, the landlord will also have dominion of the farmland and the crops.<sup>108</sup> The crops will be sold and the proceeds should first be applied toward the expenses the landlord spent in nurturing, selling and marketing the crops, and the remainder would be applied towards the claim for rent.<sup>109</sup> If there are any remaining proceeds, they flow to the tenant's estate.<sup>110</sup>

Unlike a cash lease, when a landowner and farmer agree to a crop share lease, they may not clearly determine the nature of their relationship.<sup>111</sup> Upon filing of bankruptcy, a court must then determine the nature of the relationship.<sup>112</sup> If the agreement is ambiguous, the court has to decide whether the relationship is a cropper contract or a crop share lease, or sometimes the situation may also look like a tenancy in common.<sup>113</sup>

After the determination of what type of relationship was created, the next question to decide is the allocation of the crops, which is governed by state law.<sup>114</sup> Under a crop share lease, courts have held that "title to the crops remain in the tenant until he severs (harvests) the crops and divides them."<sup>115</sup> A cropper contract, in contrast, usually leaves title to the crops in the landowner until such time as he divides them.<sup>116</sup> Depending on the state law, property rules may create a property interest in the crops which may or may not divest before the division of the crops.<sup>117</sup>

### III. FARM MANAGEMENT COMPANIES

Farm management companies are an option that is becoming widely available in agriculture today.<sup>118</sup> Over the last few years farm management companies have grown increasingly sophisticated in their analysis and the services they are able to provide.<sup>119</sup>

Farm management is a changing business making it difficult to characterize in one general statement. For most purposes, farm management companies act as a

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107. *Id.* See also 11 U.S.C. § 507(a)(1) (1994).

108. See Grossman & Fischer, *supra* note 75, at 633.

109. See *id.* at 633-34.

110. See *id.* at 634.

111. See *id.* at 602.

112. See *id.*

113. See *id.*

114. See *id.* at 615-16.

115. *Id.* at 616.

116. See *id.*

117. See *id.*

118. See *Farm Management Continues to Change*, AGRIC. FIN. Jan. 1997 at 43.

119. See Walter J. Armbruster, *Challenges for Agricultural Lawyers Facing the 21st Century*, 3 DRAKE J. AGRIC. L. 1, 3-4 (1998). This was the presidential address given at an AALA conference which addresses the agricultural attorney's need to serve the evolving needs of clients and the public through the vastly changing world of agriculture.

consulting service.<sup>120</sup> These consulting services can take many forms, depending on the expertise of the individual managers.<sup>121</sup> For example, “those with strong agronomic backgrounds will offer advice and consultation on conservation practices, regulatory compliance, and habitat maintenance,” while farm managers whose strengths are more financial may offer investment advice and keep detailed records.<sup>122</sup> Essentially, farm management “covers everything from negotiating land leases to paying the bills and overseeing all the details in between, including maintenance, repairs, capital improvements, record keeping, budgeting, planning crops, marketing grain, volume buying and timber management.”<sup>123</sup>

Using a farm management company means the farm agreements will be individualized depending on the company’s strengths and services offered. Generally, these arrangements are popular on farms of 500 acres or more.<sup>124</sup> Under these agreements, farmers can provide the land with fixtures and machinery.<sup>125</sup> The company then provides the labor, management, and storage.<sup>126</sup> “In return, the farmer receives a prior charge—a proportion of profits from his assets, including land and buildings . . . [h]e will also take a share of the overall profits depending on the risks taken.”<sup>127</sup> The company usually charges a fixed rate, which is paid after harvest.<sup>128</sup> The company will “also get a fixed retainer for the ongoing crop management and a percentage of the profit, depending on the level of their input.”<sup>129</sup>

There is much criticism surrounding the use of farm management companies.<sup>130</sup> With the set percentage being paid, the company used by the Smith’s did not care whether the farmer or the landowner was making a profit.<sup>131</sup> The management company decreased their input of machinery but consistently took the first cut of the gross profit so the farmer and landowner were left on their own to buy equipment and live on slim returns.<sup>132</sup>

The broad range of services that a farm management company can provide may be an attractive alternative to the farm leases. There are criticisms that balance out the advantages and those should be weighed before entering into this type of agreement, like any other farm agreement for an extended period of time.

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120. See *Farm Management Continues to Change*, *supra* note 118, at 43.

121. *See id.*

122. *Id.*

123. Mayer, *supra* note 1, at 30.

124. See *Using FMAs to Save Future Cereal Income*, FARMING NEWS, May 15, 1998, at 22.

Here fixed costs are high and cannot easily be spread. *See id.*

125. *See id.*

126. *See id.*

127. *Id.*

128. *See id.*

129. *Id.*

130. See Interview, *supra* note 22.

131. *See id.*

132. *See id.*

#### IV. CONCLUSION

There are many options available to farmers who want to hold on to their property in lieu of selling it. The advantages of not selling but leasing not only helps the owner of the land but can give others investment opportunities or may help a new farmer get a foot in the business. Leasing, whether by a farm lease or through a management company, has almost become essential in today's economy and lifestyles. Deciding what type of agreement to enter into, the terms of the agreement and the consequences are all determinations one needs to make before entering into a formal written or oral agreement. However, the pros of the leasing options should help an unsure farmer or owner of land if they can retain their interests in the land and also gain some practical benefits.