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An amicable farmland succession continues to elude

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An amicable succession

Farmland succession is notoriously known as a thorny and troublesome process, with seemingly few remedies. *Julie Butler* offers a roadmap on how to pre-empt conflicts

It's very likely that anyone with practical farming knowledge who reads the title of this article might have heard the simple expression, 'Good luck with that'.

Such a statement would be especially relevant when the professional adviser is tasked with encouraging farming clients to pay for quality legal documents, and to put a strategy in place to try to help to avoid future conflict within the farming family in light of recent cases.

The value of farmland has increased dramatically in recent years, development values are returning, and the majority of farming businesses are run by a close family in partnership, which is often a melting pot of factors that could lead to future disputes.

Not all family members are necessarily involved in the partnership, and this can lead to jealousy and possibly undue influence over elderly members.

Will capacity

Farming is an industry where the farmer often hopes to (and unfortunately generally needs to, for inheritance tax purposes) die 'with their boots on'. The average age of landowning farmers are generally in their 70s, 80s and 90s.

The mental capacity of the testator when making their will can therefore be a very strategic point, and an up to date will is a key document for succession in the farming community.

There are many farming families currently contemplating succession planning before death. Solicitors are bound by very strict rules regarding mental capacity and will drafting, which is very reassuring for all those involved. There is a golden rule set out by Mr Justice Templeman, in *Kenward v Adams* [1975] CLY 3591:

'…in the case of an aged testator or a testator who has suffered a serious illness, there is one golden rule which should always be observed, however straightforward matters appear, and however difficult or tactless it may be to suggest that precautions should be taken. The making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator, and records and preserves his examinations and findings.

'There are other precautions which should be taken. If the testator has made an earlier will, this should be considered by the legal and medical advisers of the testator and, if appropriate, discussed with the testator.

'The instructions of the testator should be taken in the absence of anyone who may stand to benefit, or who may have influence over the testator. These are not counsels of perfection. If proper precautions are not taken, injustice may result or be imagined, and great expense and misery may be unnecessarily caused.'

A lot has changed since the time of this case in 1975, however many consider that the statement still holds to be sound advice. The 'proper precautions' that need to be taken when drafting a will, in an attempt to avoid the possible 'great expense and misery' still holds true today.

It is very much the case that tax planning and the legal decisions surrounding lifetime gifts need the same protection as those assets gifted by the will; they need 'proper precautions', e.g. witnessed or approved by a medical practitioner.

Many doctors do not want the risk of litigation in respect of any medical reports surrounding the question of capacity, and may not help in this regard. This is against a background where it is often the case that many beneficiaries see a will as a measure of the deceased's love and affection, and that the reality of the disappointment felt by beneficiaries can quickly turn to potential dispute.

It is extremely important for the professional advisers to try to avoid conflict that might go through to the courts, and cause excessive legal costs. So how is this achieved?

Lifetime gifts

The professional protection that is needed around the mental capacity of the testator can be extended to lifetime gifts, made by ageing farmers who are possibly losing capacity. Any tax adviser working in connection with tax planning around lifetime gifts, should work with a solicitor who will have similar responsibilities as to the will, in deciding mental capacity on lifetime gifts.

A recent tribunal case, *Timothy Clayton Hutchings v HMRC* [2015] UK FTT 009, has highlighted the risk of undisclosed lifetime transfers by beneficiaries, and the risk of beneficiaries being charged with the penalty. Any gifts made without the protection of professional advice are at risk.

If there are doubts for the tax adviser about the client's capacity, this may cause uncertainty and expense after the client's death, if the matter is not clarified at the time of the gift.

Complicated issues of judgement can arise for all those professional advisers involved in lifetime transfers, and protection needs to be considered from every angle.

> **"If proper precautions are not taken, injustice may result or be imagined"**

Many suggestions to clients of protection regarding capacity might be considered difficult or tactless, but they need to be pursued. Tax planning around lifetime gifts are complex. The immediate impact of potential inheritance tax (IHT) and capital gains tax (CGT) liabilities still have to be considered.

A lifetime gift of assets is still an effective sale for CGT purposes, and has to be recorded as such. It could well be that a holdover election is made for CGT purposes, where the asset is a business asset and so qualifies for holdover relief. The beneficiary will have to consider the loss of the tax-free uplift on death on such a gift, i.e. they are taking on base cost of the donor.

Farming wills currently in place

Many current wills within the farming community contain a number of potential tax problems. Many farm wills simply leave the assets to the spouse, for example, 'Everything to the missus, she can sort out the children!"

On the statistical basis that the husband will die first, the wife is left with all the problems of being proved to be the active farmer. They must also deal with equity and fairness between farming and non-farming children.

There is much potential for using the tax planning tool of the deed of variation, so as to try to achieve agricultural property relief (APR) and business property relief (BPR), which can be utilised instead of the surviving spouse exemption.

For planning purposes it is essential that the wills tie into the farming partnership agreement (if there is one). The question of using a deed of variation as a tax planning tool was mentioned in the March 2015 Budget, and HMRC launched a consultation on the matter on 15 July. We await further developments on this front with interest.

Disputes, assurances and proprietary estoppel

If there is any question as to the propensity for the current trend for dispute as to farm ownership, together with the risk that such disputes present to the farming industry, simply consider the facts of *Davies & Another v Davies* [2014] EWCA Civ 568.

This is the recent case known as the 'Cowshed Cinderella', and indeed *Ham v Ham* [2013] EWCA Civ 1301 is a further example of the problems caused through misunderstood partnership agreements, regarding fair basis for valuation on leaving the partnership.

The core issue in the appeal brought by the parents of Eirian Davies following her claim to the farm, which resulted from her parents trying to evict her, was whether their daughter's reliance on the assurances made by her parents gave rise to sufficient detriment, so as to entitle Eirian to a share in the ownership of the family farm.

Both *Ham* and *Davies* show the professional care that is needed with the

Key points

- Not all members of a farming family will be involved in the partnership, which could lead to disparity in inheritances and cause to conflicts
- Due to the old age of most farmers and the need to 'die with their boots on', mental capacity is an area that often excites suspicion
- A lifetime gift can throw the estate of a farmer into a legal wrangle if it was not correctly handled at the time of gifting
- Many farming wills currently in place may not be suitable as they leave the farm to the wife, who may not be an active farmer, thus presenting further complications
- Assurances made by farmers to their children can lead to successful proprietary estoppel claims, as in the 2014 case of *Davies & Another v Davies*
- Partnership agreements, appropriate wills and an understanding on the part of the beneficiaries as to who will inherit what (and why) will be essential to any amicable succession

Figure 1: 200 acres at agricultural value

£10,000 per acre	2,000,000
30 acres with hope value of £30,000 per acre	+ 900,000
BPR will be restricted to 50 per cent at £900,000	2,900,000
Further tax due £450,000 @ 40 per cent =	£ 180,000

process of updating wills, considering tax planning around lifetime gifts, legal agreements, assurances made by family members, partnership agreements, and the legal definition of all arrangements around the family farm and the interaction thereof.

The mediation route

The preparation of strong legal agreements that are understood by the farming family, where the advisers fully understand the farm arrangements, and the full impact in reality, are absolutely key.

Legal agreements are a move in the right direction when trying to avoid disputes within farming families. However should these protectionary efforts fail and there is a farm dispute, mediation is an alternative as opposed to the court route.

Mediation is used in a variety of scenarios including disputes on farming estates regarding the rights of children, lack of clarity following the death of a family member, partnership agreement disputes, and much more besides. These can often all be solved by taking the mediation route.

The advantages of mediation can be the cost-saving element that provides speed, flexibility of process and outcome, complete confidentiality and improved communication. This is especially the case when compared with the effect that contested court proceedings can have.

The cases of *Ham v Ham* and *Davies v Davies* for example, involved very high court costs and vast stress. The mediation process is understood to be just as detailed as the court process when necessary, and in some ways, pays more attention to detail.

If the parties are willing to choose mediation to reach a compromise, it may be sensible (regardless of the stage of the dispute) to try mediation to bring an early end to farm conflict.

The court cases of *Ham* and *Davies* have shown the problems of the cost and detail of the dispute being in the public domain, as well as the emotional costs of unclear legal agreements.

> **“For planning purposes, it is essential that the wills tie into the farming partnership agreement”**

The reliance of tax planning on good legal documents

Well-drafted partnership agreements are needed for all farming families for both tax and legal protection. For business property relief (BPR) purposes, business assets (including land) achieves 100 per cent BPR as partnership property, and only 50 per cent BPR as non-partnership property. This can be a very key point for development land.

It has been said that many farmers, and even some advisers, do not know the difference between partnership property and property owned jointly. When hope value exists on property, there could be a significant loss of BPR. For example, if the deceased owns farmland used in the partnership, but not in the partnership and there was no partnership agreement, the the scenario demonstrated in figure 1 would occur.

All farm tax planning, especially farm succession strategies, needs the support of good legal documents and considerations over the capacity of those making the decisions. Farming conflicts have been in the headlines in recent years, and with the average age of farmers being in the 70s, 80s and 90s, this is something the professional adviser must focus on moving forward.

It might be the case that by telling the professional advisers of the risks, there is a degree of 'preaching to the converted'. Perhaps in reality, it is the farming community itself that needs to learn the lessons from distressing cases such as *Ham* and *Davies*, and ensure that there is full legal protection and understanding in future, and of course, full tax protection.

For many farming tax advisers, working with good legal advisers will help protect their tax work. The full team of advisers with a memorandum of understanding between the roles of each adviser has to be the key for future advice.

Summary

The example in figure 1 shows extra tax due of £180,000 by only achieving 50 per cent BPR, as the farmland was outside the partnership.

If the point had been sorted with a partnership agreement from the start of the partnership, or when the potential development land was identified or indeed at any time, then no IHT would be payable at all, as the land would have qualified for 100 per cent BPR. ■

Julie Butler F.C.A. is a partner at Butler & Co. She is the author of Tax Planning for Farm and Land Diversification; Equine Tax Planning; and Stanley: Taxation of Farmers and Landowners