AGRIBUSINESS LAW UPDATE

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Changing Hands: How to Make Succession Planning a Success

By Scott D. Harvey, Attorney

Most business owners have little time to spend planning for the future of their business after they are no longer involved. Not surprisingly, most business owners are rightfully focused on the reactive, day-to-day maintenance and operation of their business.

The agribusiness owner is no different. He may have a general idea about succession, but no formal plan in place to ensure a smooth and efficient transition of the business. And while a business can operate without such a plan, too often owners are hit by unexpected events that result in financial insecurity, personal and familial strife, and unanticipated losses; both financial and emotional. By creating and implementing a strategic succession plan that encompasses the needs of all aspects of an agribusiness, owners will increase the likelihood of financial security after their departure and allow them to have a significant say in the future structure of the enterprise.

The Process and the Players

Succession planning is not just about creating "cookie-cutter" legal documents. Rather, succession planning is a process as unique as the owners themselves and involves strategically identifying the practical, financial, legal, and emotional requirements of the owners. As many agribusinesses have been passed down over multiple generations, there often exists a strong desire to maintain the agribusiness within the family.

For this to occur, the owners must first identify a potential successor or successors who have sufficient experience and capabilities in all aspects of the business to lead it into the future. Once the successor is selected, owners must get the commitment of all stakeholders to be equally engaged in the process. Next, the stakeholders must work together to assemble a team of trusted advisers; such as attorneys, accountants, bankers, and financial planners. In the beginning, the owners work with their advisors to determine an appropriate ownership structure, methods for resolving familial disputes, timing, training and compensation provisions, liquidity and retirement needs, and the "fair" (as opposed to "equal") distribution of assets among family members.

Essentially, owners have three basic options when considering the transfer of control of an agribusiness:

1. First, the agribusiness may be maintained within a family as a viable business.
2. Second, the agribusiness may be sold to a third party as a viable business.
3. Third, the agribusiness may be liquidated and its assets sold on an individual basis.

From a legal perspective, the owners who choose to transition the business within the family will, at a minimum, need well-drafted estate planning documents, business documents that ensure a proper ownership structure of the business, and a well-drafted "buy-sell" agreement detailing the anticipated transfer of the business.

The Third Party Buyer or Asset Liquidation

Owners who are unable to identify a family member may consider selling the agribusiness to a third party or the liquidation of the business and the sale of its assets. To do this, several factors must be taken into account. First, valuation of the business must occur. Undoubtedly, the land that comprises the farm, orchard, or vineyard will account for a majority of the assets. Depending upon the circumstances, the market for the business may be less than the value that could be gained by selling the property for commercial or residential development. Should this be the case, owners may be confronted with a difficult decision of how to proceed if the goal is to maintain the agribusiness as a viable entity.

In any event, the assistance of trusted advisors will provide owners with the information and identification of issues that must be addressed in order to reach an informed decision on the future of the agribusiness. The resolution of these issues will drive the development of an appropriately crafted plan.

Transitioning ownership of an agribusiness involves a complex network of emotional, legal, and business needs. By relying heavily on the help of a team of trusted advisors, business owners can maximize their time and develop a succession plan that will ensure that the business is transitioned to great success.

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Meet the Agribusiness Attorney: Robert W. Parker

Robert Parker worked in the agricultural industry long before he came to Smith Haughey Rice & Roegge. He put himself through undergraduate and law school by working in a cherry canning factory. As for his 30 years of professional involvement in agricultural law, he notes that “if you practice law in northern Michigan, you can’t help but work for agricultural clients”.

A lifelong resident of Traverse City, Robert practices in the Traverse City office of Smith Haughey and helped establish the firm’s agribusiness team. Robert represents landowners, fruit and vegetable processors, developers, business owners, lenders, and municipalities; predominantly in western Michigan.

Robert assists a number of agribusiness clients; including processing facilities, farmers, growers and vineyards. As a dominant portion of his practice involves real estate and land use, his experience corresponds nicely with the needs of most agribusiness clients.

The services he provides to these clients include:

- Real estate
- Commercial leasing
- Contract review
- Perishable Agricultural Commodities Act claims
- Corporate governance and compliance
- Business succession planning.

Robert also represents clients before numerous planning and zoning bodies as well as many state agencies; including contested cases before the Michigan Department of Natural Resources & Environment, Barrier-Free Design Board, Michigan Tax Tribunal, and the Liquor Control Commission.

Robert is active in the Traverse City community and is currently a member of the board of directors of the Botanical Society of Northwest Michigan and Grand Traverse Industries, which provides job training and placement for persons with disabilities. He is also a member of the Michigan Land Title Association and approved counsel for the Michigan Sate Housing Development Authority.

Recent Amendments to the Real Estate Transfer Tax Act Bring Both Good News and Bad News

By Robert W. Parker, Attorney

In early 2009, the Governor signed into law some significant changes to Michigan's State Real Estate Transfer Tax Act. Previously, in 1994, the Michigan Legislature elected to impose a state tax on real estate transfers in addition to the tax that had historically been imposed by counties. Since that time, uncertainty has existed as to whether or not the real estate transfer tax applied to the transfer of an interest in a corporation or limited liability company. With recent amendments to the Act, there is both bad news and good news regarding these types of transfers.

The *bad* news is that, under certain circumstances, the Act now clearly applies to the transfer of entity interests. The tax is imposed upon a *transfer* that is broadly defined to include "the conveyance of title to or other transfer of a present interest or beneficial interest or any other interest in real property by any method, including the interest in real property acquired through the acquisition of a controlling interest in any entity with an interest in the property." Thus, without a doubt, conveyance of an LLC membership interest can trigger a state transfer tax under the Act.

The *good* news is that the legislature has defined clearly the controlling interest that triggers a transfer tax. According to the revised definitional section of the Act, "'[c]ontrolling interest' means more than 80% of the total value of all classes of stock of a corporation; more than 80% of the total interest in capital and profits of a partnership, association, limited liability company, or other unincorporated form of doing business; or more than 80% of the beneficial interest in a trust." Accordingly, the question of whether a transfer of a 51% interest in an LLC constitutes a "transfer" for purposes of the Act has been answered in the negative. Further, the Act states that it applies to contracts for the transfer of a controlling interest "only if the real property owned by that entity comprises 90% or more of the fair market value of the assets of the entity determined in accordance with generally accepted accounting principles." Finally, a transfer of a controlling interest is exempt under the Act "if the transfer of the real property would qualify for exemption if the transfer had been accomplished by deed to the real property between the persons that were parties to the transfer of the controlling interest."

The 2009 amendments do not affect the provisions of the Act that address conveyances between a limited liability company and its members or between a partnership and its partners. So long as the members of a limited liability company own the affected real estate in the same proportion as they own their membership interests, and so long as the partners own the affected real estate in the same proportion as they own the partnership, such conveyances are exempt from the Act.

Despite the 2009 amendments, the Act is not without its gray areas. The amendments do not specifically address whether an individual's conveyance of property to an entity as a capital contribution is a taxable transfer or falls outside of one of the exemptions where the individual receives less than a controlling interest, or where the affected real estate and the entity are not owned by the same people in the same percentages. Further, as described above, the Act contains an exemption for transfers between members and a limited liability company, and between partners and a partnership, where the affected real estate and the entity are owned by the same people in the same percentages, but the Act contains no similar exemption for transfers between shareholders and a corporation.

While these are perilous waters, there are also planning opportunities here which, if done correctly, may result in the avoidance of state transfer tax.

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Understanding Michigan's New "Cottage Food" Law

By Andrew J. Blodgett & Scott D. Gordon, Attorneys

A new law in Michigan will make it easier for people who make and package food in their home to sell it at places like farmers' markets and roadside stands. The "Cottage Food" law, signed by Governor Granholm on July 12 of this year, regulates certain home-based food producers. The advantage to the producer is that the act exempts them from the licensing requirements and routine safety inspections that would otherwise be required under Michigan law.

To be exempt, the food must be prepared in a home kitchen and stored within the home. Also, only "non-potentially hazardous foods" qualify under the law, defined as goods with longer shelf lives and those that can be stored safely at room temperature. So, goods like cookies, breads, and dry herbs are covered, while items such as meats and dairy products are not.

All sales of qualifying cottage foods must be made directly to consumers, and not to grocery stores or restaurants. Because cottage food operations will not be routinely inspected for safety, the law protects only direct sales, where customers can talk directly to cottage food manufacturers about their methods of production and safety precautions. Also, the Cottage Food law is clearly aimed at small scale sales, as households only may earn $15,000 annually through the sale of cottage foods.

The new law still requires homemade foods to be labeled in detail. A label must have the name and address of the cottage food operation, the name of the product, its ingredients, and weight. The label must state that the food was made in a home kitchen and not inspected by the Michigan Department of Agriculture.

Besides labeling, other aspects of state and federal law may also still apply. More detail on the Cottage Food law can be obtained at http://michigan.gov/mda, or by contacting a member of Smith Haughey's agribusiness industry team.

Andy can be reached directly at 231-486-4537 or ablodgett@shrr.com. Scott can be reached directly at 231-486-4543 or sgordon@shrr.com.

Smith Haughey's Agribusiness Team News & Success

George Bearup and **Todd Millar** are two of 15 Smith Haughey attorneys who have been selected for inclusion in the 2011 edition of *Best Lawyers in America*. This publication is regarded as the definitive guide of legal excellence and inclusion is based on peer-review surveys.

George Bearup and **Pat Geary** are two of 14 Smith Haughey attorneys who have been selected for inclusion in this year's edition of *Michigan Super Lawyers*. In addition, **Scott Harvey** is one of three Smith Haughey attorneys who has been selected as a "Rising Star." This publication lists outstanding attorneys who have attained a high degree of peer recognition and professional development. Selections are made using a combination of peer reviews and third-party research.

Tony Quarto recently gave a presentation titled, "Wind Energy: Legal Considerations," to the Current Topics in Planning & Zoning class at Grand Valley State University.

Jon Siebers and **Robert Parker** recently represented a group of landowners in negotiating a form wind lease to be used in a 56-turbine wind project in the northern lower peninsula.

Smith Haughey is a 2010 prime sponsor of the northwest Michigan program, **Taste the Local Difference** presented by the Michigan Land Use Institute.

Smith Haughey's Immigration Law Department Expands With Two New Attorneys: Joanna C. Kloet and Robert M. Suarez

The immigration attorneys at Smith Haughey help both individuals and businesses navigate through the complex area of immigration law. Our immigration attorneys provide legal advice and assistance to businesses transferring or hiring employees from countries around the world. In addition, they work closely with Smith Haughey business attorneys to help foreign-born entrepreneurs start their own businesses and fully participate in the American dream. We are living in an era of rapidly evolving immigration policies, and our attorneys stay up-to-date on the latest developments in immigration legislation and regulations. Above all, we take a personal interest in our clients and their families, and do all we can to help them achieve their goals.

Joanna Kloet

Joanna is an attorney in the firm's Traverse City office. Before joining Smith Haughey, Joanna worked at the United States Department of Justice through the Attorney General's Honors Program. In that position she served as the sole judicial law clerk for the six federal immigration judges in the 10th Circuit. Prior to working for the federal government, Joanna spent a year as a research attorney at the Michigan Court of Appeals in Lansing.

Joanna received a B.A. from the University of Michigan and a J.D., *summa cum laude*, from Michigan State University College of Law, where she was an associate editor of the *Law Review* and the recipient of the Jurisprudence Achievement Award in Contracts and in Will Drafting. Joanna is admitted to practice in Michigan and Colorado. She is a member of the State Bar of Michigan, the Criminal Defense Attorneys of Michigan, the American Immigration Lawyers Association, and Traverse City Young Professionals.

In addition to immigration law, Joanna also practices in the areas of commercial litigation and criminal defense. *She can be reached directly at 231-486-4515 or jkloet@shrr.com.*

Robert Suarez

Rob is an attorney in the firm's Grand Rapids office. He is fluent in multiple languages; including Spanish, Russian, and French and is conversational in Arabic. He often uses his language skills when counseling clients.

Rob is a combat veteran and served in the United States Marine Corps and Army. He served in Operation Iraqi Freedom and received a letter of reference from General Petraeus, and earned the Combat Action Badge and the Bronze Star. In addition to his military service, Rob has also worked for the North Carolina State Bureau of Investigations and the New York City Department of Health, Bureau of Environmental Investigations.

Rob received his Juris Doctor from Thomas M. Cooley School of Law, a Bachelor of Science from Long Island University, and became a sworn law enforcement officer after attending the North Carolina SBI Academy.

In addition to immigration law, Rob also practices in the areas of business law, criminal defense, and veterans' claims. *He can be reached directly at 616-458-4256 or rsuarez@shrr.com.*

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