

Chapter 8.
Coming to a “Good”
Agreement Regarding an
Estate Plan for Your Families’
Farm or Ranch





Alan Schroeder, Agricultural
& Natural Resources Law
Specialist
University of Wyoming,
Cooperative Extension Service

If you have completed each of the steps so far you have come a long way in establishing an estate plan for your family¹. You have:

- Agreed developing and implementing an estate plan is an important goal for your family (Chapter 3).
- Developed common goals as to what this plan should cover (Chapter 4).
- Identified the resources the estate has and the location of any necessary paperwork (Chapter 5).
- Become aware of important aspects of transferring management (Chapter 6).
- Reviewed a number of estate planning tools your family might use to carry out its vision (Chapter 7).

We are now at the next to last step: coming to an agreement regarding the specifics of the estate plan. In this chapter we will discuss how to conduct a family meeting(s) on the final estate plan for the agricultural operation. We will consider how these conversations are typically handled. We will then outline one specific negotiation technique which addresses some of the concerns raised by other methods. This third (preferred) alternative will obtain an agreement that is mutually acceptable and more likely to be implemented by the family.

Coming to an Agreement: the person facilitating this conversation—the Facilitator.

At some point in this process the family must sit down and agree to the specific terms of the estate plan. The resulting meeting may be led by the initiator (see Chapter 3), another family member (often times the father), the person with the most forceful personality, or a neutral third party

(an attorney, an estate planning consultant, or mediator). Like the initiation process, who facilitates this conversation will have a great impact on the success of the conversation. In the best of all possible worlds, the facilitator will be trusted by all the participants to oversee the conversation in an unbiased manner. An unbiased facilitator will not favor any family member in the conversation.

Family members seeking to facilitate these meetings must recognize that, in the heat of these conversations, their unbiasedness may be challenged. They must give participants permission to stop them if they appear to cross the line. It is a difficult role to play. In many instances the best solution for family members who have initiated this conversation, once the family agrees to meet to negotiate the terms of a transition plan, is to contact an independent professional to facilitate the subsequent conversation(s).

Three Approaches for “negotiating” a final estate plan

The Autocratic Approach. Under the first, the facilitator proposes a complete plan to assembled family members. The plan may be presented as “take-it-or-leave-it,” with no negotiation or an opportunity to make minor suggestions for change. This first approach typically relies on the autocrat’s version of truth, sense of important interests and concerns, and ideas as to what is best for the family. In many ways this first approach reflects how estate plans are typically developed for many traditional farm or ranch families. The senior generation (typically the father) announces a completed plan to assembled family members.

The chief advantage of this approach is that it is quick; only the autocrat needs decide. Absent a conversation, the plan

- may not truly capture the interests and concerns of all family members,
- may miss creative opportunities to address these concerns,
- may damage family relationships, and



- may not be implemented when the autocrat dies. We strongly suggest that readers avoid using the autocratic approach.

The one-text² or charter development³ approach. These two approaches rely on the facilitator to develop a mutually acceptable estate plan by engaging in a series of one-on-one dialogues with each participating family member. With the one-text approach the facilitator will produce a detailed estate plan. Under the more general charter approach the facilitator prepares a detailed outline of the essential elements (the specific interests and concerns identified by the participants) which is then given to the family attorney or other estate planning professionals to use in drafting the necessary trust, will, insurance, or other estate planning documents.

Participants are then given an opportunity to review the one-text or charter, not to critique any particular aspects of the proposed plan but rather to identify particular interests or concerns that the plan does address. The facilitator then incorporates their comments into a second draft plan, comments are again solicited, and the process continues until the parties are satisfied with the draft.

The chief advantage of either the one-text or charter approach is that all family members have an opportunity to participate in the plan's development. The plan will reflect all participants' knowledge, interests, and concerns. Either approach may be appropriate when it is difficult to get all necessary family members together or when family members do not work well together. The facilitator can act as a screen to remove toxic comments that may in the past have prevented parties from coming to an agreement.

The chief disadvantages are that it requires the facilitator to be very knowledgeable (charter) or an expert (one-text) in estate planning to make sure the resulting document addresses all the legal, financial, and personal issues that are raised.

Additionally this approach does not really encourage communication (and understanding) amongst family members. Dialogue is limited to one-on-one conversations between the facilitator and individual family members. An opportunity for mutual learning, understanding, and improved communication thus may be lost.

This approach focuses only on the presented problem, the need to develop or revise an estate plan. It avoids potential underlying problems that may prevent the family from working together or implementing the plan in the future. The toxic comments have not gone away; they have simply been postponed.

Direct negotiation approach. The third approach brings all relevant family members to the table to negotiate the estate plan for the family farm or ranch. While there are many approaches to negotiation, we focus on interest-based negotiation, an approach popularized by Roger Fisher and William Ury in their book *Getting to Yes*. In general, Fisher and Ury recommend that interest-based negotiators

- focus on the problem, not the people;
- gather information on the parties' underlying interests rather than fight over positions;
- generate multiple options; and
- apply objective standards in final negotiations to come to an agreement.

The facilitator begins the process by asking family members to outline their stories (their perception of the history of the agricultural operation, their interest in it, and their recommendations regarding the proposed estate plan). The facilitator will ask follow-up questions to identify each participant's interests and concerns. In some instances, the facilitator might meet one-on-one with participants to determine if there are any interests or issues that individuals are unwilling to share with the larger group.

Following this conversation, the facilitator prepares and has the group agree on the key issues for negotiation. The facilitator then asks participants to brainstorm solutions for each issue, and helps



the group develop alternative plans that address the interest and concerns that have been identified. These interests and concerns will be reflected in the goals prepared in Chapter 4. These goals provide the

neutral standards that will be used to evaluate any alternatives.

During the process, participants may be assigned responsibilities to gather information. The group and facilitator may also ask various professionals—accountants, attorneys, and financial planners who specialize in estate planning—to provide information that the family can use in developing the estate plan.

The chief advantage of this third approach is that it addresses the interests of all participating family members. It reflects each participant's truth, emotional sensibilities, and self-esteem. The process, if well managed, will encourage better understanding, improved communications, and respect for one another.

Its chief disadvantage is that it can be time consuming. It requires the facilitator and participants to be knowledgeable about and willing to use interest-based negotiation in developing and implementing their plan. It also requires the facilitator to be able to identify and avoid potential pitfalls that previously stopped his or her family from coming to an agreement on their estate plan.

We favor using interest-based negotiation for developing an estate plan as well as carrying out day-to-day planning and addressing individual conflicts for a family farm or ranch. It encourages communication, respect for each family member's story, and creativity. It encompasses many of the key factors identified by the two Wyoming families in Chapter 2 to achieve a successful transition plan for a farm or ranch.

Interest-based Negotiation: A More Detailed Discussion

What does interest-based negotiation require of participants—General requirements

The interest-based negotiation style of direct negotiation requires negotiators to be sensitive to others' perceptions of the facts, emotions, and self-esteem issues surrounding the conflict. It requires them to be willing to accept a solution which addresses their interests and concerns, even if it is not the solution they initially proposed. It requires them to accept the interests of other participants as legitimate, even though they might not share those same concerns.

Interest-based negotiation does not ask participants to give up their interests. It asks only that they prioritize their interests, look for overall success of the agreement rather than success on each issue being addressed, and be willing to engage in trade-offs to ensure all parties are satisfied and will implement the plan because it is better than the current no-plan alternative.

What does interest-based negotiation require of each participant?

For simplicity these requirements can be summarized by the acronym, "A LARIAT":

- A:** Adjusting Attitudes to recognize the multiple truths family members might have regarding this matter.
- L:** Listening attentively, gather information regarding each participant's interests regarding the transition plan before discussing your own interests.
- A:** Active Listening, Acknowledging and summarizing others' perceptions and feelings regarding the matter (you need not agree); and Apologizing if you believe your actions have harmed them in this matter.
- R:** Refining your story, Refocusing the conflict as a mutual search for a solution that addresses all parties' interests and concerns ("how can we develop an estate plan that..."), and Reframing family members' stories to reflect their interest(s);



I: Inventing as many options as possible to address each issue, interest, and concern that has been raised.

A: Assessing the options based upon objective criteria and identified interests.

T: Preparing and agreeing to a Tentative plan, making sure to identify who will do what, the Timeframe to complete each task, and establishing a clear standard to judge completion; Testing the tentative agreement by asking “what if” questions; and providing for the Transformation of any agreement, as necessary, to reflect changing conditions.

Show genuine curiosity and interests in collecting information: The first two elements of “A LARIAT”

If you ask questions, expect answers; if you do not want to know, don’t ask. “A LARIAT” requires participants to genuinely want to know what others perceive and feel with respect to the matters being discussed. This means that participants must be willing to accept that there are a number of legitimate versions of the story. The first purpose for asking questions and listening then is to learn each participant’s story.⁴ The key attitude is curiosity, a true interest in learning why and how others came to their stories.

Stone, Patton, and Heen in their book⁵ note that some people use questions for purposes other than acquiring information. Their questions often are:

- “Statements disguised as questions” or
- Designed to “cross-examine” (get them to confess) rather than to learn more.

Persons receiving such questions are not fooled. They know the person asking them is not genuinely interested in them or their perceptions. They will typically respond in kind.

The authors of *Difficult Conversations* recommend asking “open-ended” questions—questions that cannot be answered with a yes or a no. A typical open-ended question might begin with “Tell

me more...” or “Help me understand better...” They also recommend “asking for more concrete information” or what might be referred to as “detailing.” Detailing questions might include:

- “What leads you to say that?”
- “Can you give me an example?”
- “What would that look like?”
- “How would that work?”
- “How would we test that hypothesis?”⁶

These questions move the conversation from the general to the specific. They identify specific factors and actions that can be addressed. Consider a claim by a child that her parents “do not pay attention to what she is saying.” The parents might unilaterally dismiss the claim (thereby reinforcing the child’s belief). Alternatively, the parents might ask for specific examples. In getting this information the parents will obtain a better understanding of how their child perceives their interactions and how the child defines their underlying intent. Follow up questions can help in getting more information on the substance of the claim.

In asking open-ended and detailing questions the authors of *Difficult Conversations* recommend using some questions that extend beyond the substance of the claims to the impact of the events on the speaker’s feelings (emotions) and reputation or sense of self. These questions might include:⁷

- “What impact have my actions had on you?”
- “Can you say a little more about why you think this is my fault?”
- “How are you feeling about all of this?”
- “Say more about why this is important to you.”

Remember that in asking such questions that you are not cross-examining the speaker. The authors tell questioners to “make it safe for them not to answer.” They may not have an answer. They may not have ever verbalized the question in the way you have. They may be concerned that you will judge them negatively if they answer the question. Give them an opportunity to think about the question. They may well come back with a thoughtful response to the question later on in the conversation.



Element three in “A LARIAT”: Active Listening, Acknowledging, and Apologizing

Readers may well point out that two elements of “A LARIAT” focus on listening. This reflects how important listening is in a successful negotiation and good relationships in general. We are not alone in this belief. Stephen R. Covey, author of *The Seven Habits of Highly Effective People*, tells us to first strive to understand, then to be understood.⁸ Good listening skills can help achieve both results.

Element three addresses several steps listeners should take after receiving answers to their questions. Many of us immediately seek to defend ourselves from charges, implicit or explicit, in the speaker’s statements. Alternatively, we give our side of the story without acknowledging what we just have heard. Both responses can be mistakes. Speakers may well feel their messages have not been heard. They will therefore not listen to what you are saying. When it is their turn again, they will not respond to your message but instead will repeat their original message again. While it is true that an exchange of messages has occurred it is equally true that not much learning has taken place.

Stone, Patton, and Heen recommend that listeners engage in active listening by first paraphrase the others’ messages before responding. “Paraphrasing,” they write, “is when you express to the other person in your own words, your understanding of what they are saying.”⁹

These authors argue that paraphrasing has two direct benefits. First, you have an opportunity to check your understanding. Speakers can immediately correct any misperceptions you might have regarding their message. Second, you have shown them that you have heard their message. In doing so you have also acknowledged the legitimacy of their story, without necessarily agreeing with their perceptions. This may well allow them to hear your story regarding these same facts. The

authors of *Difficult Conversations* conclude: “Once they feel heard, they are significantly more likely to listen to you. They will no longer be absorbed by their internal voice, and can focus on what you have to say.”¹⁰

Careful listening can also allow you to acknowledge past mistakes and apologize. Genuine apologies and acceptances can change the atmosphere of a conversation. They can reflect a willingness to change and grow, not only with respect to the person giving the apology but also the person who accepts it.

Why is the word apology modified by the adjective “genuine”? In many cases “apologies” are simply rationalizations for what was done. In some instances an “apology” may blame the recipient for the speaker’s mistakes. Such “apologies” do not signify real change and growth. Indeed recipients of such “apologies” may well harden their positions as a result of what is said.

Element Four of “A LARIAT”— Refining your story, Refocusing the conflict as a mutual search for a solution that addresses all parties’ interests and concerns, and Reframing each family member’s story to reflect their interest(s)

Having learned and demonstrated an understanding of their story, it is now your turn to give your story. In preparing to outline your story Stone, Patton, and Heen reminds us:

- Recognize that you have a right to express your story (no more, no less; do not sabotage your story; failure to express yourself keeps you out of the relationship; feel entitled but not obligated);
- Speak to the heart of the matter (start with what matters most; say what you mean, don’t make them guess); don’t make your story simplistic, include your perceptions of the facts and their impacts on you);
- Speak with clarity (don’t present your conclusions as the truth, share where your conclusions come from; don’t exaggerate



with “always” or “never”); and

- Help them understand you (ask them to paraphrase back, ask how they see it differently—and why).

In Figure 2 of Chapter 3 you saw three family members’ stories regarding their perceptions as to the need to establish an estate plan for their agricultural operation. Assume you were one of these characters. How might you refine that character’s statement to satisfy each of the above requirements? Assuming you have completed the same questionnaire (Appendix B in Chapter 3) detailing your story regarding your perceptions as to your family’s current estate plan, how might you refine your statement to satisfy these same requirements?

Element four also encourages the facilitator to refocus the discussion from a fight to a mutual search for a satisfactory outcome. In Chapter three we suggested reframing the conflict as “how can we develop an estate plan which addresses our shared vision for our family?” We provided a potential listing of interests for both the senior and younger generations regarding an estate plan earlier in Chapter 4.

Finally let’s consider how we might reframe family members’ stories in terms of their underlying interests. Figure 2 in Chapter 3 characterizes the parties’ stories in three ways: factually, emotionally and psychologically (impact of the events on each person’s sense of self). In this chapter we again encourage you to identify what “interests” underlie the concerns regarding the family’s current estate plan for your family farm or ranch.

Recall that the second principal in interest-based negotiation advocates “focus[ing] on interests not positions”¹¹ What is the difference? “Positions are statements or demands framed as solutions”.¹² The son’s statement (Figure 2 in Chapter 3) that he needs “some ownership or management responsibility” represents a position. “Interests

in contrast are essentially what each party needs for satisfaction or resolution. Interests are the reasons behind the position.” As the Mennonite Conciliation Service notes,¹³ “Interests typically fall into three categories:

- Substantive interests—content needs (money, time, good or resources, etc);
- Relationship or psychological interests—needs that refer to how one feels, how one is treated, or conditions for ongoing relationships; or
- Procedural interests—needs for specific type of behavior or the “way that something is done”.

The son’s statement, in Figure 2 of Chapter 3, arguably raises all three types of interests—a substantive interest in terms of being able to demonstrate credit worthiness to bankers; a psychological interest in terms of respect; and a procedural interest in terms of the fairness of how decisions are currently being made on his family’s agricultural operation.

Figure 1 on the next page illustrates how the initiator might describe the initial positions and interests for the two of the three family members whose stories are captured in Figure 2 of Chapter 3. Take a moment and outline the underlying interests for the son. Do you see any commonalities between the senior and younger generation?

Why is identifying family members’ underlying interests important? In many cases, moving from positions to interests will permit parties to find additional options that can satisfy all parties’ interests. For example, in the son’s case in this example, the son’s underlying substantive and psychological interests may be satisfied not only through his original position (transfer of an ownership interest) but also by giving him management responsibilities regarding a particular enterprise in the business (i.e., being in charge of the livestock, cropping, or equipment) with salary bonuses tied to successes in each. What other options might you suggest?



**Figure 1: Checklist. Identifying Family Members' Interests—
The Example from Chapter 3.**

Family Member	Opening Position	Interest(s)		
		Substantive	Psychological	Procedural
Father	No change in either the current estate plan or in the management of the business	<p>Need to utilize the estate for retirement funds</p> <p>Need for health coverage (availability of estate to cover potential health costs)</p> <p>Need to take care of family (spouse)</p> <p>Desire to pass the ranch on</p>	<p>Need to be respected</p> <p>Fear of being out of control</p>	<p>Desire to be fair</p> <p>Acknowledges that autocratic rule when he was young was unfair</p> <p>Wants son to take initiative</p> <p>Would like to figure out a way to give up some of the day-to-day responsibilities.</p>
Mother	???	<p>Concern how financial needs (retirement, health care, etc) will be covered in the future</p>	<p>Wants to be respected</p> <p>Fear of being out of control</p>	<p>Wants to be involved in decision making (interest be addressed and informed of what will happen).</p>
Son	Immediate transfer of an ownership interest and management of the agricultural operation			



The same checklist is reproduced in Appendix A, with two additional columns. Can you identify the initial position and interest(s) of your family members regarding the development of an estate plan

for your farm or ranch? Look first at each family member's story, as you summarized it in Appendix B in Chapter 3. If you need additional information to identify their interests, consider asking additional open-ended questions described earlier in this chapter. These questions might include "Why is this (position) important to you?" or "What concerns would (position) help satisfy?" In identifying your own interests, readers should ask themselves these same questions.

Elements Five, Six, and Seven of "A LARIAT"

The remaining elements in "A LARIAT" carry out the other steps in interest-based negotiation. Element six asks parties to select an option based upon their shared vision. Chapter 4 walks readers through several exercises their families can complete to develop shared goals for their farm or ranch. In many cases this step should be completed before options are generated (step five). The shared goals will be negotiated just like the ultimate estate plan. The checklist in Appendix A asks readers to identify the family's potential shared vision (which the goals will help achieve), using the interests identified from each party's story. What would you predict this shared vision to be given the information you have collected so far?

Element five encourages parties to invent and identify as many options as possible to address each of the issues that have been raised. As we illustrated earlier, by developing multiple options parties have a greater likelihood of finding an option that satisfies both their individual interests and the shared vision of the family. The checklist in Appendix A encourages readers to think about additional options, beyond the initial positions family members have taken, which satisfy the agreed upon shared vision.

Finally, element seven asks the parties to test the tentative option they have selected before coming to a final agreement. Why is this step important? In some instances the option may not work. It is better to make that discovery at the planning stage rather than after the option has been implemented. Element six also asks parties to establish time tables and identify responsibilities for implementing the plan. An exercise in Chapter 4 of this book provides a roadmap covering each of these requirements. Doing so provides family members some assurance that the plan will be implemented. Finally element six encourages participants to include "safety-valve" provisions in case facts (or the law) change after the plan is implemented. Such provisions might include annual meetings to assess how well the business and the plan are doing. In Chapter 5 readers are given several tools to measure success. The family then can see progress, make necessary changes, and continue moving forward. In this way the plan can be "transformed" to ensure it satisfies the family's vision both now and in the future.

Why will the resulting agreement from a direct, interest-based negotiation be "good" or at least better than the first two approaches?

Unlike the first approach, both the second (one-text or charter) and direct negotiation approaches work hard to ensure that the agreement addresses the concerns of all participants. The third approach can also tackle potential indirect problems revealed in the negotiations—misunderstandings, hurt feelings, poor negotiation skills, and bad communication practices. Its benefits can carry over into both the day-to-day operation of the farm or ranch and the personal relations of family members.

Facilitating the dialogue regarding an estate plan for the family farm or ranch: Using an outside mediator

Why a mediator?

It may be difficult for any family member to remain neutral and unbiased in these conversations. Moreover, communication problems, strong emotions, and other relationship issues may prevent



the initiator or other family member from effectively facilitating a family meeting to approve an estate plan. Initiators may thus want to turn the meeting(s) over to a professional mediator to assist the family in coming to an agreement.

What does a mediator do?

Mediators are not judges. Their role is to help participants address conflicts and overcome any impediments to negotiation that might prevent participants from coming to an agreement. The mediator's approach and techniques will depend upon the nature of the conflicts and problems identified by the mediator and the participants.

Rikk Larsen illustrates how one mediator dealt with a family conflict involving the distribution of personal property not explicitly covered by a parent's will.¹⁴ Larsen describes how the mediator helped family members explore a variety of options and finally agree to have the distribution process accomplished by ensuring an equal dollar value (a fair standard) would be received by each heir. Larsen concludes:¹⁵

By monetizing each item and acknowledging that at the end of the day each heir's column would total the same dollar sum, even if that required adding cash from the estate checking account, they were freed to deal with the variable emotional content of each item both named by the father and not named. This 'adjustment process' allowed them to maintain harmony and actually exorcise some of the demons of their youth.

How can a mediator be located?

There are several ways to identify mediators for these dialogues. In some instances, a family attorney or financial advisor may feel comfortable in mediating this conversation. In others, they may be able to help the initiator and family identify another qualified individual with mediation training. In Wyoming, initiators and family advisors can contact Lucy Pauley, Coordinator of Wyoming's Agriculture & Natural Resource Mediation Program, located in the Wyoming Department of Agriculture, at (307) 777-8788, to obtain the names of mediators in the state. Several other Western states have similar mediation programs, often housed in Cooperative Extension or the state's Department of Agriculture, which families can contact to identify potential mediators. A listing of members of the Coalition of Agricultural Mediation Programs (C.A.M.P.) can be found at <http://agecon.nmsu.edu/mediation/CAMP.htm>.

Appendix A: Checklist—Identifying Initial Positions, Underlying Interests and Other Options for the Estate Plan

Family Member	Initial Position	Interests			Family’s Shared Vision (framed in terms of interests)	Other Options that Address Family’s Shared Vision
		Substantive	Psychological	Procedural		

Notes



(Endnotes)

¹ For simplicity we will refer to the estate or succession plan hereafter as simply the estate plan. It is important to remember that any estate plan addresses three issues: the accumulation, preservation, and transfer of estate assets over a lifetime. Our focus here is on the transfer aspects related to a family farm or ranch.

² See, e.g., Roger Fisher and William Ury, *Getting to Yes* (1981) [hereinafter YES]; Paula Young, *One-Text Mediation Process: Clinton's 2000 Christmas Proposal to the Israeli's and Palestinians* (2001), available at Mediate.com.

³ Laura Bachle, *Estate Planning and Family Business Mediation*, available at Mediate.com.

⁴ Douglas Stone, Bruce Patton and Sheila Heen, *Difficult Conversations*, 173 (1999) [hereinafter DIFFICULT CONVERSATIONS] say it quite simply: "Inquire to Learn."

⁵Id.

⁶ Id.

⁷ Id., at 176.

⁸ Stephen R. Covey, *The Seven Habits of Highly Effective People* (2004).

⁹ *Difficult Conversation*, op cit., at 178.

¹⁰ Id.

¹¹ YES, op cit., at 41.

¹² Mennonite Conciliation Service, *Mediation and Facilitation Training Manual*, 183 (4th ed. 2000).

¹³ Id.

¹⁴ Rikk Larsen, *Mediating a Key Estate Settlement Issue—Dividing Persona Property* (March 2003), available at Mediate.com.

¹⁵ Id.