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Succession and Estate Planning for Country Clients

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The material in these seminar notes was produced by Paul Muntz of Fleming Muntz, Solicitors. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters.

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Profile

Fleming Muntz
Solicitors

SINCE 1863

Paul Muntz, Principal

Practice Area

Business Law and Estate and Succession Planning

Expertise/Areas of law

Paul is the sole Principal of Fleming Muntz, a pre-eminent legal firm established in Albury in 1863. In addition to management of the firm, Paul has an extensive practice in Estate and Succession Planning, and is an Accredited Business Law Specialist.

Other Relevant Background

- Paul has been Managing Partner of the firm for over a decade and has served or is serving on the Boards of a number of other charitable and community organisations.
- A past member of the Board of Albury Wodonga Development Corporation ("AWDC").
- Past Chairman of Hume Riverina Business Connect Incorporated (a business and export development program funded by the Federal Government and administered through the AWDC.
- Current Chairman of Hume Murray Food Bowl (an incorporated committee receiving State and Federal funding for promotion of local products in developing markets.
- Provided legal services to a number of Government and quasi Government bodies including, State Forests of New South Wales, Albury Wodonga Development Corporation, Murray Regional Development Board, and the Area Consultative Committee.

  This advice included matters as diverse as joint ventures with local Councils, managed investment schemes, carbon credit trading and water management strategies.
- Provision of advice to a number of international companies, as well as to companies regionally based and major local business enterprises.

Affiliations/Memberships

- Fleming Muntz is a member of Law Australasia, an affiliation of legal firms throughout Eastern Australia, Perth and now in Auckland, New Zealand.
- Paul is currently Chairman of the Estate Planning Section of Law Australasia, and a former Chairman of the Business Law Section.

Academic Qualifications / Professional Development

- Diploma of Law (SAB).
- Accredited Business Law Specialist (New South Wales).
- Admitted to the Supreme Courts of New South Wales and Victoria and in the High Court of Australia.

Succession and Estate Planning for Country Clients

The farming community represents one of the great paradoxes – many families have high net worth, but suffer from wildly variable incomes, poor provision for retirement and an appalling return on capital. Whatever their skills may be, and despite the vast experience of many years brought to a task, none of it is worth one red cent when the forces of Mother Nature conspire to wipe out in one day the labours of a previous year.

No wonder many in the farming community are cynical and embittered and say they have little or no cause for optimism.

Yet despite the vagaries of the farming profession, there is a part of farming day to day life that is utterly controllable and will have the highest probability of success if carefully managed and an orderly strategy put into effect.

There are few topics of conversation that cause more angst, confusion and distress than the subject of "passing on" farming assets – the mere subject brings back vivid memories of past ill treatment and inequities, broken family relationships and irretrievable chasms driven by conflict. Yet despite these bitter memories, many in the farming community are doomed to repeat history and to create the same conflict and bitterness in the present generation as they were subjected to by deceased ancestors.

Universally my experience is that few in the farming community lack the resolve and commitment to obtain a fair solution – most simply have no clue as to how to go about the task and, regrettably there are very few advisors out there who are competent to take them through the process.

I am appalled when I see the attempts made by some of my colleagues to deal with farming succession strategies. Many simply do not realise that the typical "husband and wife" Will is not a universal panacea for all planning problems, and that despite the fact that their clients may ask for a "simple Will", the inescapable fact is that the affairs of farming families are mostly complex and demand careful and measured planning to ensure that there are no unwanted consequences.

The process can appear to be arduous at first, yet I find that as intellectual people gifted with a large dose of common sense, farming folk quickly recognise the importance of each step and throw themselves into the task without hesitation. Some times simply breaking the inertia brings with it almost a watershed of relief, as farming parents quickly realise that the issues that had been "taboo" for so many years become quickly the subject of spirited and constructive family discussion (albeit heated on occasions!).

Why have a Succession Plan?

- Because of a vast number of factors, farmers are living longer and are healthier than ever before (I understand that the average age is now well in excess of 55 years).
- Most farming parents have more than one “farming” child yet many farms do not have the capacity to provide more than one farming income.
- Dividing up a farm may appear equitable but the farming enterprise mostly suffers a loss of viability as a consequence.
- Social change is upon us – no longer is the eldest farming son the natural beneficiary – other non-farming children are becoming more vocal and there are more and more non-farming children seeking (quite reasonably) equality with their “farming” siblings.
- An educated and free thinking generation no longer sees the natural order of things that farming assets belong to certain children with little or nothing for the others – they know their rights and are prepared to exercise them with family provision claims.

A common scenario?

A typical family dynamic within the farming community might be:-

- Dad wants the family farm to remain intact and for all his farming sons to be able to work together in harmony;
- Dad would like to see the rest of his family (non-farming children) happy, even though they will receive only a small inheritance;
- Dad does not want to do to his family what his father did to him (notwithstanding that he probably will);
- Mum wants all of the kids to be treated “fairly” and for there to be family harmony;
- Mum wants to retire into town, and to start enjoying life (buying that new dress and pair of shoes, finally, from retirement cash);
- Eldest son worries that Dad is showing no signs of retirement and is still, after 40 years of working together, telling him how to run the farm and how he “used to do it”;
- Eldest son worries about what Dad is proposing in his Will (which he won’t discuss) and worries that after so many years of loyalty, he may miss out;
- Second son is worried that he will miss out because farm will go to eldest son, and that even if they inherit the farm together, he doesn’t get on with his brother and in any case the farm would not support them both;

- Second son is away at Agricultural College, and is worried that the eldest son is seeing parents daily and can therefore influence them to his way of thinking;

- Daughter-in-law is fed up (after 40 years of married life to eldest son) about:-

  (a) Living in the old shearers quarters;
  (b) Receiving a token salary from the Family Trust, and “half a sheep for rations” from time to time;
  (c) The fact that her husband is “spineless” and will not raise issues of inheritance or fairness with his father;
  (d) All her friends have holidays and new clothes – why does she have to wait until there is a sprinkling of funds from the Family Trust at the end of the financial year?;
  (e) What her husband is (not) doing about ensuring that <u>their</u> son will end up inheriting the farm one day, when he has an uncle hovering in the wings.

- Non-farming daughter, after 10 years living in Sydney and completing a university degree in Social Equities, is beginning to think that it is all a bit unfair that her brothers are going to inherit the farm and she will get little or nothing.

Any of this sound familiar…?

Key critical factors

In the life of a farming family, the following factors are important:-

- Death of the key farming asset owner, or his/her disability through illness or accident.

- Farming children – changes in their interest or level of enthusiasm in continuing the farming operation.

- The “prodigal” child – cannot make way in the outside world and returns to the farm for security.

- Conflict within the family relationships.

- Insufficient assets – where there is simply not enough to “go around” for the next generation.

- Family communications – open and transparent <u>or</u> patriarchal or tyrannical?

- The willingness of a generation to let go in favour of the next generation. Where and when are parents to retire?

- Independent children – want to farm but will do it elsewhere (with financial help assumed).

The planning process

Planning, like most good business decisions, requires input from the key players. Rarely can a Succession Plan satisfy all family members, and certainly it will not do so without their involvement in the planning process.

For that reason I regard the following as <u>key</u> "building blocks" in the planning process:-

(A) Information gathering

Most farming families are co-operative in providing me with the information that I need – this is done through a "client questionnaire" which gives me most of the straightforward information (full names of children, dates of birth, assets etc.) but importantly also has an educational role in illustrating to the farming clients the nature of the assets that they hold and the necessity of dealing with each of them in turn.

Where possible, this information gathering is done by my clients themselves to minimise wasted time and expense. I have had great success in working closely with the accountancy profession during this phase, where professionals with a knowledge of a client's affairs quickly and efficiently put together asset details in a manner which is useful and productive (called a "Wealth Statement").

Examples of the information that I need are:-

- Details of land (Title references, acreages, relative location of properties, mortgagees etc.) – remarkably, this process "flushes out" a good deal of problems and deficiencies that have laid dormant for years – land holdings can often increase (or decrease!) and notionally owned paddocks disappear (or if we are lucky, still remain in the family, although sometimes in the name of great grandfather Fred!!).

- Particulars of plant and livestock and any special issues (breeding stock, artificial insemination strategies etc.).

- The structures of the farming enterprise (companies, trusts, partnerships etc.).

- A description of improvements and their location (critical where farming properties are to be separated between children). For example, on a dairy farm going to two boys, if there are two blokes but only one dairy, then when the land is divided up, the boys will simply have to learn to get on!

- A careful examination of financial statements to confirm the viability of the farming enterprise (and most importantly, to look for entries that will sound "warning bells" – loan accounts etc.).

- Copies of all relevant documents (Trust Deeds, Partnership Agreements and company returns, or like documents).

- Supporting evidence of how insurance policies are held, or the total of benefits held in a superannuation fund (many clients rarely get insurance and superannuation right – their initial "guesses" often prove hopelessly wrong).

- Details of all other assets, including in particular Farm Management Deposits (FMD's), shareholdings (in farming industry type companies and others) and most importantly, in whose names those assets are held.

(B) Dealing with your wishes, hopes and aspirations

No lawyer should ever blindly follow the instructions of a client in relation to his or her Will. That is not to say that a client's wishes should not be respected, but every legal practitioner has a clear duty to ensure that a client makes not only a decision, but that it is an <u>informed</u> decision. To that end, a lawyer must properly advise the consequences of the instructions being given, discuss other options, and when all else fails, write to the client to formally record that whilst the wishes will be carried out, it is contrary to the advice of the lawyer. Happily, my own experience is that once the difficulties of following a particular course are pointed out to a client, he or she will readily consider other options and seek a solution that will achieve the same outcome in a more efficient manner.

It is at this point of the planning process that the "Family Meeting" plays such a key role. If there is open communication, or at the very least a willingness to begin open communication, then I encourage farming parents to involve their children (and, yes, even their sons-in-law and daughters-in-law!) in the round table discussion. Fear of family conflict is a very real problem in this area and there is a marked reluctance by many parents to open "Pandora's Box" and unleash pent up frustrations (and often anger). Yet if the process does not occur, the farming parent is risking a legacy of conflict and bitterness, simply because of a desire to avoid "unpleasantness" during his or her lifetime.

Make no mistake about it – a parent may not want to talk about the issues but the children (and unequivocally the in-laws!) <u>certainly</u> want to lay their views on the table.

I warn my clients that the family meeting may well be unpleasant and at times heated, yet the process is in itself therapeutic. Ironically, the meeting may lead to greater harmony in the remaining years of a parent's life, where fears and misunderstanding about what may happen are replaced with certainty and sureness. Whilst a child may not necessarily get what he or she would like, far better that they know exactly where they stand rather than to sail aimlessly around a sea of uncertainty.

I find that, surprisingly, "in-laws" present at these meetings mostly stay very quiet (as if they recognise, quite rightly, that it is primarily the parents and children that should be in dialogue). On the other hand, if a daughter-in-law is <u>excluded</u> from the meeting, you can be sure that will be a recipe for disaster! Rarely are the events of a family meeting accurately conveyed back that night, and the poor old farming son is invariably told that the matter should have been handled differently. Far better that everyone is made aware of the facts and reasons for any decisions, so that the process is utterly transparent to all affected persons.

(C) Putting the Plan into effect

Once there is consensus in the plan, the wishes of my clients are firmly understood and certain, and there is a desire to move to finality, then my role becomes one of designing and selecting the ‘building blocks’ for the estate succession plan.

There are two key misconceptions about this phase of the planning process:-

(a) That a Will is itself an “estate plan” – that is not the case, a Will is simply <u>part</u> of that plan but there may be other documents (and most frequently there are several other documents needed);

(b) The lawyer alone prepares the plan – almost certainly, in the course of selecting the “building blocks”, different options may be available and a wise lawyer will consult freely with the financial advisers to the client (financial planner or accountant) to consider all potential adverse consequences (taxation, loss of pension entitlements and the like). Often a non-lawyer professional adviser will have knowledge of certain circumstances that have not emerged during the course of the lawyer taking instructions – an outcome that appears harmless may in fact trigger a disaster. Farm consultants and mediators may also be needed.

Despite the importance of a “team approach”, this suggestion often meets with some resistance from clients who perceive it as unnecessarily incurring further expense. Often, my clients need to be reminded that they are dealing with assets worth several million dollars and that an adverse tax outcome could result in penalties that will exceed by many multiples the fee that an adviser may charge for input into the estate plan.

(D) Implementing the Plan

Often, a succession plan is not limited to a series of documents that are signed and then simply set aside pending death – a strategy may call for interim planning steps, such as land or other asset transfer, creation of new structures, or amendments of existing deeds. In the course of this process, communication or the strategy to a client’s financial advisers is critically important – the accounting adviser for an individual needs to be kept informed of any change in his or her affairs and most certainly should receive copies of any documents that alter those affairs.

Key issues in Estate Planning

(1) The Will

- It is important that a client be made aware that a Will can only deal with personally held assets or rights – there is a perception by many people (including, regrettably, some professionals) that a Will can deal with all manner of assets including those held by a Family Trust – that is not the case.

- There are certain legal requirements for a Will to ensure it is recognised as "legal" and the Will maker must have legal capacity (be over 18, have an understanding of what is being done etc.).

- Where there is the potential for future litigation or conflict, a client must be reminded that whatever is in the Will is "ammunition" for the court case – if a family provision claim is likely, then precautionary steps should be taken before death or dealt with through assets outside the will, to minimise the effect of that litigation (remembering that in NSW we have the concept of 'notional estate' which can rear its ugly head).

- The Will can convey other wishes and statements, including reasons for particular decisions, preferences for funeral arrangements, and directions as to which advisers should be retained by executors.

- Remember – a Will cannot deal with any non-estate assets (for example assets in a Family Trust, superannuation benefits etc.).

(2) Testamentary Trusts

There is a misconception that a testamentary trust is a document signed in addition to a will – in reality, it is nothing more than a discretionary trust created within a will and which is intended to deliver the following benefits:-

(a) improved protection against claims of partners through family law or defacto property claims;

(b) protection from creditors;

(c) taking advantages of taxation benefits (Section 102AG *Income Tax Assessment Act 1936);*

(d) to protect a beneficiary from loss of inheritance – gambling, alcoholism, drug addiction etc.;

(e) preservation of pension entitlements for disabled children.

It is worth mentioning that many of my colleagues have a belief that a testamentary trust in itself is a protection from divorce or de facto claims – with respect, I do not share that view. The Family Court has jurisdiction over a party to a marriage, who may also be the trustee of a testamentary discretionary trust. Whilst I am aware that there is a strategy using the siblings of an affected child to look after the trust for that child, or the more expensive option of use of a trustee company, that situation is undesirable for two reasons:-

(a) it assumes the possibility of a future relationship breakdown, when all may be going "swimmingly" in the marriage at the time of making of the will, and continue that way – the position of trustee should be flexible;

(b) a child will always feel less empowered if the control of his or her trust is vested in others, with whom often there may be underlying conflict.

To maintain maximum flexibility, I would usually make the testamentary trust voidable in whole or part at the instance of a principal beneficiary, which gives the beneficiary the choice of bypassing the trust and taking the asset personally should a change in law or circumstance make that option more desirable when the time comes [for infant children, that opportunity would not arise until they had attained a certain age, usually 25 years]. My approach is to educate beneficiaries as to the various options, and to encourage to them to seek accounting and other advice before making a final decision whether to move an asset to themselves personally. Often the circumstances of one child are different to another and whilst each child must have the opportunity of having a trust created (as it will be too late once a Will maker is dead), the concept and usefulness of a trust is not "one size fits all" – flexibility is important.

I also have a preference for separate trusts to be available for each child, particularly adults – history has shown that siblings rarely work together successfully and most would prefer to be the controller of their own destiny.

A possible solution to avoid the loss of the family farm, in the event of a marriage breakdown, is to have a farming child and their spouse enter into a "Binding Financial Agreement" (BFA) <u>before</u> transfer of the farm to that child. A BFA is binding on the parties, and removes the jurisdiction of the Family Court, in circumstances where there has been no fraud or "unconscionable conduct" in the signature of the BFA, or no significant change in circumstances of the parties. As long as the parties are properly advised by independent legal practitioners, a BFA can be binding.

This approach can, in appropriate circumstances, enable parents to "bring forward" the transmission of farming assets to children without the spectre of loss of the family heritage through a poor marriage choice. My colleagues who regularly prepare BFA's tell me that the perception that there will be resistance from a child's spouse is often unfounded, with a ready acceptance by the son or daughter-in –law that it is "fair and reasonable" that the family farm does not form part of divisible matrimonial property.

This issue is particularly important for farming parents who (rightly or wrongly) distrust a partner chosen by their farming child. Where there is a opportunity to pass on farming assets, most farming parents would want to protect those assets rather than simply gift them to a son or daughter, and leave the issue to chance.

It is important to understand that BFA's are a <u>specialist</u> legal area and require careful planning if they are to be successful.

(3) Power of Attorney

Whilst a will takes effect on death, an individual is able to control his or her affairs during their lifetime with the use of a "Power of Attorney".

Whilst there are various forms of Power of Attorney, the most common document is an "Enduring" Power of Attorney which is intended to be effective after its maker loses capacity. Until 2005, the various States on the Eastern seaboard did not generally recognise each other's forms of Power of Attorney, necessitating in some cases three separate documents for clients who had assets in Queensland, New South Wales and Victoria. Happily, there is now reciprocity in recognition!

The spirit of co-operation between States does not, unfortunately, extend into other areas that regulate the affairs of a client. As well as dealing with financial matters (through a Power of Attorney), many clients wish to give others legal authority over their health care and medical treatment.

On the border in Albury – Wodonga, we have the joy of dealing with two separate legal jurisdictions. The "sixty four dollar question" is whether a client is going to be treated in a New South Wales Hospital or, in critical circumstances, be shipped south to Melbourne for treatment. Where a client executes an "Appointment of Enduring Guardian" in New South Wales, to deal with health care and medical treatment, that document may not be recognised in Victoria (where there are in fact two separate documents to deal with those issues). A document dealing with health care in Victoria can only extend to medical treatment that is regarded by the hospital or doctor as being "in the interests" of the person concerned. If a person wishes to deal with the more radical aspects of medical treatment (the well known "*I direct that the respirator be turned off if I am a vegetable*" strategy), it is necessary to execute an Enduring Power of Attorney (Medical Treatment)" which effectively binds a medical practitioner or hospital, and also desirable to sign a "Advance Health Directive" to record those wishes in the clearest possible terms.

In my firm, we address the needs of Border citizens by preparing an additional document without charge, so that our clients have effective paperwork for both States. This should keep all medical authorities happy, no matter which side of the Border the ambulance stops!

If a person loses capacity (through illness, accident or aging etc.) and has no Power of Attorney, then the consequences for their family can be dramatic:-

(a) The "freezing" of assets held in the name of the incapacitated person, with serious financial outcomes (at least in the short term);

(b) The necessity to go to a government tribunal to be appointed as financial or other representative of the incapacitated person;

(c) The necessity to be answerable and account to that government tribunal for actions taken as an “Appointed Guardian”; and

(d) (most dramatically) the inability to deal with jointly owned assets freely.

All of these difficulties can be simply avoided by signature of an appropriate Power of Attorney – it is as important a document as a Will yet is most often overlooked.

It is also important to understand that any of these documents can be revoked at any time, assuming the maker of the document still has capacity, and so a decision to appoint a particular person need not be final and irretrievable.

Within business, every equity owner has an obligation to his or her other partners to have at the very least a financial Power of Attorney so that the affairs of the business can continue uninterrupted should accident or illness intervene.

(4) Strategies for Companies

The affairs of farming clients may well include a company (whether it acts as a trustee, as a trading entity or merely holds assets). Within the frame work of that company may be different share classes, and the financial records of the company may disclose loan accounts or other unusual items.

It is <u>critical</u> in the planning process to investigate a company thoroughly, to determine the office bearers, rights attributable to various share classes, and to examine the financial accounts to look for unusual items.

Where there are loan accounts, it must be determined whether these are intended to be forgiven or whether they represent an opportunity to pass to others equity in the company assets.

Within the Will, share ownership (even if the shares have no value, as in the case of a trustee company) must be dealt with carefully and after consideration of the legal effect of transfer. It is not unheard of for shareholdings to be overlooked in the course of transfer of farming assets to a particular child, and for those shares to fall into residue (which is most often distributed to the non-farming children), with disastrous consequences.

In addition, where significant loan accounts are not addressed, a farming son may find that his inheritance of the company entity is burdened by the obligation to repay non-farming siblings the loan accounts (which have by default fallen into estate residue).

In examining the structure of a company, there are also two other key issues:-

(a) Often a surviving spouse wishes to conduct the affairs of the company without involving other family members – if that is intended, some clients would prefer to amend older Memoranda and Articles of Association to permit single shareholder/single director control.

(b) In business structures, there may be Shareholder Agreements in place allowing pre-emptive rights to other parties over shares in the event of death. Those rights need to be considered.

(5) "Umbrella" documents

In a number of situations, I have found that with a multiplicity of structures and entities, the intentions of the patriarch and/or matriarch of the family can sometimes be "lost in translation". It is possible to address each of the pieces of the jigsaw separately, but unless the jigsaw is seen as a single picture, the meaning could potentially be lost on the family.

For that reason, I have found it useful to draft on occasions a "Family Memorandum" in which the Will maker expresses the rationale behind his or her actions, includes statements of affection or other non-legal issues, expresses wishes in relation to future preservation of assets and farming philosophies, and generally creates a document which "speaks from the grave". Whilst I have had limited experience with how these documents are received once the Will maker passes on, my guess is that they will be more likely to be beneficial than not, and may clear up issues that might otherwise have gone unrecorded in a more conventional document.

It is also possible for the framework of an Estate Plan to be reduced to a summary document which is circulated to family members for approval and (after they obtain independent advice) each gives written acknowledgment that they agree with the philosophy behind the plan.

Whilst these family "contracts" or "acknowledgements" may be of little practical legal effect if the family launch into litigation, they will at the very least act as an "*aide memoire*" to remind individuals of what they had in fact agreed to at some earlier date, and guide the courts on what was considered fair and reasonable at some particular point (notwithstanding that a change in financial circumstances between that date and the date of death may turn the agreement on its head).

Certainly, it would be important that each family member acknowledge that they either sought independent legal and accounting advice, or were given the opportunity to do so but did not require it, so that their agreement to a strategy is seen as an <u>informed</u> one.

For convenient reference, in most cases I would provide my clients with the following at the conclusion of the planning process:-

(a) A schematic diagram showing in visual form the various components of their plan; and

(b) An Estate Planning Folder with copies of all of their documents, to be kept with their personal papers (the original documents are securely placed in deed storage at my offices).

(6) Discretionary Trusts

The 1960's and 1970's saw an "explosion" in the use of discretionary or "family" trusts, to avoid death duty and to minimise taxation. Many of the controllers of these trusts are now passing away, often with unanticipated or unwanted consequences.

It is a <u>critical</u> element of Estate Planning that the affairs of a discretionary trust be thoroughly and comprehensively examined.

Some <u>minimum</u> steps would be:-

- Review of the Trust Deed generally – it is amazing how often the Deed cannot be located, is improperly signed, unstamped etc. <u>All</u> documents amending the Trust must also be thoroughly checked so that the current "picture" is clear.

- The person named as Appointor (some times called the "Principal" or "Guardian") should be identified and the Trust Deed examined to see how the power of appointment can be passed on – do we want to pass on that Power of Appointment in the Will (where it is open to challenge) or do we want to do it by separate Deed <u>now</u>, to avoid unwanted outcomes? If there is no power of appointing a successor, then the Deed needs to be amended.

- Checking the list of eligible beneficiaries – occasionally the Trust Deed simply does not include persons intended to be benefited (or their families) (it also occasionally "flushes out" some unwanted beneficiaries, such as a former spouse!).

- Close examination of the structure of the trustee company, including office bearers and shareholdings, and appropriate dispositions in the Will to persons intended to have the ultimate benefit or control of trust assets.

  Occasionally, I have seen colleagues draw a trust "direction" <u>directing</u> the trustee of a discretionary trust to take certain steps in relation to trust assets. With respect, that is not an appropriate strategy. A trustee must act as the trustee sees fit, in accordance with the trust deed and in the interest of beneficiaries. It is not appropriate or proper for a trustee to be to take a certain course. Nonetheless, this does not prevent the "wishes" of a Will maker being expressed in a memorandum, addressed to the trustee, and with steps then being taken to ensure that the persons who will act as trustees (or control the trustee) are those who will in fact carry out the "wishes" of the Will maker.

  On occasions, this can in fact present some problems – where certain children are put in control of a trust but have some obligations to other children (under the "Memorandum of Wishes"), it is quite natural for discomfort and uncertainty to set in amongst the family when they are told that at the end of the day it will be in the discretion of the trustee whether the "wishes" are carried out. As a measure of comfort in these circumstances, I suggest that an independent appointor be selected (it can be a trustee company, nominee company or trusted professional) who will be available to family members if they suspect that the "wishes" of a parent are not being carried out or are shortly to be thwarted. In that event, the letter of directions I prepare makes it clear that the appointor is to intervene and remove the trustee, replacing that person or company with a trustee that will in fact carry out the wishes so expressed. The appointor is exonerated from liability, in the event that the dastardly deeds are done before action can be taken to remove the trustee, but in reality it is the fact the power exists is sufficient to act as a "sword of Damocles" hanging over the trustee to ensure the trustee toes the line.

- Financial statements must be examined and discussed at length – does the Will maker intend loan accounts to be part of the farming assets to pass with the trust, or are they a useful way of passing on trust assets subject to an obligation to pay out non-farming children? Even if the farming son is to receive the benefit of the loan accounts, I would prefer that they not be "forgiven" with all of the "nasties" that it may involve, but more usefully directed into a testamentary trust for the beneficiary who can then take trust income for infant children in a far more tax effective way.

  Where after a will maker dies, trust loan accounts are intended to be actually paid by a trustee to beneficiaries, it is also wise to give the trustee time to pay those loan accounts by appropriate conditions attaching to the bequest. Where loan accounts are intended to be negated, I would encourage a "round robin" of payments out to the beneficiaries, with a return of funds through cash settlements upon the trust, rather than to deal with the loan accounts in the Will (where they may become embroiled in family provision litigation).

In summary, it is important to stress that trust assets are in fact <u>non-estate</u> assets, they cannot be dealt with under a Will, and require a separate and considered strategy.

(7) Superannuation

Another asset of testators most frequently overlooked in the planning process, is superannuation benefits.

There is a perception that signature of a form of "beneficiary nomination" alone suffices to ensure that vested benefits will pass to the nominated beneficiaries – there is horror and outrage when clients are told that at the end of the day the final decision is in the trustee's discretion (at least in managed funds where the final decision will lay with the trustee, mostly after <u>all</u> family members or potential beneficiaries are consulted – now that certainly does set the "cat amongst the pigeons" when it occurs!)

A far more certain approach is to roll over superannuation into a self managed fund, with a trust deed permitting the trustee to accept Binding Death Benefit Nominations (BDBN's).

With a BDBN, despite the necessity to renew each three years (if the trust deed requires it), there is at least certainty in the process and the comfort of knowing that a BDBN cannot generally be challenged (although in New South Wales the amount paid may be relevant in the case of a family provision claim).

Where there is a self managed fund, it may also be useful if control of the trustee company passes appropriately to those intended to benefit by the BDBN.

Whatever happens, the client must be told of the potential outcomes for his or her superannuation benefits and what steps need to be taken to ensure certainty in the gifting process. Most Will makers would wish to avoid leaving a legacy of conflict and to subject family members to the vagaries of the Superannuation Complaints Tribunal.

As a result of the recent dramatic changes to superannuation, there is encouragement by government to move massive amounts into superannuation and to keep the money there. This means that, more than any other previous generation, people are likely to die over the next decade or so with large amounts of superannuation which have not been "redeemed". If those benefits pass to non-eligible beneficiaries, tax totalling 16.5% (including the Medicare levy) will be payable – is this a "new death duty"?

The good news is that there are strategies available to minimise taxation, or indeed to avoid it altogether. It is critical that persons with significant superannuation benefits take expert advice on strategies to avoid passing on a taxation liability to their loved ones.

(8) Partnerships

A Will maker with partnership interests must be reminded that all he or she has to give away in a Will is the interest in the partnership held by the Will maker, not the assets which are owned by the partnership. Notwithstanding that, for abundant caution I would always add livestock and plant and equipment as an extra bequest, as often the book ownership of these items can be a little vague.

In other words, if it is intended that farming assets passed to a particular beneficiary, it is best to cover all bases.

(9) Farm management deposits

It is not unusual for Farm Management Deposits (FMD's) to be gifted to a farming child, as they are perceived by the Will maker as being part of the farming "assets". There is a potential problem with this approach. Tax is payable on the FMD, in the year of date of death. Tax for a deceased person would normally be paid out of residue, so that potentially a farming child may receive the full cash value of an FMD, with the residuary beneficiaries being obliged to pick up the tax bill from the (often) meagre sum left in the residuary estate for non-farming children.

To overcome that possibility, an FMD should always be bequeathed subject to the beneficiary paying income tax on the Deposit.

(10) Joint ownership

In the course of analysis of a client's affairs, I take great pains to check and double check the method of holding land or other assets. This is important for a number of reasons, including:-

- Where there is a second marriage, the passing of assets to a surviving spouse may potentially mean children of the first marriage will miss out (as the spouse will naturally prefer to benefit his or her <u>own</u> children).

- Automatic inheritance by a surviving spouse of jointly owned assets may affect pension entitlements.

- A <u>strategy</u> built around transfer of a share in an asset to a particular beneficiary may be worthless, if the joint holder (and not the named beneficiary) has an automatic right to the asset (that is to say, it is a non-estate asset that never enters the Will).

(11) Guidelines to Trustee

I have found that many young, intelligent and educated Will makers think beyond conventional practice when drafting their Estate Plan. For that reason, I have developed a set of “Guidelines” which can be given to trustees of a discretionary trust or testamentary trust, affirming the opinions and wishes of the Will maker on a range of topics as diverse as:-

- Preferred farming practices (organic etc.);

- Moral philosophy and values;

- Specific wishes for children’s education;

- Parameters for financial assistance to children, to encourage self-worth and personal enterprise;

- Giving free authority to spend funds for the benefit of the child (education, the accumulation of business acumen, or simply travel to broaden the mind).

This list is certainly not exhaustive and simply illustrates the nature of directions that Will makers like to leave as their “legacy”, rather than to simply hand over the care of children, and control of trust funds, without <u>any</u> direction.

This type of instrument is likely to act as a reassurance to trustees, and at the very least would be a helpful guide for their own decision making.

(12) Retirement strategy

A familiar “investment” scenario for many farming clients would be:-

(a) Reducing debt in good years so that the farm is <u>debt free</u>;

(b) When spare funds become available, buying <u>more land</u> so that the farm gets bigger;

(c) Living frugally in the hope of better things in retirement.

In reality, retirement often commences (or is finally thrust upon a parent by a frustrated farming child) with little or no cash in reserve, nowhere else to live but on the farm (a debt free farm, but without any direct benefit or financial returns available to the retiring party).

Retirement planning <u>cannot</u> be left until the last moment. Planning should start at least five to ten years before retirement and include:-

(a) Debt reduction, where cash permits, but <u>not</u> at the expense of the retirement plan (most clients inherited debt from their parents, and managed to survive, so why struggle to pass on a debt free farm?);

(b) Purchase of non-farm assets as investments or for future lifestyle (investment units, holiday home, personal residence etc.);

(c) Purchase of additional or different farm properties close by or geographically separate, and which can become viable (but separate) units for other farming children;

(d) A commitment to superannuation funding through cash (if available) or transfer of selected portions of farming property (if appropriate);

(e) Accumulation of non-farm investments to fund bequests to non-farming children but with which can be used in the interim to fund retirement lifestyle;

(f) Transfer of farming assets or operation to farming children, not as a "gift", but in return for an income stream in retirement (where the debt cancels on death);

(g) Payment of land rental by farming children to retiring land owners, generating an income stream in retirement.

Retirement planning is not one readily accepted by the farming community – it was an "alien" concept for their parents, and often the perception is that a farmer will live on and from the land until death. This can often cause some frustration to children carrying on the farming enterprise, who not unreasonably shy away from taking directions (at the age of 60) from their 85 year old father!.

It can also be as simple as the fact that farming sons and their families would like to move out of the (often) substandard second residence on a farm to move into the "homestead" (ensuring Mum and Dad move off the farm and "into town"). The key issue is to ensure that farming clients have financial security generated through assets other than the farming operation.

In appropriate circumstances, there may even be the capacity for a pension to be taken by farming parents, augmented by appropriate amounts of income from the farm (through farm rental or interest on loan accounts generated through transfer of assets).

Where the farming operation is conducted by a discretionary trust, and farmland ownership is vested in individuals, the handover process can be quite simple (transfer of notional control of the discretionary trust over to the farming son, but preservation of the powers of appointment in a farming parent until their death, when those powers pass to the farming child).

This strategy is often of psychological benefit, insofar as the farming parent relishes the continuing control that he or she has (as appointor) whereas that is regarded as being of little or no consequence to the farming son who effectively (and practically) takes over the (almost) full control of the farming operation.

(13) Taxation and Stamp Duty consequences

In the course of succession and Estate Planning, careful regard has to be had to adverse taxation and stamp duty consequences arising from any particular strategy. New South Wales has a stamp duty regime which is more onerous, and less flexible, than other states. Pre-CGT status may be unwittingly lost through an untimely transfer of ownership.

For that reason, sound accountancy advice is a vital element in any planning exercise.

Where to from here?

- I urge the farming community to review their present position, know that there is a solution, to take preliminary advice from their accountant and solicitor, and then commence the process.

- I also urge the farming community to articulate their wishes, involve their family, and carefully document their asset position (with assistance from their advisors where needed).

- Once the process is started, keep moving forward – and make sure your advisors reduce a plan to writing at the earliest opportunity.

- Once the plan is in place, it should be reviewed (not necessarily changed) regularly and certainly should any critical events occur (divorce, remarriage, additions to the family, bankruptcy etc. of a beneficiary or a major change in financial circumstances).

Critically, you should act now and not delay – the problem is not going to go away.