Undue influence and farm tax planning

There have been three recent tribunal cases where the tax treatment of expenditure by the taxpayer was determined to be "revenue" in nature as opposed to capital expenditure, eg, Pratt, Hopegear and Cairnsmill. In addition, the Finance Act 2013 increased the Annual Investment Allowance (AIA) to £0.5m. That means a farmer can achieve up to £0.5m 100% capital allowances in 2014/15 and 2015/16 (subject to pro rata).

Inheritance tax efficient repairs

It is therefore very income tax and inheritance tax (IHT) efficient for elderly farmers to spend surplus funds on their farming operation. The expenditure can be extremely tax efficient with the correct planning and as a result of the expenditure the farm should be able to operate more smoothly with improved plant and machinery to work with and a strong repair strategy.

One problem that can arise is that the correct consideration of the elderly farmer's will as to the division of his estate to his children can lead to the final result becoming distorted. For example, the will could read that one son – perhaps the one who doesn't stay working on the farm – is due to inherit the outside investments and the son who works on the farm is due to inherit the farm.

Perhaps the farming son has in good faith persuaded his father to move the investments into farm repairs and machinery. The son who doesn't stay on the farm then has nothing left to inherit as all spare funds have been spent on the farm. It could be that everything has been dealt with in good faith and for the good of the farm. The matter could be dealt with by a claim for "presumed undue influence" by the child who is left nothing in the will as a result of the actions of the son who stays farming.

Presumed undue influence

The recent case of Hart and Samways v Burbidge [2013] EWHC 1628(Ch) provides a good illustration of how presumed undue influence can impact on many farming wills in the current farming situation. The problem is made more acute by how much farm values have increased in comparison with outside investments.

The question has to be asked, when the farmer is being encouraged to spend more and more on the farm by the sibling who inherits the farm, is legal advice being obtained? The case of Burbidge shows it is necessary for the court to be satisfied that the advice and explanation by a solicitor was effective to free the donor from the impairment of influence on his free will. The sibling who has nothing or a considerably reduced sum left to inherit needs protection.

Undue influence

The Hart and Samways v Burbidge case is a good illustration of the factors that will lead the court to determine that undue influence has taken place, even where there has been no deliberate wrongdoing on the part of the person considered to have exerted the influence.

The case involved two brothers claiming their sister Susan had exerted undue influence over their mother, causing them to lose out on their inheritance.

The court held it was the daughter's duty to prove there was no undue influence and she failed to do so.

While there was no evidence of actual undue influence, there was a relationship of trust and confidence between mother and daughter which gave rise to presumed undue influence.

The judge absolved Susan of any deliberate wrongdoing, but emphasised that undue influence can still exist in those circumstances, and relief can still be granted to undo the transactions procured by it.

The farming problem and solution

How can farmers and their advisers protect against future situations such as shown in the case?

- Those in farming must be made aware of the fact that farming wills are being challenged, "Estopell" cases are becoming common place and with the high value of farms such disputes or potential disputes could be something that is dealt with in the future.
- Where an elderly farmer is being "persuaded" by one child to introduce more money into a farm then perhaps legal help should be considered. In the Burbidge case Susan Burbidge could not identify any independent advice received by her mother before she undertook the transactions in the daughter's favour.
- Many accountants and tax advisers will find that often they are the only advice sought, with no legal help being taken. What appears positive for income tax and IHT planning might not be positive for the will's protection of the elderly farmers. Another problem is that perhaps for the partnership accountant there is a conflict of interest and ideally this should be identified where appropriate.

Summary

Farm values have increased dramatically in the last decade and this has not been matched by an increase in other investments values. If it is a long time since legal advice has been sought, then significant tax planning advice should be matched with legal protection. It could well be that the elderly farmer refuses legal assistance. In this case ideally, the accountant/tax adviser should set out the disadvantages of failing to do so. Most farmers do not have up-to-date partnership agreements, wills or a legal overview of all matters, and this is something that should be considered by all farm tax advisers.

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