The Legal Risks and Impediments of Estate and Succession Planning In Rural New Zealand

Chris Spargo

Kellogg Rural Leadership Programme 2011

Executive Summary

The purpose of this paper is to consider **The Legal Risks and Impediments of Estate and Succession Planning in Rural New Zealand.** The success of New Zealand's rural industry is driven by the most appropriate people, farming families. The success of rural communities largely rests upon the proper succession of farms (normally family farms) to successive generations.

In my desire to better understand estate and farm succession planning I reviewed the case law in New Zealand that involved farming families. By reviewing these cases I was able to better understand where lessons could be learned and how ineffective some farming families have been in trying to achieve a succession plan when the very best of intentions were present.

The review of the New Zealand legal system impacting on farming families continually involved the application of the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949.

To illustrate the potential impact of this legislation I reviewed three court cases. These three cases are examples of estate and succession planning gone wrong. However, my hope is that the industry will know and will learn that, with the right people, these situations should not occur. In discussions with farmers I do not believe that many are aware of the large number of farming families in the New Zealand court system, sometimes setting significant legal precedents.

My focus was to review estate and succession planning with direct reference to the lessons learnt from the case studies. While an estate plan is important it is not a succession plan. The three case studies were clear examples of an estate plan camouflaged as a succession plan. An estate plan is necessary to complement a succession plan.

The themes that developed from the perspective of these case studies determining the success or failure of a successful estate and succession plan were:

(a) How good were the professional advisors?

(b) How adequate were the business structures?

(c) Was there enough communication? and

(d) What has changed? Repeal of Gift Duty.

In comparison to countries such as the USA, New Zealand is a relatively young country with a lot more to learn. It needs to treat estate and succession planning seriously by committing to its success. This commitment must be made by both the rural industry and the advisors who support it.

"The industry and its advisors must stand up and be counted"

Acknowledgements

I would like to thank my business partner Ian Blackman for suggesting that I apply to be a participant of the 2011 Kellogg Rural Leadership Programme. His foresight in encouraging me to better myself professionally and personally has allowed me to develop into a more rounded rural lawyer, businessman and person. I also thank him for critiquing my paper to help me focus on the issues I discovered and really wanted to address.

I am thankful to be surrounded by such a great and supportive team as BlackmanSpargo Rural Law Limited. They have allowed me to take time out of work to complete this paper while knowing that our rural clients were still being well looked after.

Most importantly I would like to thank my two boys, Jacob (11) and Riley (8), and my wife Heather for their support of me attending the Kellogg Rural Leadership Programme and the time I have had to take out of family life to attend the course and research and write this paper. That support has been a significant factor in allowing me to succeed as a person to date and I hope will help my children to have the motivation and lessons to likewise succeed in what they set their minds to achieve in the future.

Table of Contents

Chapter 1

Introduction

The purpose of this Kellogg Rural Leadership paper was initially to investigate the impact of foreign investment on rural New Zealand. That is, does the increase in foreigners buying New Zealand farm land have a positive and/or negative impact upon the fabric of New Zealand's rural society and New Zealand's primary industry?

New Zealand's primary industry is clearly a target of foreign buyers to protect future food sources with reputably produced food. At the time of writing this paper the highly publicised Crafar Farms receivership and the application by the second Chinese consortium known as the Shanghai Pengxin Group was awaiting Overseas Investment Office approval. The decision is expected to be released after the 2011 election. In the last 18 months 72 farm sales to overseas people have been approved by the Overseas Investment Office. Just two have been declined.

The corporatisation of New Zealand farming has also led to family farms being sold to large corporate entities, and to large farm land holdings. This has, to a degree, been in competition with farming families.

The potential implication for farming families is they may become tenant farmers to large corporates of farm land once owned by farming families.

The fabric of New Zealand's rural community is made up of rural farming families with the goals and aspirations to make a living off the land, enjoying the lifestyle that rural communities and farming can offer, with an underlying emotional connection to the land. Most farming families have an apparent desire to see the family farm succeed to their children. They are all, at the same time, making a significant contribution to New Zealand's economy.

In addition to more rural land being sold to foreigners, more farming families are ending up in the New Zealand court system, or at least it seems that way with the number of cases involving farming families.

I focused on what was required for farming families in New Zealand to succeed with estate and succession planning having regard to the risks and implications of the New Zealand legal system.

The new Federated Farmers President Bruce Wills sees succession as one of two key issues challenging the farming sector (Rennie, 2001). The method of how succession should occur has not been studied much in New Zealand, Europe and North America, notwithstanding a long tradition of farm succession in farming families (Keating and Little, 1997).

My approach is driven from a legal perspective. As a lawyer specialising in the New Zealand rural sector and working with farming families, in what I see as a very special and privileged position, I have a very good perspective and insight into the dynamics of farming families and the success of succession plans. Unfortunately the failure of the industry to properly address the issues often leads to the intervention by the legal system, which ultimately can destroy families and the proper succession of a very positive future to successive generations or the sale of the family farm out of the family. The key is how to ensure that the wealth being created by farming families in New Zealand remains in farming families.

My topic became:

The Legal Risks and Impediments of Estate and Succession Planning in New Zealand

I focused on five areas relevant to the success and/or failure of succession of the rural industry to the next generation. These relevant areas are:

1. The Impact of the New Zealand legal system on estate and succession planning.

The tone of my paper will be evident by illustrating, through the study of three cases of farming families in the New Zealand legal system, how families had to deal with their claims through the court system. New Zealand farming communities need to be concerned with the outcome of these cases. The theme of all of these cases was the overriding best intentions of the deceased to ensure that the family farm went to succeeding children. More importantly, these cases could have been avoided with proper advice and assistance being given to the parents in these farming families.

2. How good were the professional advisors?

Professional advisors working within the rural estate and succession planning area must be true to themselves and their farming family clients. They must have the necessary skills and expertise to create a proper estate and succession plan.

Furthermore, farmers must be prepared to search for and obtain specialist advice and assistance to create a succession plan. By analogy, one would not go to your local General Practitioner for open heart surgery.

3. How adequate were the use of business structures?

The use of proper business structures is one of the most important aspects of ensuring that a succession plan can succeed. Without the right structure, it is very difficult to achieve a succession plan without extra costs and complexities.

Normally a farmer will have created significant wealth in predetermined legal structures before succession planning becomes relevant. A lack of foresight and having the wrong structures can create problems for the future. Proactively putting in place the right structure early as wealth accumulates is invaluable.

4. Was there enough communication?

Communication is healthy for any form of relationship.

Proper structured communication, structured by an advisor, between family members and their advisors is important to ensure that open and frank discussions occur to support everyone working towards the same goals and objectives.

The choice of the correct structure can also add weight so that proper communication can be facilitated. Where the business structure is a company, communication can be more properly formalised through the use of board meetings and shareholder meetings.

This communication process needs to be driven by someone – commonly the professional advisor.

5. What has changed? Repeal of Gift Duty

The repeal of gift duty by the current government, effective from 1 October 2011, has given current professional advisors and parents a significant tool and opportunity to restructure their legal affairs in such a way to ensure that a proper estate and succession plan can occur. All assets can be alienated to the family trust, preventing exposure to claims against the estate personally.

If these key areas can be satisfied through the family relationship then there is a greater chance of achieving succession of the family farm to the next generation, avoiding the impediments of New Zealand's legal system.

Chapter Two

Impact of the New Zealand Legal System on Estate and Succession Planning

Commonly the success or failure of estate and succession planning are readily seen after being contested in the New Zealand court system.

I selected three reported cases where New Zealand farming families and their relevant advisors have failed in their endeavours to help the deceased obtain their objectives. The areas of conflict involve the Family Protection Act 1955, the Law Reform (Testamentary Promises) Act 1949 and the Property (Relationships) Act 1976.

I have excluded the implications of the Property (Relationships) Act 1976 from this paper because of its complexities and breadth. This Act's impact upon succession planning is intensifying, especially where a child succeeding to the farm separates from his or her spouse. The legal precedents are moving at an alarming pace through the courts, with legal precedents being set and then overturned, almost like a pendulum swinging. This topic in itself would be a future research paper once the case law becomes more settled.

A further area of law that will create significant issues for the future will be the application of the law around family trusts. As set out in this paper, the use of family trusts is an active ingredient to the success of a succession plan. The New Zealand Law Commission is currently undertaking a significant review of the law of trusts with the potential for trust laws to be rewritten. I will not explore the law of trusts in this paper, given the potential future changes, but the law of trusts and any future changes are completely manageable provided that trusts are properly administered.

The outcomes of these case studies leaves a strong unease that farmers' legal affairs were not properly addressed. Trying to create a succession plan solely through an estate plan is fraught with risks and difficulties.

The Family Protection Act 1955

The Family Protection Act 1955 ("Family Protection Act") is legislation that has commonly been utilised to contest the assets of an estate where it has been felt that the deceased has not made adequate provision for the proper maintenance and support of relevant family members. Section 4(1) of the Family Protection Act which states that:

> *4 Claims against estate of deceased person for maintenance*
>
> *(1) If any person (referred to in this Act as the deceased) dies, whether testate or intestate, and in terms of his or her will or as a result of his or her intestacy adequate provision is not available from his or her estate for the proper maintenance and support of the persons by whom or on whose behalf application may be made under this Act, the Court may, at its discretion on application so made, order that any provision the Court thinks fit be made out of the deceased's estate for all or any of those persons.*

The purpose of the original legislation was to prevent the deceased "from leaving their estates to strangers and casting their dependents on the charity of the State" (Brookers 2011). To enable the courts to apply this provision, the courts have developed the theory that every deceased has a moral duty to provide for their relatives and in particular children and their spouse, whether married, de facto or in a civil union.

An emerging concern was while the courts stated they did not have the power to rewrite a will in the interests of fairness to protect the intention of the deceased, the same courts would continue to rewrite what the deceased had stated in the will. For instance, a child's conduct, seen by the deceased as detestable, would be seen by the courts as the fault of the deceased parent (Brookers 2011).

Nicola Peart conducted a survey of cases between 1985 and 1994 to determine the success of Family Protection claims. Out of 215 cases, 91.5% of those cases found that the deceased parents did not adequately perform their moral duty to provide proper maintenance and support (Peart, 1995).

The New Zealand judiciary has recently taken a more conservative approach taking into account various Law Commission Reports recommending changes to the legislation, although such changes never eventuated. A large number of cases still continue to be taken to the courts with no absolute clarity around what constitutes a breach of a moral duty. Furthermore once a breach of that duty has been found, what the courts will do to remedy that situation is unclear.

The key principles appear in *Vincent v Lewis* (page 714):

(a) The test is whether, objectively considered, there has been a breach of moral duty by [the testatrix] judged by the standards of a wise and just testatrix.

(b) Moral duty is a composite expression which is not restricted to mere financial need but includes moral and ethical considerations.

(c) Whether there has been such a breach is to be assessed in all the circumstances of the case including changing social attitudes.

(d) The size of the estate and any other moral claims on the deceased's bounty are relevant considerations.

(e) It is not sufficient merely to show unfairness. It must be shown in a broad sense that the applicant has need of maintenance and support.

(f) Mere disparity in the treatment of beneficiaries is not sufficient to establish a claim.

(g) If a breach of moral duty is established, it is not for the Court to be generous with the testator's property beyond ordering such provision as is sufficient to repair the breach (Brookers, Family Protection Act 1955, 2011).

(h) The Court's power does not extend to rewriting a will because of a perception that it is unfair.

(i) Although the relationship of parent and child is important and carries with it a moral obligation reflected in the Family Protection Act, it is nevertheless an obligation largely defined by the relationship which actually exists between parent and child during their joint lives

A large number of recent cases now involve farming families which can prove very destructive to the family unit. These eventually compromise the financial viability of the farming enterprise.

In the context of farming the Court of Appeal has previously ruled that the overriding desire of a farmer to pass his farm on to a son should not cause an injustice to his daughters (*Re Leonard* [1985]).

Case Study One

Andrews v Andrews

My first case study reviews a case that illustrates the risks of relying on leaving assets to family pursuant to a will rather than considering other options available to the deceased during their lifetime.

Background

This case concerned a claim by Catherine Andrews under the Family Protection Act against the estate of her father. This case will not address all of the issues to be resolved between the family members.

The deceased, Murray Andrews, died on 7 September 2006. Four of his five children, Catherine, Graeme, Michelle and Daniel, were involved in the legal proceedings.

Murray Andrews' main asset was a dairy farm with associated farming assets, such as livestock, plant and machinery and Fonterra Co-Operative Group Limited ("Fonterra") Shares.

Murray Andrews' last will provided for the following:

1. The executors were Michelle Andrews and a solicitor, Mr Chilcott;

2. Graeme was to receive $10,000;

3. The balance of the estate was to be held on trust equally for Michelle and Daniel until they reached the age of 20.

4. There was no provision for Catherine due to perceived earlier benefits she had received.

The will then went on to detail a first option for Michelle to purchase the farm land and dead stock. Murray wanted to give Michelle the opportunity to succeed to the farm.

Subsequently Michelle gave notice to purchase the assets in accordance with the option to purchase, and an agreement for sale and purchase was completed between Michelle as purchaser and Michelle and Mr Chilcott as executors. To ensure that the parties were acting prudently a valuation of the dairy farm was undertaken and a purchase price of $2,057,000 for the land, buildings and chattels and $161,500 for the Fonterra shares was determined.

Catherine Andrews' claim is under the Family Protection Act. The value of the estate is $1,000,000. If Catherine is successful in this part of her claim, she will increase the value of the estate to $2,000,000. If she was unsuccessful in these initial proceedings then her eventual Family Protection claim could reduce Daniel's share of the estate. Daniel supported Catherine's claim in these proceedings so that Michelle would also have to contribute to any eventual Family Protection claim.

The clear desire of Murray Andrews was that Michelle should be given the opportunity to purchase the dairy farm, which by inference would have meant all associated assets. However, Catherine's position was that the transaction was void for self dealing.

The Rule Against Self Dealing

The major problem for Michelle was that she was both the purchaser and the executor of the estate.

The rule against self dealing can be stated as follows:

1. *"The self-dealing rule is ... that if a trustee sells trust property to himself, the sale is voidable by any beneficiary ex debito justitiae, however fair the transaction" (Tito v Waddell [1977] at 241);*

2. *"A person who is a trustee for sale of, or who has a power of sale over, trust property may not effectively purchase it from himself or herself; except where it is under an express authority contained in the instrument creating the trust, under an order of Court of competent jurisdiction, or with the consent of all beneficiaries. One of several such persons may not effectively purchase it from the others. Any such purchase is automatically voidable at the instance of any beneficiary no matter how honest or fair the purchase may be ... Moreover the trustee cannot sell the property to himself or herself jointly with others, or to a Trustee for himself or herself" (Laws of New Zealand (2011) 283).*

3. *"The rule has been defined and explained on innumerable occasions during the course of the last 200 years or so"* (Chellew v Excell [2009], 711).

4. *"The purchase ... of trust property by a trustee is generally prohibited. This is because it places the trustee's personal interest in conflict with the beneficiaries. The same prohibition applies in the case of a sale of trust property by co trustees to one of themselves and third parties. Equity treats any such transaction as voidable ... "*(Del Pont, 573).

It is therefore permitted for an affected beneficiary, in this case Catherine, to contest the transaction from the estate to Michelle as being void.

The position of Michelle was the end result should be *"... to implement the clear intention of the testator, namely that Michelle should receive his entire farming operation ..."* (*Andrews v Andrews*, paragraph 17). She wanted the court to give effect to her father's intention.

Notwithstanding the *"... significant inconvenience and disappointment for Michelle ..."* (*Andrews v Andrews*, paragraph 33), the court found that the sale, three years earlier breached the rule against self dealing and was *"... invalid and of no effect ..."* (*Andrews v Andrews*, paragraph 37). The court also found the option-to-purchase process was flawed, whereby the executors failed to follow the explicit terms of the option to purchase contained in the will.

The reality was that, because Michelle was an executor, the option-to-purchase was always going to fail unless the consent of all the beneficiaries was obtained to the transaction. Catherine would have never consented to this transaction as it reduced the value of the estate she was claiming against by $1,000,000.

The Court was sympathetic to Michelle's position and noted that:

1. It would appear a harsh and unfair outcome for Michelle;

2. There would be difficult issues for Michelle's solicitors and accountants to address the reconstruction of the estate taking into account the contributions Michelle had made to the farm over the last three years.

However, she had breached the rule of self-dealing and her advisors failed to properly follow the option-to-purchase procedure. The distribution to Michelle was invalid and of no effect.

As a result of Catherine succeeding with her claim she was now able to proceed with her Family Protection claim against the assets of the estate now valued at $2,000,000. The result of that case is still unknown, but it will be about the competing interests of Daniel, Catherine and Michelle.

The Lesson

While Murray Andrews was trying to enable Michelle to succeed to the farm, he clearly favoured her by making Michelle the only child to be an executor. This actually worked against his wishes.

Murray Andrews was relying upon the terms of his will to give effect to his succession desire. It would have been much wiser to have worked on a succession plan with Michelle during his lifetime. He was 79 years of age at his death and still owned a significant asset personally. The intentions of Murray Andrews could not be carried out notwithstanding the common view that a will is paramount.

Murray Andrew's will always contained a risk that it would be subject to a Family Protection claim by Catherine and potentially Graeme. This is purely by the fact that Catherine, as Murray Andrews' child, was not provided for in his will. The conclusion in this case is unknown. It will involve the inappropriateness of the contents of the will. The circumstances around its drafting are yet to be disclosed. Why did the drafter of the will think that it would be successful, when Michelle was both an executor and purchaser and Catherine was not provided for? It appeared to be set up for failure, unless a court order or consent of all the beneficiaries was obtained during the administration of the estate.

It should also be noted that Murray Andrews' will was dated 10 August 1998, some eight years before his death. The circumstances would have changed during those eight years and the will should have been reviewed from time to time. The risk would have increased every year given the significant increase in farm values over that period.

The fact is that these risks would have been known at the time the will was signed, and reviewing the will should have prompted a discussion around the succession of the farm to Michelle before Murray passed away. Michelle could have been the legal owner of the relevant assets with a mortgage to her father, such mortgage being dealt with under the terms of the will. The mortgage was always going to be exposed to a family protection claim, subject to the amount of gifting that would have been done by Mr Andrews to Michelle, but any increase in value would have been for the sole benefit of Michelle.

Of further concern from the outcome of this case regarding the rule against self-dealing is that a large number of family trusts have been set up in New Zealand with the family trust owning the land. In any situation where land is distributed or sold to a child who is also a trustee, that transaction could be voidable at the option of the other beneficiaries if it is not properly administered with the correct procedures followed. The third case study supports this risk.

The Law Reform (Testamentary Promises) Act 1949

The second area of legislation used to contest estates is the Law Reform (Testamentary Promises) Act 1949 ("Testamentary Promises Act"). There is no equivalent legislation in any other legal jurisdiction in the world.

It has been stated that *"... the mischief which it was designed to remedy was largely the tendency of testators to persuade people to render services to them by promises later found to be unenforceable against the estate..."* (*McCormack v Foley* [1983] at 66). The legislation converted promises into legal contracts.

The relevant section of the Testamentary Promises Act is section 3(1). The legislation provides a framework for people to enforce contractual promises made by the deceased prior to their death, such promises not being contained in their will. Generally it relates to an award for services rendered as a direct result of a promise being made by a deceased. The court can award a person a share of the assets of the estate.

The deceased *"should perform his promises to those who have served him, whether they are members of his family or not"* (*McCormack v Foley* [1983] at 66).

The elements that need to be proven for such a case to succeed are:

(a) The claimant must have rendered services to, or performed work for, the deceased in the deceased's lifetime;

(b) There must be an express or implied promise by the deceased to reward the claimant;

(c) There must be a nexus between the services and the promise; and

(d) The deceased must have failed to make the promised testamentary provision or otherwise remunerate the claimant (Brookers Law Reform (Testamentary Promises) Act 1949 paragraph TA3.03).

The legislation gives the Court discretion to use a large and liberal construction, especially where there are difficulties of proof because the person who may have made the promise is deceased (Patterson, 2004).

The next legal case chosen is a continuation of the Family Protection Act theme with a Testamentary Promises Act claim added into the dynamics of the case and family.

Case Study Two

Hamilton v Hamilton

Background

This case concerned a claim by two daughters against their father who died at the age of 100. Mr Wilfred Hamilton was a well respected farmer in the Hot Water Beach community within the Coromandel peninsula.

Incidental to this was that fact that Mr Hamilton transferred one of his farms "Dalmeny Corner Farm" to his son Douglas, such farm now being owned by his grandson. They were not parties to these proceedings and clearly the succession plan of that farm, when Mr Hamilton was 60, went very well.

It is important to list the plaintiffs against Mr Hamilton's estate in this case to get a full understanding of the family dynamics involved. They are as follows:

- Zoe Laycock – his daughter
- Viola Waldrom – his daughter
- Michael Hamilton – his grandson
- Donna Cressey (Michael's previous wife) – his granddaughter-in-law
- Errol Hamilton – his grandson

The defendants were Mr Hamilton's executors, Douglas Hamilton, Michael Hamilton and Errol Hamilton; and Neville Hamilton personally (his grandson).

Facts

Upon the death of Mr Hamilton his will made provision for the following:

1. The "Home Farm" with plant and equipment, being a dairy farm of some 48.29 hectares representing a major asset of the estate that was left to his grandson Neville.

2. A farm known as "Ponderosa" representing 494.02 hectares was owned by W A Hamilton Limited (Hamilton Limited). Mr Hamilton directed that all his shares in Hamilton Limited and his interest in Ponderosa and certain equipment be left to his grandsons Michael and Errol in equal shares. However, this clause failed because he had dealt with that transfer of those assets to Michael and Errol during his lifetime.

3. The residue of the estate was bequeathed to his three daughters Zoe Laycock, Viola Waldrom and Cynthia Waldrom. It is unknown why Cynthia Waldrom did not contest the estate.

Mr Hamilton's intention, which was very much accepted by the family, was that:

(a) The Dalmeny Corner Farm was to go to his son Douglas;

(b) The Ponderosa Farm was to go to Michael and Errol; and

(c) The Home Farm was to go to Neville.

The Claims

Fours claims were brought against the estate of Mr Hamilton as follows:

1. Mrs Laycock and Mrs Viola Waldrom made claims under the Family Protection Act 1955 in relation to their contributions to Mr Hamilton's farm and for recognition of their roles in the family.

2. Ms Donna Cressey, the former partner of his grandson Michael, made a claim under the Law Reform (Testamentary Promises) Act 1949 for the care she gave to Mr Hamilton during his last stages of life.

3. Michael was seeking the establishment of an access way though the Home Farm as the current access though the Home Farm was unsatisfactory pursuant to the Law Reform (Testamentary Promises) Act 1949. He also claimed under the Family Protection Act in support of Ms Cressey's claim.

4. Errol's claim was for a constructive trust and legal title over the curtilage on the Home Farm for a cottage he improved, such claim being under the Family Protection Act.

The unfortunate position for the estate was a multipartite dispute over an estate where no assets were left to form part of the residue to share between the daughters. The court agreed to only deal with the claims of Mrs Laycock, Mrs Viola Waldrom and Ms Donna Cressey and to allow the brothers to determine their position once their claims had been determined.

Neville Hamilton's Position (Grandson of Mr Hamilton)

In the context of the claims being made it is very important to understand the position of Neville. He left school at 15 under family pressure to leave the school and worked on the farms.

Neville was told that if he worked on the farms he would have the Home Farm transferred into his name, like Dalmeny Corner Farm and Ponderosa had been transferred to his uncles. Neville carried out extensive work on the Home Farm and managed it as his own, along with the improvements to the homestead.

The position of Neville is in direct competition with the daughters and Ms Cressey.

Zoe Laycock's Position

Zoe Laycock was reared on the family farm, as was the whole family. She left school at 13 to be a full-time farm worker until she was 21 when she married and moved to Matamata. She had a good rapport with her father.

Viola Waldron's Position

Viola Waldron led a similar life to Zoe Laycock. She left school at 13 to work on the farm for no wages and helping her father double the production on the farm as his contribution to the war effort during WWII. She also enjoyed a good relationship with her father. She married at 23 and moved to the Hawkes Bay.

It was very clear that both daughters were owed a moral duty to receive a payment from the estate for the:

> *"proper support in the form of recognition both of membership of the family of the deceased and of contributions by way of assistance to and support of the deceased"* (*Williams v Aucutt* [2000] at 479).

Claim By Donna Cressey

The basis for Donna Cressey's claim was for the support she gave to Mr Hamilton in his later years of life.

This support was for the following:

1. Ms Cressey and her former partner Michael agreed to have Mr Hamilton live with them from September 1991 until April 1999, three months before his death following gall bladder surgery. He wanted to be within the locality of the farm.

2. For over seven years Ms Cressey, along with raising her family of five children, cared for Mr Hamilton. Her duties included:

   (a) Cooking meals and washing dishes;

   (b) Cleaning his room and laundry;

   (c) Personal care with his dressing and undressing;

   (d) Assisting with toileting;

   (e) Undertaking shopping; and

   (f) Undertaking medical and social visits.

3. Michael supported the position of Ms Cressey and added that Mr Hamilton enjoyed life within the family unit and was taken on holidays with the family. He also deposed that:

   > *"At the time we didn't expect to be paid to be looking after him. However, we didn't expect to be left in a position we are in today either."*

4. Mr Hamilton also suffered old age issues such as incontinence and dementia which Ms Cressey had to deal with.

The Testamentary Promises Act relies on a promise to be made by the testator. Ms Cressey deposed that:

> *"... during the ... years that Michael and I cared for him on many occasions he would say I was not to worry and he would look after Michael and I and the children"*

While there was no specific promise or suggested value of the promise being made by Mr Hamilton that she would receive a particular asset the Court was prepared to accept that a testamentary promise was made. The Court found that her devotion was commendable.

Overriding Claims

The major difficulty faced by the Court was that the only asset under the will available to address the competing claims was the farm being left to his grandson Neville.

The Court knew that any provision made in favour of the daughters and Ms Cressey would impact on Neville's position. The Court then went on to justify how it was to weigh up the rights of the competing interests in what they had defined as being a small estate. To deal with the competing claims the Court followed a previous case whereby:

> *"The essential consideration where there are competing claims ... is to resolve the conflict in such a manner as will best meet the justice of the particular case and produce a just result as [among] all the parties"* (*Re Hayward* [1989] at 767).

The court took into account the wishes of the testator, but he wished for more than he could deliver.• The court acknowledged that Neville would have to fund the payments to the two daughters and Ms Cressey. The court did not want to disinherit Neville of what he had been promised. From a total asset value of $665,000 for the estate the court provided $50,000 to each daughter and $70,000 to Ms Cressey, leaving Neville a value of $495,000, effectively losing approximately 25% of the share of the estate he had expected to receive. Although not addressed in the case it is presumed that he had to fund the cash payments to allow him to retain the Home Farm (albeit with more debt).

AND the other outstanding claims were yet to be settled. It is surmised that those issues were settled out of court given that this case was in 2003.

The actions of Mr Hamilton put the family under enormous pressure. The transfer of the two farms during his lifetime was very successful and were not part of any claim. However, there was poor planning around the Home Farm. It is difficult not to be critical of the will completed by Mr Hamilton. It was set up for failure, because there were never going to be any residual assets for the estate. He ignored his legal obligations to Ms Cressey and to his daughters. If he really wanted to ensure that the Home Farm would succeed to Neville then it had to be properly dealt with and transferred during his lifetime like the other farms.

It is interesting to note that while the family was in conflict by going to Court to protect their position the Court made some positive comments that the grandsons did acknowledge that their aunts were entitled to an award, notwithstanding it possibly creating financial difficulties for them. Furthermore Mrs Laycock was at pains to emphasise her father's wish that the three farms were to go to the relevant family members and the aunts did want to see their father's wishes carried out.

However, the fact that this dispute had to go to court meant that while these acknowledgements were disclosed they did not go far enough to prevent the family from having to go before the Courts to resolve their disputes.

Case Study Three

Scott v Scott

Introduction

The case of Scott v Scott is the best illustration of bad planning out of the three cases selected. It shows what happens when an intention to try to undertake a succession plan in complicated circumstances goes wrong. This case did not involve the Family Protection Act or the Testamentary Promises Act.

The Scotts have been in the courts litigating since 2002 until the most recent case in 2011. They were fighting over two farms known as Tombstone and the Trust Farm. All attempts to reconcile their differences failed and they held firm irreconcilable views to the detriment of themselves and the family.

Effectively Lewtyn Scott ("Lewtyn") was against his mother Rosemary Scott ("Rosemary") and his three sisters Lee McNeilly ("Lee"), Alison Scott ("Alison") and Cara Clare ("Cara").

Facts

There were three claims in total. The first two related to Tombstone Station (Tombstone) and the third to a property owned by the Arthur Scott Family Trust.

Tombstone

Lewtyn's grandfather purchased and developed this farm. Lewtyn's father known as Roddy inherited the main part of the farm before he met Rosemary, following which they worked on the farm together.

When Roddy died in 1993 his half share was left to Rosemary, Lee and Lewytn as trustees of his Will (the Will Trust), with Rosemary being given a life interest and upon her death the half share was to go to the four children equally.

Lewtyn was in London and in 1999 he expressed an interest in coming back to New Zealand to farm the property. Rosemary then moved from Tombstone and onto the Trust Farm. In April 2000 he returned and took over the farm. In July 2000 he purchased the estate's half share of Tombstone from the executors. He had continued to live on and operate the farm during these proceedings.

The Arthur Scott Family Trust

Lewtyn's grandfather created the Arthur Scott Family Trust (the Family Trust) in 1987 of which the trustees were Roddy and Rosemary for the benefit of the four children. Lee replaced Roddy upon his death. The main asset was a farm on State Highway 29 (the Trust Farm) along with a vacant section and other assets including livestock, plant and machinery and cash.

The Family Trust's vesting date was 1 March 2002, representing a very short vesting date of some 15 years.

Rosemary and the three sisters then became concerned that Lewtyn's purchase of the estate's half-share in Tombstone had disadvantaged them. Rosemary had proposed that her half-share of Tombstone was to be sold to Lewytn with the purchase price forgiven in her will. This was linked to a proposal that he would forgo his interest in the Family Trust as a method of equalisation. However, the Family Trust method had actually been implemented where the assets of the Family Trust went to Lee, Alison and Cara. Lewtyn did not agree and issued legal proceedings.

Claim One

Lewtyn's first claim was to enforce the transfer of Rosemary's half-share of Tombstone to him pursuant to an alleged agreement for sale and purchase for a price of $565,000 with settlement to be after he returned to New Zealand.

It was accepted that there were intentions and discussions around the potential sale to Lewtyn but Rosemary denied that there was ever any legal agreement. There were a number of factual issues and evidence that the court had to review. However, the Court found that there was never any concluded agreement with Rosemary to sell her share to Lewtyn.

Lewtyn also pleaded equitable estoppel whereby Rosemary had created and encouraged a belief for Lewtyn that he was to purchase her share. It was found that while Lewtyn may have hoped to purchase her share, it was not a legitimate expectation from the actions of Rosemary.

Claim Two

The second claim, and most far reaching, related to Lewtyn's purchase of the half-share of Tombstone from Roddy's estate that was held by the executors pursuant to a life interest in favour of Rosemary during her lifetime.

Rosemary and Lewtyn had met with the family lawyer to deal with the sale of this half share of Tombstone. Prudently a valuation was obtained valuing the farm at $1,590,000 and therefore setting a sale price of the half-share at $795,000. The payment of $795,000 was satisfied by Lewtyn providing a first registered mortgage. Lewtyn did pay $36,000 in interest and ceased payments when litigation commenced, at which time Rosemary began to demand payment of interest.

The initial part of this claim was that Lewtyn was applying undue influence/duress on Rosemary and Lee as executors to sell the estate's share of Tombstone to him due to his domination and control. The Court found that this could not succeed, no evidence was found and all the legal documents were signed in front of the family solicitor without any objection by Rosemary and Lee, or even at a later date until these court proceedings.

The second part of this claim related to the obligation of trustees of the estate to administer the estate in accordance with its strict terms. It is a well known principle that a person in a fiduciary position cannot profit from that position or put that person in a position of conflict (Bray v Ford [1896].

The executors had "duties of loyalty to all beneficiaries and ... duty to avoid conflicts" (Scott v Scott (2008) paragraph 71). The court found that no one turned their mind to these issues at the time of this transaction.

The Court found that Lewtyn profited from the transaction to the detriment of the life tenant Rosemary and the beneficiaries and did not try to obtain the best possible price as an executor. The Court also found that Rosemary, Lee, Alison and Cara were not given the opportunity of obtaining independent legal advice and in particular Alison and Cara were not fairly and fully informed. The Court felt that at the very least their consent should have been properly obtained or even taking the most conservative approach by obtaining Court approval.

The Court also found that both Rosemary and Lee were in breach of their duties to protect the beneficiaries and in particular Alison and Cara.

The Court ruled that "the estate's half-share in Tombstone has been fully preserved, maintained and developed by Lewtyn for over eight years and is now a valuable asset available to be returned to the Will Trust" (Scott v Scott (2008) paragraph 86).

Lessons and Issues

This case was significantly more complicated and tragic than what has been set out above. On first glance any reasonable person, especially a farmer, would have felt that the sale of the half-share to Lewtyn at market value was fair and appropriate.

There is no doubt that Lewtyn could never have foreseen the problems of that transaction. He was simply never advised of this potential problem.

While people may organise their affairs in any way they desire, there are a myriad of complex legal issues in using family trusts and for people as trustees and executors of estates. If it is not undertaken correctly or without proper foresight then problems will eventually arise.

The judge had been critical of the family solicitor involved because he failed to take into account the interests of all beneficiaries under the will and issues were not fully analysed or addressed at the time. The person providing advice on the drafting of a will or advice being given on the will owes a duty of care to the beneficiaries even if they do not act for any of the beneficiaries.

The judge also noted that the sale and purchase transaction was represented by one solicitor. No one was given the opportunity to obtain legal advice and Alison and Cara were not represented at all. It was clear that there were significant conflicts of interest and the solicitor should not have continued with the transactions and had been accused of acting incompetently.

If it had been done properly with fully informed consent with independent advice at the time that transaction was completed, there may not have been an issue with that transaction because at the time the family seemed to be doing what Rosemary, the mother, was wanting.

I would pose the question that, if Lewtyn had not contested the breach of trust which was legally correct and he was entitled to do, would it have been likely that Rosemary would have left him her half share under her Will?

One last comment was that the overall perspective of the judge was that "Rosemary was at all times looking to achieve an overall fair distribution of her assets among her four children". (*Scott v Scott* (2008) paragraph 25.) Rosemary was also put into a difficult situation by the creation of a life interest will. This meant she had obligations to consider her children as an executor, in conflict with her own personal needs, and she was found to have breached that obligation. Rosemary should never have been put into that position.

The end result was that Tombstone and the Trust Farm will now be sold on the open market with no guarantee that Lewtyn will be the successful purchaser of Tombstone, even if he decides to compete with others on the purchase.

Chapter Three

Estate and Succession Planning

The term "estate planning" is utilised a lot by professional advisors in the rural industry. The ideology and concept of estate planning is very important to understand especially in the context of the legal perspective set out at Chapter 2 that estate planning by itself is fatal to proper succession planning if relied on solely to try and create a succession plan.

It is not appropriate for a will to be used as a default succession or as a succession plan. Wills are complementary to a succession plan (Mishra and El-Osta, 2008).

Inadequate estate planning is a major cause preventing a proper transition to a successor (Agri Marketing Editors, 2011).

Estate planning reflects what is to occur with the assets and powers that a person holds on his death. This includes the terms of his will but also more importantly the legal obligations and requirements of the control and decisions to be made by trustees of the family trust that may hold all the relevant assets.

Estate planning can leave particular assets to selected beneficiaries in accordance with a will. The fundamental disadvantage of this type of estate planning is that the assets are exposed to legislation such as the Family Protection Act or the Testamentary Promises Act.

The term succession planning used in the farming context is the process by which a farm, normally the family farm, is passed to successive generations. This is through the transfer of ownership, income and management to the next generation (Mishra and El-Osta, 2008).

It is recognised that the proper succession in the rural industry not only relies on the success of intergenerational succession of family farms but also succession of farms to the younger generation who may not be family. The purpose of this paper was to focus on the impediments to succession of farming families with specific regard to the case studies undertaken.

The consequences of completing succession planning incorrectly are dire for the farming family with the potential that the family farm is sold when it gets "too hard" or the farming family battles in the legal system. Furthermore countries such as New Zealand which have a very strong agricultural industry are moulded by this focus on agriculture (Mann, 2007). The success or failure of New Zealand is not only based on the profitability of farming but also on the success of the farming families involved in the industry. It has been reported that larger farms are more likely to promote a positive succession plan (Barclay, Foster and Reeve, 2005).

The case studies have evidenced that a significant trap for farmers trying to create a succession plan is by leaving specific assets to specific people pursuant to their wills, as part of the estate plan upon death. The legal case studies set out in this paper have clearly evidenced that an estate plan relying solely on a will is likely to fail if the intention is to create a succession plan. The use of an estate plan is important, but the proper transition must be done through a succession plan (Tevis, 1998).

An estate plan of leaving particular assets to specific people upon death does not work, because the risks of failure in the current New Zealand legal environment are too large and complicated. The intention should be to pass on a good business operation successfully and that needs a succession plan (Conroy, 2009).

New Zealand has not been settled for as long as countries such as the USA. New Zealand will encounter the succession issues occurring in the USA and should learn from them, notwithstanding that succession issues are already occurring in New Zealand. It has been stated that:

> *"The greatest transfer of wealth in the history of America is about to happen. While 80% of family farms plan to transfer control of the land to the next generation, only 20% have succession plans to achieve that important goal"* (Agri Marketing Editors, 2011 at 28).

This was supported by a warning that the USA is on the brink of a massive generational shift of the thousands of farms settled after the Second World War (Tevis, 1998). The average age of American farmers is 58 and only 40% are prepared to transition management, operation and/or ownership to the next generation. Further research indicated that over 25% of all farmers and ranchers and half of agricultural landlords are over 65 years of age (Gudorf and Beckett, 2009). Robert W. Taylor of Purdue University has said that

"… historically, 22% of family owned small businesses are transferred from generation to generation; for farming, the number is about 80%" (Wall Street Journal, 1991).

There are dedicated American websites on farm succession, such as www.FarmJournalLegacyProject.com. The U.S. Department of Agriculture's Economic Research Service released a report that the succession planning decisions for farmers and ranchers are important for America's food supply. This was supported in the 2008 Farm Bill (properly known as the Food, Conservation, and Energy Act of 2008), such legislation being widely criticised by the United Nations and the World Trade Organisation due to the continuation of subsidies. A national estate planning conference in Texas announced the creation of a pilot programme to develop proper succession planning to support the problems facing America (Gudorf and Beckett, 2009).

The USA has taken estate and succession issues very seriously and this is one reason for the large amount of data available in America on estate planning and succession planning, but not necessarily in New Zealand. Some mid-western American states have even legislated to prevent farmers from selling to larger corporate entities.

In Canada it is estimated that about 120,000 farmers will turn 65 over the next ten years (reported in 2003). From 2003, over the following 15 years it was expected that about $50 billion worth of land would need to be dealt with due to retirements and death (Morriss, 2003).

In 2005 the average age of farmers in the United Kingdom was 58 and in some areas it was a lot higher (Ashbridge, Ian, 2005).

New Zealand is now beginning to experience those same issues with the baby boomers. The succession issues of New Zealand are not new issues to other countries where agriculture is a significant part of the economy. It is important to acknowledge that in some countries succession issues are related to the different legal environments that the farming families operate in, such as tax planning.

A large amount of data has been written around the world about what it takes to undertake a successful estate and succession plan. Some of the supporting articles seem to be purely academic and sometimes do not go to the heart of the issues to actually make a difference to the ultimate success of the rural industry through estate and succession planning.

Common themes were proper planning and timing by the farming family, finding and creating the successor and succession being a multi-staged process. These are already well known issues. What remains to be determined is what are the important elements that farmers need to be aware of to better control the succession for their family. Most farmers will know that they have unresolved succession issues or desires, some do not know what to do and do not get the right support and others just need to obtain the right guidance rather than doing nothing.

The ultimate decision to properly complete an estate and succession plan is by the farming family and they control how this should be achieved.

With reference to this important background to estate and succession planning the next chapters focus on the themes taken from the case studies.

Chapter Four

How Good Were The Professional Advisors?

Specialist professional advice is a necessity for the industry. Farmers are being let down by a lack of appropriate advice to assist them to properly complete an estate and succession plan. This is clearly supported by the case studies undertaken.

Donald Jonovic, an experienced succession planning expert in America, found that farmers faced difficulties in finding good advice. They were not getting access to proper help, but another issue is that when they did find the right experts they did not want to pay for that specialist expertise (Tevis, 1998).

A proper succession plan cannot be created by one person. While tax advice on the implications is critical it will always involve a team approach requiring an effective team. The professionals must have the necessary skills and expertise and be able to work as effective team members. Gudorf & Beckett (2009) have succinctly set out what the team approach must entail:

Competency

The team approach will require expertise in the areas of accounting, business structuring, insurance planning, estate planning, investments, tax planning, long-term care planning and asset protection. Each team member must have the relevant experience and skills and background in their relevant areas.

Commitment

Each team member must be committed to the process. They must demonstrate a commitment to the client, the team and the processes. Any one of the team lacking this commitment will make it harder for the succession plan to be created.

Communication

There needs to be effective communication. While that communication at times may raise conflicts between the parties, better communication will allow advisors to voice their opinions. Such voicing should not be done in an adversarial way. The aim is for members of the team to communicate effectively to resolve conflict efficiently without the loss of mutual respect.

Collaboration

Collaboration is the process of two or more people working together to reach a common goal. More succinctly put, it is the creation of a "we" environment to overcome the desire to compete with other team members.

Chemistry

A very important question is whether the team has the right chemistry. You could have a team with the right qualities, except for chemistry. Everybody needs to feel that there is the right fit.

The commentators noted that if these criteria are not met and the team is not working out, then it may be best to ask a team member to leave the team to find a better fit. The aim is for the team to be for the greater good of the succession planning goals of the client.

Farmers need to give themselves every opportunity of passing on their business and ensuring that they have the right team around them is important. They do not want to be in the position of a failed succession plan due to not having the right team, as shown by the case studies.

The New Zealand legal system can at times be relatively simple to understand and achieve the right result. The rules are known and a farmer's circumstances should be structured within the terms of the current law. It is essential that the circumstances are continually reviewed to take into account law changes.

Advisors in the industry who work in this area need to take responsibility for the success of estate and succession planning. It needs a passion for the success of the rural industry and in particular each and every farming family.

Advisors should say whether they are experienced in their relevant area. If not, they should let the right team member be involved. The consequences are too great for incorrectly setting up the wrong estate and succession plan.

Advisors should also be confident enough to help farming families make the right decision. Invariably advisors will encounter difficult farmers whose way of undertaking matters is set for failure. Advisors have an obligation to ensure the farmer ultimately makes the right decision. Is there any value in an estate and succession plan being created which the advisors know will fail upon the farmer's death?

Chapter Five

How Adequate Were the Business Structures?

The success of a succession plan is driven by creating the right business structures. It will require the farming family selecting the best way to transfer ownership through the proper use of legal structures.

In New Zealand it is common that historical structures, sometimes implemented very recently, do not promote the required staged process of a succession plan. Sometimes these structures have been chosen for tax purposes, such as the use of family trusts to own all of the farming assets and trade, commonly known as a trading trust. If succession is not relevant then the structure will be less relevant. The wrong decision now can still have significant implications in the future when succession suddenly becomes important, which from experience does happen.

Family trusts owning a farming business significantly conflicts with the needs of a succession plan. Of great concern is the number of family trusts directly owning land in New Zealand. In discussions with rural bankers, the ownership of farm land by trusts could be as high as 50%.

Furthermore the success of a succession plan will also require the element of good corporate governance. It remains to be seen whether a family trust operating a dairy farm can be seen to be operating it with good governance. Trustees must act with prudency for the benefit of the beneficiaries, but there is no strict legal requirement upon how that is to occur and children will not be trustees with their parents. The Companies Act 1993 and companies' constitutions clearly set out governance requirements. Corporate governance has been concisely stated by Neil Richardson, chairman of the Foundation for Research, Science and Technology as:

> *" ... the system or process by which an organisation is led, planned, directed and controlled in order to protect, create, and ultimately maximise the sustainable achievement of direct shareholder interests, in synergy with wider stakeholder interests" (Richardson, 2004)*

A company structure clearly incorporates the corporate model of operating the company through a Board of Directors. The obligations of a trustee are more onerous than those of a director.

A company structure also allows the family to properly plan the sharing of income, structuring ownership through the shares in a company based on proportionate interests and participation in management.

The proportionate shares in the company are owned by family trusts for the respective child and parents.

Proper succession planning is not something that can occur overnight, unless succession happens by the passing of assets upon death and this, as set out in case studies, could face the rigours of the New Zealand legal system. Professional advisors have more than a duty to the families to set up a proper structure. They have an underlying duty to continue to ensure that the structure is given an opportunity to operate and move forward. The duty is not to create the structure and forget about it. It must be managed over the life of the family ownership.

I have personally seen succession plans not being implemented very well. Usually the child who receives the farm is the winner but the parents and other family members are losers. It should be accepted that the family as a whole will need to make an overall sacrifice to permit the succession to occur, but by how much? By way of illustration I have seen the following:

1. The farm is sold to the succeeding child at market value;

2. That child raises finance to pay the parents, thereby reducing the parents debt and allowing funds to purchase a house;

3. The parents finance the balance of the funds because the child does not have much equity;

4. When times are tough the child cannot pay interest on the bank's debt and the parents' debt and the parents are forced to accept a reduced interest payment, if any. No principal repayments are made.

5. In the meantime the value of the farm is increasing significantly and the other children cannot be provided for by the parents.

This example effectively sets out a succession plan that has occurred too quickly. It should be "a multi staged process that may take many years" (Taylor, Norris and Howard, 1998) and can be considered to be "a long-term transitional improvement in the way business is managed, financially supported and equipped to convey to the next generation" (Spafford, 2006).

A common mistake is the estate planning ideology that when dealing with assets to be left to children it must be done equally. It does not have to be completed equally but rather fairly, which is a significant distinction. A succeeding child should be recognised for his or her commitment to the farm, especially if the child left school to go onto the farm. It is very common for a child to work longer hours than an independent employee because they have more blood in the game and they are often paid less than market salary.

One significant step is the eventual release of control from the older generation to the younger generation. By using a company structure it is readily understandable that once a child has 51% of the company shares and the parents 49% of the company shares, control has been transferred.

The appropriate business structure must be decided on by the farming family, but that farming family will need the right team members to work together who are committed to the industry and have the requisite skills and experience.

Chapter 6

Was There Enough Communication?

As in all facets of life you can not underestimate the need for proper communication. Some farming families find it difficult or are not good at communicating.

I have experienced such family situations when discussing personal matters with children about their desires to succeed to the family farm. A common response has been that they want to take over the farm, they think that is what their parents want, but they actually do not know. They have never asked their parents and their parents have never disclosed their position. They may have already worked on the farm for a decade. This is potentially a significant issue for the farming community. Without any communication succession may not follow.

Furthermore, if families are not properly communicating then how is this issue to be resolved. The clear view is that the family must be given the opportunity of working with experienced rural professionals who can properly facilitate the communication. The family should have full and frank discussions in an appropriate forum facilitated by a professional without taking that communication personally.

The parents will have their own concerns, such as financial security and a child's commitment, and the child will have their own concerns, such as the future of the business.

These concerns must be openly addressed. There are a number of examples of attempted succession plans occurring and when the child takes over they sell the family farming business.

It needs to be acknowledged that family dynamics can make communication difficult with associated stresses. These stresses may be from financial pressure, working with family members, generational value differences and unfairness. These will need to be properly managed (Pitts, Fowler, Kaplan, Nussbaum & Becker, 2009).

The communication conflicts tend to be about relinquishing control versus retaining control, profit versus affordability and progress versus continuity (Pitts, fowler, Kaplan, Nussbaum & Becker, 2009).

It has been discovered that to overcome communication problems the families need to include younger generations, developing functional family ideas on how to positively deal with conflicts and encourage two way interactions between family members (Pitts, Fowler, Kaplan, Nussbaum & Becker, 2009).

There are a large number of succession plans that operate well because the family is prepared to openly discuss matters and to resolve any issues. The case studies have reflected poor communication whereby things were occurring that affected the rights of other beneficiaries without them being advised of the legal implications or detriment to them. This was clearly illustrated by Scott v Scott.

Chapter Seven

What Has Changed? Repeal of Gift Duty

The recent abolition of gift duty by the National Government from 1 October 2011 has provided an opportunity for assets to be more effectively alienated thereby increasing the success of estate and succession plans.

One of the relevant issues with a proper succession plan is the alienation of assets out of the farmers' names personally to a family trust. As evidenced by this paper assets held in the name of any farmer personally are able to be attacked by family members.

Prior to the abolition of gift duty, an effective succession plan included the transfer of assets to a family trust. The value of the assets was lent by the farmers to the trust and the farmers then commenced a gifting programme of $27,000 each over a number of years. A lot of farming couples had a number of years to gift, especially if the amount was $2,000,000, equating to 38 years of gifting.

Effective from 1 October 2011 legislation was passed to repeal the Estate and Gift Duties Act 1956 which removed gift duty on any gifts. There is now an opportunity for farmers to gift all of their wealth to a family trust in one gift, thereby reaching a very important asset planning goal of alienating wealth.

The Family Protection Act has significance in succession planning. As shown assets held personally are exposed to this legislation. However, the Family Protection Act does not contain any provisions that prevent a person dealing with their assets during their lifetime in any way they desire. Assets gifted to a family trust or another person they have natural love and affection for cannot be attacked pursuant to this legislation. It is clear that a large number of assets have already been gifted to a significant number of family trusts over the last 30 years. With the abolition of gift duty that alienation to family trusts is very likely to significantly increase. The Family Protection Act has no ability to claw back those assets from a family trust, unlike other legislation such as the Property Law Act 2007 (gift made to defeat creditors), Insolvency Act (insolvent gifts) and the Property (Relationships) Act 1976 (gifts made to defeat spouses).

The proper alienation of assets and the proper legal structures undertaken by farmers and their professional advisors should reduce the implications of the Family Protection Act in the future. However, while one can now gift all assets by one gift, it was still possible previously to alienate assets during one's lifetime and be in proper legal structures today. This has occurred for some farmers with good early professional advice.

With the significant number of family trusts formed in New Zealand, the New Zealand Law Commission has released four significant reports on the review of trust law and the Trustee Act 1956. It is very clear that the future of trusts will require their proper administration to a very high standard, especially when the Family Protection Act would have less relevance and people will be reviewing other legal options to contest trusts assets and trustees' decisions.

The review of family trusts and the obligations of trustees are likely to play a more significant role in the administration of trusts and the transfer of wealth to children as beneficiaries.

The fact that gift duty has been abolished is only one part of the equation of estate and succession planning as the business structure still needs to be correct.

Chapter Eight

Conclusion

We must always take account of what is happening around us to better understand what is happening within farming families.

One of the most sobering areas to review to obtain a snapshot of issues facing farming families is what legal cases and precedents are being contested in the courts. The initial purpose of my paper was to review what was good practice to undertake a successful estate and succession plan. However, there was an uncomfortable feeling that I was not doing justice to my research and in particular the glaring facts of farming families contesting matters in court.

I felt that more would be achieved for the benefit of the farming families in the rural industry and New Zealand to explicitly state the obvious recurring theme of these types of cases in the courts. There were a number of cases that I could have chosen and many more that would have been settled before legal proceedings were heard in court.

While farming is now being taken as a very serious and significant business by farmers as well as a lot of advisors that support the industry, there are some advisors undertaking estate and succession planning without being specialists. This is pointed out by the case studies which showed a lack of appreciation of the complexities of farming families and the technical legal issues that need to be addressed and resolved as part of the succession planning process.

The clear options for a farming family are:

1. Work hard on completing a succession plan, taking into account the essential requirements, during the lifetime of the parents. At least the parents will have some control over the outcome.

2. Leave assets on death pursuant to an estate plan. As seen in the case studies, if there is an hint of unfairness, in the eyes of the children not the parents, the estate could be contested and what transpires may be against the parents' wishes and detrimental to the child who was supposed to succeed to the farm.

3. Sell the farm without a succession which is clearly the least preferred option.

Option one is the preferred option but this will only be properly achieved with the right team of advisors who can properly communicate and create good communication with the family members to set up the right legal structures.

The repeal of gift duty has given advisors the perfect opportunity to transfer equity to trusts to avoid the problems of the Family Protection Act and the Testamentary Promises Act and have the assets properly administered by the trust for the benefit of the parents and all the children.

What is needed? A commitment from advisors to accept responsibility to ensure that farmers are given access to specialist advisors required to properly implement the desires of the family and in particular the parents and collaboration between industry organisations, such as Federated Farmers and Dairy NZ with assistance from those advisors.

Appendices

Appendix One: Table of Cases

Andrews v Andrews FAMC New Plymouth, FAM – 2007-043-858, 28 May 2007

Bray v Ford [1896] AC 44 (HL)

*Chellew v Excell [*2009] 1 NZLR 711 (HC)

Hamilton v Hamilton [2003] NZFLR 883

McCormack v Foley [1983] NZLR 57 CA

Re Hayward [1989] NZLR 759

Re Leonard [1985] 2 NZLR 88

Tito v Waddell (No. 2) [1977] Ch 106

Vincent v Lewis (2006) 25 FRNZ 714

Williams v Aucutt [2000] 2 NZLR 479

Appendix Two: References

Agri Marketing Editors. May 2011. "Legacy Project Leaves a Legacy", AgriMarketing.

Ashbridge, Ian. 9 September 2005. "Golden Opportunity of Life or Hard Graft", Farmers Weekly.

Barclay, E., Foskey, R., Reeve, I. 2005. "Farm Succession and inheritance: Comparing Australian and international trends". Report to the Rural Industries Research and Development Corporation, Institute for Rural Farmers, University of New England, Armidale, Australia.

Brookers Legal Database, 2011, "Introduction to the Family Protection Act 1955".

Conroy, Ann-Marie. July 2009. "Farm Management, Successful Succession", AVG.

Gudorf, Ted and Beckett, David. 2009. "Farm an Ranch Succession Planning, Part I: The Time Is Now". Journal of Practical Estate Planning.

Mann, Stefan. 2007. "Tracing the process of becoming a farm successor on Swiss family farms" Agriculture and Human Values.

Mishra, Ashok K. and El-Osta, Hisham. 2008. "Effect of agricultural policy on succession decisions of farm households". Rev Econ Household 6.

Morriss, John. 2003. "Old McDonald: Has a Farm", Manitoba Business, Vol 25, Issue 2.

Patterson, Bill. 2004. "Law of Family Protection and Testamentary Promises", Lexis Nexis.

Peart, Nicola "Awards for children under the Family Protection Act" (1995) BFLJ 224.

Pitts, Margaret J, Fowler, Craig, Kaplan, Matthew S., Nussbaum, Jon & Becker, John C. 2009. 'Dialectical Tensions Underpinning Family Farm Succession Planning", Journal of Applied Communication Research.

Rennie, Richard. 2011. "Wills takes over Federated Farmers". The New Zealand Farmers Weekly. 4 July 2011.

Richardson, Neil. 2004. "Corporate Governance Could we show the world sustainable governance?; Are New Zealand directors in a unique position to embrace sustainable business practices? And could our sustainable corporate governance strategies be an example to the world? Yes, apparently. Why? Read on". New Zealand Management.

Spafford, Kevin. Dec 8 2006. "Succession Soluitons", Farm Journal.

Taylor, Janet Edgar, Norris, Joan E. and Howard, Wayne H. December 1998. "Succession Patterns of Farmer and Successor in Canadian Farm Families", Rural Sociology.

Tevis, Cheryl. November 1998. "Succession Planning for Success", Successful Farming.

Appendix Three: Table of Legislation

Family Protection Act 1955

Food, Conservation and Energy Act of 2008 (U.S.)

Law Reform (Testamentary Promises) Act 1949

Property (Relationships) Act 1976