Estate Planning Techniques

to Avoid Disputes Involving Family Farms

"His delusional insistence on his entitlement to own and operate his grandfather's pastoral properties has I suspect, operated as a self-imposed impediment to his advancement in life."

Pembroke J, *Wilcox v Wilcox* (No 2)[1]

Sam McCullough TEP

1 *Wilcox v Wilcox* (No 2) [2014] NSWSC 88, paragraph 31.

1. Introduction

"Succession planning is about how families move assets from one generation to another or even actually between generations. It's about how they do it in a way where they get on and don't kill each other, and how they actually build trust..."

Leigh Waser, Riversdale[2].

1.1 This paper and the related seminar presentation consider some of the succession and estate planning issues that can arise for Australian farming families.

1.2 Four key types of potential disputes will be considered.

(a) **estoppel/equity claims, and the related topic of testamentary promises/contracts** – illustrated by the Victorian Court of Appeal decision of *Flinn v Flinn* [1999] VSCA 109;

(b) **disputes involving trusts forming part of a business structure** – illustrated by the Tasmanian case of *Benson v Doloraine Pty Ltd* [2015] TASSC 41;

(c) **family provision claims** – illustrated by the case of *Torney & Ors v Shalders & Anor* [2009] VSC 268; and

(d) **family law disputes** – illustrated by the Family Court decision of *Summit v Summit* [2009] FAMCA 371.

1.3 The case illustrations will be broken up by a  designating detailed discussion/technical topics that will be covered in the seminar presentation.

2. Estoppel/Equity Claims, and Testamentary Promises

"There is a general rural expectation, reflected by most families, that a son should inherit the family farm. It is part of the ideology of "the farm" that the son continues as the cornerstone of family identity and history..."[3]

---

2 "All in the Family", ABC Landline story transcript, 11 February 2009.

3 Voyce, Malcom, *Testamentary freedom, patriarchy and inheritance of the family farm in Australia*, Sociolgia Ruralis 1994. Vol XXXIV, No. 1, pp. 71-83, page 74.

STEP ADVISING FAMILIES ACROSS GENERATIONS

2.1 Disputes may arise when representations/promises are alleged to have been made by the owner of farming land to a child or other person(s) about that land and not kept, or where it is claimed that it would otherwise be unconscionable in the circumstances for the legal owner to deny the interest of another in their property. Family farming enterprises provide fertile ground for these types of disputes, with recurring themes of promises made, expectations aroused, significant and longstanding contributions made to land owned by another, underpaid (and sometimes unpaid) work, and multiple parties living on the same land.

Flinn v Flinn **[1999] VSCA 109**

http://www.austlii.edu.au/au/cases/vic/VSCA/1999/109.html

2.2 Brooking JA gave the judgment of the Victorian Court of Appeal, Charles and Bat JJ.A. concurring.

2.3 The Judge at first instance had found, for the Plaintiffs, that a binding agreement had been reached in 1993 (but not earlier in 1988), and that even if there was no binding agreement the Plaintiffs succeeded on their claims based on estoppels, and constructive trust:

> 47. I turn now to his Honour's principal findings of fact and determinations on questions of law. I have already said that it is not clear on the pleadings whether the plaintiffs were claiming any relief in respect of the 1988 agreement alleged in paragraph 8 of their statement of claim. The judge, while accepting the plaintiffs as truthful witnesses and **finding that representations had been made to them in 1988 by Bill and Mary that provision would be made in their wills, was not persuaded that Bill and Mary had entered into any binding, concluded contract with the plaintiffs in 1988**. There is no notice of cross-appeal and no notice of contention, **nor have the plaintiffs argued before us that the judge was wrong in failing to find that a contract had been made in 1988.** I therefore say no more about his Honour's failure to be satisfied that the first contract alleged had been made. I return later to the judge's findings about the promises made in 1988.
>
> 48. His Honour found for the plaintiffs on the issue of the making of the variation agreement which they alleged had been made in July 1993. **He found that in that month Bill and Mary had put a proposition to the plaintiffs that if they continued to operate the farm as they had in the past, on the same terms as had been agreed upon in the past, then the testators would leave the farm and the dairy business to the plaintiffs upon the death of**

the survivor of them, subject to two conditions, namely, that the plaintiffs would pay a sum of money to Robbie, and that they would assume the liabilities over the farm. The judge was satisfied that this proposition had been accepted by the plaintiffs. He went on **to reject the contention that the alleged contract was uncertain or illusory by reason of the failure to agree on the amount to be paid to Robbie, being of opinion that it was enough that the parties to the suggested contract had agreed that it would be left to the testators to decide how much should be paid to him.** The judge found that Mary was under a contractual obligation to the plaintiffs to leave the farm to them and that she had broken this obligation by the execution of her will dated 3 March 1995. He **rejected the defence of the statute of frauds, determining that the wills executed by the testators on 26 October 1993 constituted a sufficient note or memorandum to satisfy s.126 of the *Instruments Act* 1958.** He went on to hold that **in any event there had been sufficient acts of part performance by the plaintiffs.** Then his Honour **considered a number of other arguments advanced against the grant of specific performance of the variation agreement.** The defendant said that the plaintiffs had not performed their obligations under the alleged variation agreement and were not ready and willing to perform it; that there was a want of mutuality; that the court was being asked to, and should not, compel the performance of personal services or the maintenance of a personal relationship; that there had been laches; and that the grant of specific performance would require the court to exercise ongoing supervision of the relationship between the parties. **His Honour rejected each of these defences. He went on to reject the defendant's contention that if specific performance was granted the court should require the plaintiffs to pay compensation to the defendant.**

49. In case he was wrong on the question whether there was a contract that ought to be specifically performed, the judge proceeded to consider the other claims. **He found for the plaintiffs on what he described as the proprietary estoppel claim, holding that in consequence of representations made by the testators and detriments suffered by the plaintiffs an equity had arisen which was to be satisfied by the defendant's giving effect to the clause of her will made on 26 October 1993 concerning the farm. The judge also held that the plaintiffs succeeded on what**

> **he called the constructive trust claim, both in view of the common intention with which the Tongala farm had been acquired in 1988 and having regard to the mutual wills doctrine.** Finally his Honour dealt with the claim on a quantum meruit, which was put forward in the alternative to all other claims, and determined, without himself ascertaining an amount, that the plaintiffs were entitled to a sum equal to 40%of the milk cheque in respect of the period from 8 February 1990 to 21 October 1994 without any deduction for expenses.
>
> [Emphasis added]

2.4 Orders were made that included the following declarations:

> 50. …
>
> "1. Declaration that the agreement made in 1993 between the Plaintiffs Daniel and Bronwyn Flinn of the one part and William Charles George Flinn deceased and Mary Ann Flinn of the other part whereby the Plaintiffs agreed to operate and manage the dairy farm known as Eulandool at Tongala for a small remuneration and the deceased and Mrs Flinn agreed that the survivor should leave the dairy farm property together with all the farm plant equipment and livestock thereon and the balance outstanding in any farm bank account used by the dairy farm business and any other livestock associated with the operation of the said dairy farm by his or her will, be specifically performed.
>
> 2. Declaration that Mary Ann Flinn holds the dairy farm property at Tongala together with all the farm plant equipment livestock thereon and the balance outstanding in any farm bank account used for the dairy farm business and any other livestock associated with the operation of the said dairy farm upon trust for the Plaintiffs to give effect to the provisions of paragraph 4(I) of her will dated 26 October 1993, such trust to be subject to the Plaintiffs' discharging their obligations pursuant to the agreement referred to in paragraph 1 hereof if required and permitted by Mrs Flinn."
>
> …

2.5 Some family/general background – see also paragraphs 2-26 of the Judgment:

> 1. William ("Bill") Flinn was a successful beef farmer and, until 1976, also a logging contractor. He followed both occupations in partnership with his wife, Mary. Bill was born in 1914 and Mary in 1920. They had a son named Robert ("Robbie"), born in 1941.

> Mary had two children from her former marriage, Philip and Gary. I shall call Bill and Mary by those names, occasionally describing them - ignoring gender - as the testators. Bill died on Sunday, 23 January 1994. (The evidence shows confusion about the date.) His wife is still alive. This case is about a dairy farm which they owned and which was run for some years by Daniel ("Danny") Flinn and his wife, Bronwyn. Daniel Flinn, born in 1953, was Bill's nephew. I shall call Daniel and his wife by their given names, at times designating them as the plaintiffs. They say they should have the farm. The judge upheld their claim. Because his findings are attacked, it is necessary to combine a summary of the clearly established facts with a long summary of parts of the evidence.

2.6 The following is a summary of the evidence about the key conversation that took place in 1993 between the Plaintiffs, Bill and Mary:

> 27. A highly important conversation took place in July 1993. According to Bronwyn what happened in or about that month was as follows: After the settlement in the litigation with the vendors of the farm, Bill telephoned Daniel, mentioned the settlement and said he thought it was about time a new farmhouse was built. As a result of this the plaintiffs obtained several quotations for the building of one. On 6 July 1993 they visited Bill and Mary in the farmhouse in Bairnsdale, taking with them from the farm at Tongala a small silo that Bill wanted for his own purposes. They discussed the possibility of a new house at Tongala and it emerged that, while the plaintiffs were contemplating that a house would be built for them at a cost of about $95,000, Bill and Mary had in mind the purchase of a "do-it-yourself" kit home for about $40,000, which Daniel presumably would somehow find time to erect. Bill said that incurring a cost of about $95,000 was out of the question and that the idea should be scrapped. A little later, when all four of them were in the kitchen, Bill telephoned his solicitor, Mr Tovey of Engel & Partners, and said that he and Mary wanted Tovey to come out to see them and bring their wills. Tovey arrived shortly afterwards, bringing copies of the two wills with him, and the five of them sat down together. Tovey began to read out the copy of Bill's will and Bill said, "Just get to the bit about the farm".

2.7 For those preparing evidence about representations made in support of an equitable claim, paragraphs 29, and 32-34 of the judgment provide a useful illustration of evidence from the recipients of those representations (the Plaintiffs) and the lawyer involved at the time.

2.8 Brooking JA considered the trial Judge's reasons for finding that a binding contract was created at that time, identifying a fundamental barrier to upholding that finding:

> 60. The judge determined that in July 1993 a contract was made between the deceased and his wife of the one part and the plaintiffs of the other part "that if they continued to operate the farm as they had in the past, on the same terms which had been agreed and accepted in the past, then the deceased and Mrs Flinn would leave the farm and dairy business to the plaintiffs upon the death of the survivor of the deceased and Mrs Flinn subject to two conditions, namely, that the plaintiffs would pay a sum of money to their son, Robert Flinn, and would assume the liabilities over the property". In challenging this determination that a contract was made the appellant has submitted that the judge erred with regard both to the facts and to the law. **I intend to deal with only one of the points argued, for in my view it is a good point and fatal to the contention that a contract was made in July 1993. It concerns the condition found by the judge that the plaintiffs would pay a sum of money to Robbie. In their final submissions at the trial, the plaintiffs had invited a finding of a condition that a reasonable sum of money was to be paid by them to Robbie. The defendant had argued that this condition "went to the root" of the alleged contract and that, there being no mechanism for the determination of what was "a reasonable sum of money", no contract could arise.**
>
> 61. The judge's finding, which I have set out above, of a condition that the plaintiffs would pay a sum of money to Robbie was expanded by him a little further on in his reasons, when he said this:
>
> > "I am satisfied that no specific amount was mentioned as to payment to Robert. On the other hand the evidence established that the amount was to put bread and butter on the table for Robert, that it would be a reasonable amount and it would not be a token sum. The emphasis was that it would be a reasonable amount."
>
> As I understood his argument, Mr Garratt invited us to treat this as a finding, not that the condition was simply that the plaintiff pay a reasonable sum to Robbie, but that the condition was that the plaintiffs pay to Robbie an amount to put bread and butter on the table for him, that amount to be a reasonable amount and not a token sum. Expressed in this way, the condition is a striking one when put forward as part of a contractual provision. But my view

STEP ADVISING FAMILIES ACROSS GENERATIONS

on the soundness of the defendant's point would be the same if the judge was to be taken to have found that the condition simply required payment of "a reasonable amount", or of "a reasonable as opposed to a token amount".

62. His Honour disposed of the argument that the suggested contract or promise or condition was illusory or uncertain by remarking that there was a clear promise to leave property by will after the death of the survivor subject to a condition; that there was no discretion as to whether that promise should be performed; and that **it was agreed that the deceased and his wife would finally determine what amount was to be paid to Robbie. They were obliged, his Honour considered, to determine the amount "in good faith acting honestly and reasonably".**

[Emphasis added]

2.9 The Court of Appeal rejected the existence of a binding contract:

65. ...I find it unnecessary to say anything about the decided cases. I have a clear view that the point taken by the defendant and now under consideration is **a good one and that a contract could not spring up from a promise of the kind found by the judge here, that is, a promise to leave property by will on condition that the donee pay a reasonable sum to a third person**, whether or not there is imported into the promise some such words as "to put food on his table" or "not a token sum". In my view **a promise to leave property by will on condition that the donee pays a third person a reasonable sum, or a sum to be fixed by the testator, or a reasonable sum to be fixed by the testator, cannot give rise to a contract,** whether the proper label to be applied to it is "illusory" or some other expression. **If the sum is to be a reasonable sum, or a reasonable sum determined by the promisor, there is no satisfactory criterion by which what is reasonable can be determined. It is one thing to ask what is a reasonable price for goods, land or services. It is altogether another to ask what is a reasonable sum to be paid to a person by way of indirect testamentary benefaction. How is the appropriate extent of the bounty to be arrived at?** ...

66. The difficulty about the condition concerning a payment to Robbie makes me conclude that **the judge's carefully considered determination that a binding contract was made in July 1993 cannot stand**, and I do not deal with the other attacks made on that

determination except in so far as those attacks may bear on some other question which I find it necessary to consider.

[Emphasis added]

2.10 Some noteworthy testamentary promise cases relevant to the farming context.

2.11 Having reached that conclusion on the contractual claim, the alternative claim based on estoppel was considered:

67. What was said on 6 July 1993 was of course relied on by the plaintiffs not only for the purposes of their claim in contract but also for the purposes of their alternative claim based on proprietary estoppel. Claims by a member of the family to a farm based on a proprietary estoppel said to arise from promises made to the plaintiff are not uncommon... In upholding that claim in the present case, the judge, having considered a number of the authorities, went on to say this:

> "I am **satisfied that in the year 1988 the deceased and Mrs Flinn represented to the plaintiffs that if the plaintiffs conducted, operated and managed the farm for the deceased and Mrs Flinn for a small remuneration they would make some provision concerning the farm in their wills in favour of the plaintiffs.** However, for reasons which I have already stated I am unable to say at that point in time what interest in the farming property was promised. **Based on those representations and encouraged by them I am satisfied that the plaintiffs did incur expenditure and acted to their detriment.** By taking a **small remuneration** they enabled the deceased and Mrs Flinn to pay moneys due under the mortgage over the property and to effect improvements to the property. It also **meant there was more income for the deceased and Mrs Flinn**. The plaintiffs in so doing **indirectly assisted with the financing of the venture**. But further, they also suffered a number of detriments. They were **prepared to live in sub-standard conditions and take a small remuneration thereby prejudicing their chances of building up their own assets and also living at a lower standard on the basis that they would receive some interest in the property.** They suffered these detriments by reason of the promises made by the deceased and Mrs Flinn.

> The latter were aware of the sacrifices made by the plaintiffs and both knew that the plaintiffs were prepared to sacrifice because of the promises that were made. In my opinion an equity did arise. However, the extent of the equity at that point is difficult to determine. Further, I am satisfied that in 1993 the other promises which I have set out above were made with respect to leaving the farm to the plaintiffs subject to the conditions I have already stated by their wills on the death of the survivor. I am quite satisfied that subsequent to the date of those representations being made, namely, 6 July 1993, **the plaintiffs did suffer the detriments which they had suffered in the past, that they suffered the detriments in the expectation that they would get farm and land upon the death of the survivor and they were encouraged in that expectation or belief by the conduct of the deceased and Mrs Flinn.** ... I am satisfied that **the extent of the equity is that they should receive the farm, together with the stock, plant and equipment subject to the conditions of taking over the mortgage and re-paying [sic] the sums to Robert upon the death of Mr Flinn but subject to the plaintiffs if requested to perform their promise to operate and manage the farm. I reject the defendant's submission that the equity could be met by the provision of a money sum for services rendered. This would not satisfy the equity which was created**..."
>
> [Emphasis added]

2.12 Some noteworthy estoppel cases relevant to the farming context.

2.13 The challenges on appeal to the finding of an estoppel were as follows:

> 68. …
>
> 1. That at the trial the plaintiffs conceded that any estoppel to be relied upon must be one which arose out of the meeting held in July 1993.
>
> 2. That the evidence was insufficient to establish the promises which the judge found to have been made to the plaintiffs.
>
> 3. That if there was evidence of any promise or representation made to the plaintiffs, the promise or representation was

vague and uncertain, not (as was essential) clear and unambiguous.

4. That there was no evidence that the plaintiffs had relied on the promises.

5. That there was no evidence of any detriment suffered by the plaintiffs in reliance on the promises after July 1993.

6. That "the minimum equity" was in any event payment of a money sum.

2.14 Brooking JA swiftly dealt with and rejected the first two grounds, before giving more extensive consideration to the issue of whether the representations were sufficiently certain:

> 78. I return to the appellant's third submission - that any promise or representation proved was vague and uncertain. The nature of the promised gift in the present case (a promised gift of property, which in 1993 became a promised gift upon a condition requiring payment to a third person) **might be thought to raise two distinct questions in relation to uncertaint**y -
>
> (a) **How certain the interest promised must be.** In the case of the 1988 promise, was it enough to promise an unspecified interest in the farm?
>
> (b) **How certain the "condition" on which the gift was promised must be.** In the case of the 1993 promise, the promised gift was on condition of payment of a reasonable sum of money to Robbie.
>
> 79. I think **these should be viewed as aspects of a wider question, namely, how certain the promise must be. Here the "condition" is merely an aspect of the promise. Often the "condition" will be a term or feature of the "interest" promised.** So there are a number of decided cases considering what degree of certainty there was with regard to the price to be paid for an easement or licence, the duration of the easement or licence and other "terms" of the easement or licence. Similarly, where the promise is of a life right of residence in a house on condition that a room in it is made available to the promisor the condition is a term of the "interest" promised. If in the present case the 1993 promise is to leave by will with a condition attached to the gift requiring payment to Robbie, the same may be said here. If, on the other hand, the promise is simply to leave the farm by will with a cross promise to make a payment to Robbie, then the

obligation to make a payment to Robbie does not, as it were, serve legally to define the promised gift. But I think that this last distinction is an unnecessary one and that **one should treat the case of cross promises just put as one where the promise was, not simply to leave property by will, but to leave property by will provided that the promisee himself did something. One should consider the certainty of the promise, viewed in this wide way**.

[Emphasis added]

2.15 The promise was found to be sufficiently certain, with the terms of the Wills made by Bill and Mary Flinn later in 1993, after the key representations were made, being used to establish the exact detail of the condition that should be imposed:

94. On the liberal approach exhibited by the authorities, **the 1988 promise found in the present case by the judge - a promise of an unspecified interest in the farm - was not too uncertain to found a proprietary estoppel.** Moreover, as the judge said in his reasons, what was promised in 1988 is not to be considered in isolation from what was promised in 1993, when the promise was made much more specific at a time when the plaintiffs had been working the farm for years, to the very great benefit of the farm and its owners, and had just been disappointed by their refusal to outlay a moderate sum in replacing the substandard farmhouse which the plaintiffs had put up with for so long. **The events of July 1993 are not isolated. The making of the enhanced promise in that month was by way of natural progression. The plaintiffs worked for six years on the faith of a promise at first vague (but not too vague to escape equity's attention) and later ripening into a promise of the whole farm.**

95. Nor do I think that the uncertainty of the condition requiring payment of a reasonable sum to Robbie - an uncertainty fatal to the existence of a contract - will prevent the equity from arising. **As the review of the authorities over the last 200 years shows, uncertainty preventing the creation of a contract has never been regarded as necessarily preventing the beneficial intervention of equity. Time and again an equity has been held to exist where no contract had arisen, the court often going a long way in giving effect to what the law of contract would ignore as an impossibly loose arrangement. The present case lies within the reach of the long and flexible arm of equity.** What the testators did, in making their wills of 26 October 1993, cannot be used to salvage the suggested contract, but **it can be used to show - and indeed in a formal and authoritative way - what the donors themselves, as the authors of the condition put**

> **forward on 6 July 1993, regarded as appropriate provision for Robbie.** Neither Bill's estate nor his mentally incapacitated wife could complain if the condition imposed in their October wills was used by the court to frame a condition in making its order. And the intended beneficiary, Robbie, could not complain, for he would receive the very sum, by the very instalments, which the donors themselves fixed upon in determining the nature and extent of their indirect bounty to him....
>
> [Emphasis added]

2.16 The "long and flexible arm of equity" indeed.

2.17 **How can recipients of representations/promises secure/protect their position in a better way than having to pursue and prove an equitable claim, perhaps many years after the events upon which it is founded?**

2.18 Having found the necessary representation to have been established, Brooking JA went on to consider the necessary elements of reliance and detriment:

> 96. …I now proceed to deal with the detriment shown to have been suffered by the plaintiffs in reliance on the promises concerned, having regard to the evidence and the judge's findings of fact and determinations on credibility. The detriments alleged by the plaintiffs may, drawing upon their written submission, be summarised as:
>
> * loss of income
>
> * loss of family network and community support in consequence of the relocation from Nicholson to Tongala
>
> * loss of six productive years of their lives
>
> * loss of assets and capital
>
> * working 365 days a year for little remuneration
>
> * living with their children in substandard accommodation
>
> * having to relocate after being forced to leave the Tongala farm
>
> * working without significant remuneration for the months of July to October 1994 coupled with having to find new employment with no financial cushion.

97. **Each of these heads of detriment was established** and may now be elaborated upon. I have found the plaintiffs' written submission persuasive. I am not persuaded by the defendant's written submission dealing with the profitability of the Tongala farm. A number of effective criticisms of it were made in the plaintiffs' answering written submission.

***

116. I return now specifically to the matter of detriment suffered after July 1993. Again, some of the facts already traversed must be repeated. Between July 1993 and the death of Bill the plaintiffs did a substantial amount of work at the farm in preparation for laser levelling. They continued to live in substandard accommodation between July 1993 and October 1994. They continued to work for inadequate remuneration between July 1993 and October 1994. Between July 1993 and February 1994 the basis on which they were remunerated was the same as previously. From March to June 1994 each plaintiff was paid $250 per week free of income tax by arrangement with Robbie. From July to October 1994 the plaintiffs received no remuneration. They kept faith with the farm labourer (whom Robbie omitted to pay) by paying out of their own pockets his wages for September and October 1994, so incurring further detriment. Although in the course of 1994 it became apparent that the promises made to the plaintiffs would not be honoured, **the detriment which they suffered was none the less detriment occasioned by their reliance on those promises, since they had on the faith of them put themselves in a position of vulnerability at the hands of the legal owner of the farm.** The final detriment resulting from that position of vulnerability was their eviction in October 1994, when, having no money worth mentioning, no jobs and nowhere to go, they were forced from the flourishing farm which they had themselves created out of the run-down and disease-ridden property that had been bought six years before. For the first week they had to stay with friends. Each of them had to find work quickly. **Equity will ignore none of this in its consideration of detriment. It is not, nor could it be, in the face of the numerous authorities, submitted that detriment is confined to the expenditure of money.**

117. The defendant submits that no detriment was suffered through reliance on the promise of July 1993. In my view substantial detriment was suffered by the plaintiffs through reliance on the 1988 promise and substantial detriment was suffered by them through reliance on the July 1993 promise. For the defendant it is said that nothing of any importance changed between July 1993 and October 1994: the plaintiffs continued to live in the farmhouse and run the farm: they did not alter their position to their detriment.

> **But this argument ignores the fact that everything the plaintiffs did for the benefit of the farm was done on the faith of expectations created by the legal owners' promises: they came to and remained at the farm because of those promises.** In answer to a leading question in cross-examination, Daniel said that he had worked on the farm down to July 1993 on the faith of the promise made in 1988. Perhaps he and his wife did not swear in terms that they continued to work the farm after July 1993 on the faith of the promise made in that month. But it would be remarkable if **that promise was not, to say the least, *an* inducement, and this is all that is necessary:**...Indeed, in the present case it would be remarkable if the promise of July 1993 did not operate most forcefully as an inducement. The judge had no doubt about this. **In considering inducement one should not forget the commonsense and rebuttable presumption of fact that may arise from the natural tendency of a promise:** ...
>
> [Emphasis added]

2.19 In relation to whether the imposition of a constructive trust over the property to satisfy the equity, or whether some lesser monetary compensation was the appropriate remedy:

> 119. The recent decision of the High Court in *Giumelli v. Giumelli* [1999] HCA 10; (1999) 73 A.L.J.R. 547 establishes that in cases of what is commonly called proprietary estoppel, in which it may be said that prima facie departure from the assumed state of affairs is contrary to the requirements of conscientious conduct, **it is a question depending on all the circumstances of each case whether departure is to be permitted. The court may require the party estopped to make good the assumption, and may in an appropriate case impose terms upon the other party. On the other hand, having regard to the requirements of conscientious conduct by the party estopped and, in an appropriate case, to the need to avoid injustice to third persons, the court may decide that some lesser relief is appropriate**...
>
> 120. I have already summarised, at some length, the detriment suffered by the plaintiffs in reliance upon the promises found by the judge to have been made. **Directing myself in accordance with *Giumelli*, I consider that the judge was right to conclude that only the imposition of a constructive trust would satisfy the equity that has arisen in this case.** Mr Kendall cited the passage from the joint judgment in *Giumelli* at 556 which referred to the need "both to avoid injustice to others, particularly Steven and his family, and to avoid relief which went beyond what was required for conscientious conduct by Mr and Mrs Giumelli." But he did not suggest that there was in the present any injustice to

third persons to be avoided, except, inferentially, injustice to Robbie as a beneficiary under his mother's will if the plaintiffs were awarded inappropriate relief. Really he put forward two points. The first was that the award of relief other than monetary relief would exceed what conscientious conduct required. The second was that great difficulties would attend the formulation of a constructive trust; this submission essentially concerned the suggested uncertainty of the testators' promises, a matter with which I have already dealt. **So far as the requirements of conscientious conduct are concerned, the argument was that there was a great discrepancy between the value of the plaintiffs' work and the value of the farm.**

121. In *Giumelli*, at 552, approval is given to the approach of Rowland, J. in the Full Court "that, even if it be conceded that Robert had not suffered an appreciable loss of income by remaining in the partnership, the detriment suffered by him was the loss of the property which he worked to improve, not to obtain immediate income from that exercise but to gain the proprietary interest." Those words are very pertinent here. **The present equity requires that the plaintiffs get the farm they were promised.**
In *Giumelli* the position of third parties stood in the way of an order for the conveyance of the promised lot. There is no such obstacle here. (It should moreover be carefully noted that **the order made by the High Court for monetary compensation in *Giumelli* secured payment to the promisee of a sum representing the present value of the promised lot after making all proper allowances.)**

[Emphasis added]

2.20 What sort of circumstances could justify a remedy less than the imposition of a constructive trust over the whole of a promised property?

2.21 The relief granted to the Plaintiffs was charged with two conditions:

122. It is plain that conditions can be imposed on a plaintiff in a case like this: ... it is clear, and accepted by the plaintiffs, that a condition should be imposed requiring payment by them to Robbie, by instalments, of the sum of $150,000 together with interest in accordance with the will of 26 October 1993. I would substitute for the date of the grant of probate the date of Mary's death. The payment should be charged on the farm. The condition imposed on the plaintiffs by Mary's will of October 1993 would plainly have required the payments to continue in favour of Robbie's estate in the event of his death within the ten year period, and the order should make this clear.

123. A condition requiring assumption by the plaintiffs of liability under the Rural Finance Corporation mortgage should also be imposed.

2.22 The following Orders were proposed to be made subject to hearing from Counsel:

129. Subject to the possible effect of the costs of this litigation, to which I shall turn in a moment, the substance of the order which I would propose, in upholding the judge's determination that an equity requiring the imposition of a trust has arisen, is as follows:

I would substitute for the declarations in the judge's order (putting to one side for later consideration after argument paragraphs 4 to 6 of that order) something along these lines - A declaration that, as from the date of this Court's order, the plaintiffs are

(a) beneficially and absolutely entitled, as joint tenants, to the farm freehold and to the livestock, plant and equipment used in connection with the farm;

(b) jointly and severally obliged properly to maintain and support Mary during the balance of her life, this obligation being secured by an equitable charge on the farm freehold;

(c) jointly and severally obliged to assume, in exoneration of the mortgagors, all obligations arising after the date of this Court's order under the mortgage over the farm, including in particular the liability to make all payments of principal and interest that have not fallen due by the date of this Court's order, this obligation being similarly secured;

(d) jointly and severally obliged to pay to Robbie or his legal personal representative the sum of $150,000 by ten annual instalments of $15,000, the first instalment to be paid one year after the date of this Court's order and interest to be paid quarterly from that date at six per cent per annum (in the case of the first four quarters) on $150,000 and (in the case of each subsequent quarter) on the unpaid balance of the $150,000, this obligation being similarly secured.

I would make, as part of the substituted order, an order that the defendant, at her own expense and by her attorney, transfer the freehold to the plaintiffs as joint tenants subject to the mortgage, or some other order vesting the freehold in them.

2.23 As to the costs of the appeal, see paragraphs 132-133 of the Judgment of the Court of Appeal, and a separate costs judgment: *Flinn v Flinn* [1999] VSCA 134: http://www.austlii.edu.au/au/cases/vic/VSCA/1999/134.html

3. Disputes Involving Trusts Forming Part of a Farming Business Structure

"Now, all of a sudden you had four decision-makers, and each one was pulling in his direction"

Emeri De Borteli, De Borteli Wines[4].

3.1 More often than not, the ownership structures used by farming families in Australia include one or more discretionary Trusts. Older Trusts may have originally been used for the purpose of managing probate duties, whereas more modern Trusts can be used for a number of reasons, including: taxation benefits of discretionary trusts; asset protection; estate planning (including defensive steps to keep assets out of estates and therefore outside (except in New South Wales) the risk of family provision claims; and the apparent desire of some accountants that their clients accumulate as many structures as possible. In more "serious" farming families, where farms have been passed down several generations, Trusts may have passed to the control of the current farming generation from a previous one.

3.2 Trusts in farming families are often fully controlled by the "farming parents", with that generation generally having a real reluctance to allow the "farm child" (or children) to share in that control. The reasons for this can include: as a legitimate and sometimes effective protection against family law risk posed by adult farming children; paternalism; and (often) an apparent lack of concern on the part of all parties as to who owns or controls what whilst relationships are good and the arrangement is working. A Trust, often (but not always) with a corporate Trustee, will sometimes own some or all of the farming land, which will then be utilised by the operator of the farming business. For many farming families with an adult farm child (or children), this will mean a farming partnership between parents and children using land owned by a Trust.

***Benson v Doloraine Pty Ltd* [2015] TASSC 41**

http://www.austlii.edu.au/au/cases/tas/TASSC/2015/41.html

3.3 The decision of Justice Porter of the Tasmanian Supreme Court in *Benson v Doloraine Pty Ltd* [2015] TASSC 41 resulted in the removal of two corporate Trustees controlled by the "farming parents" and the appointment of independent Trustees. That followed proceedings by the "farm children" in the Federal Court seeking an equitable interest in the Trust property, which was settled after the evidence closed with the ultimate effect that each of three sons received a fixed and vested 20% share in the capital of both Trusts.

[4] "All in the Family", ABC Landline story transcript, 11 February 2009.

STEP ADVISING FAMILIES ACROSS GENERATIONS

3.4 Ian and Gloria Benson had three adult children – Christopher, Mark and David Benson. The family farmed together in Queensland for about twenty (20) years, before moving to Tasmania in 1995. They continued farming, and moved into organic farming. Their structure included two discretionary trusts established by the parents – the IR&GM Benson Family Trust (settled 1998) and the Benson Family Trust (settled 2001). Each Trust had a corporate Trustee, the shareholders and Directors of which were the parents. The IR&GM Benson Family Trust held investment properties. The Benson Family Trust held five farming properties, and the farming business (organic vegetables). In addition, the parents operated a partnership that owned three farming properties, which were then leased or otherwise made available to the Benson Family Trust to use for the purposes of the farm business. Both Trusts had different terms, but appear to have been discretionary family trusts in the "common" form. The parents, sons and broader family members were within the class of discretion or capital and income beneficiaries.

3.5 The total assets across both Trusts and the land owned personally by the parents was agreed at $12.9M, subject to associated liabilities $5.92M (Trusts) and $1.59M (partnership), all of which were charged against the Trust and partnership assets[5].

3.6 The family appear to have farmed happily together in Queensland and then Tasmania until September 2013. A falling out then occurred, and the farming sons ceased to work in the farming business. They continued to live in houses on the farming properties.

3.7 An interesting aspect of the Benson structure is that the Trusts were only established relatively recently (1998 and 2001), after the family relocated from Queensland. It is also noteworthy that the sons appear to have had no ownership or controlling interest in the structure at all, with even the farm business being owned by the Benson Family Trust rather than a parent/child farming partnership.

3.8 Paragraphs **6-7** of the judgment summarise the background to the relationship between the parties, and the dispute that resulted in the application by the sons to remove their parents from the control of the Trusts:

> Until September 2013, all members of the family were involved in running the business. That business is the production, packing and marketing of organic vegetables. There are a number of assets associated with the business, which include water licences, plant and equipment, livestock, stock-in-trade, goodwill and consumables.

[5] At paragraph **10**.

Since September 2013, the applicants have not worked in the business, but they continue to live in houses on farm properties. The applicants have been, and continue to be, in conflict with their parents over the applicants' interests in the properties and the business. Very little of the history was revealed in these proceedings, but the issues seem to have been ones which regrettably are not uncommon within farming families. In November 2013, the three applicants took action in the Federal Court against Doloraine, FHFT and Ian and Gloria Benson. The applicants asserted that they had been required or expected to work on the farming properties (and on a property previously owned by the parents in Queensland), and made financial and non-financial contributions towards the acquisition of assets. They claimed representations were made by the parents that the farming business was a joint enterprise, at least involving the individuals, and that they would acquire interests in the assets.

3.9 Farming structures, and the importance of knowing everything.

3.10 The Federal Court proceedings were settled by the parties after the evidence had been heard. It was agreed that the Trustee of each Trust would resolve to pay or apply twenty percent (20%) of the net value of the assets of that Trust to each of the three sons. The Federal Court made Orders by consent declaring that twenty percent (20%) of the net value of each of the Trusts was beneficially held by each Trustee for each of the sons[6]. There was no dispute that the Trustees made the resolutions upon which the declarations were made.

3.11 Shortly after the settlement of the Federal Court proceedings, disputes arose between the parties as to the effect of the resolutions and declarations, and in relation to how the Trustees were conducting themselves. The sons applied to the Supreme Court of Tasmania, seeking the removal of the Trustees and related relief. The Trustees by cross-application sought to clarify their powers under the terms of the Trusts.

3.12 The judgment sets out in full a chain of correspondence between the lawyers for the parties, starting only a week after the settlement of the Federal Court proceedings. Porter J expressed a view that the correspondence summarised the positions taken by the parties in the proceedings. The correspondence is worth reviewing, as there may be lessons in it for how Trustees should conduct themselves to avoid a removal in similar circumstances.

3.13 The first letter was from the lawyer acting for the sons, to the lawyer acting for the parents. It raised the implementation of the Federal Court Orders, and sought a discussion between the parties as to which assets would be appropriated to

6 At paragraph **8**.

satisfy the 20% share of each son. The letter is in constructive/enquiring terms, as the following extract illustrates[7]:

> ... Are there particular assets within either Trust which might be, for want of a better expression, 'traded' or appropriated towards the satisfaction of a portion of any Applicant's interest in the net proceeds of the Trusts after payment of liabilities? Also, can our clients lease any premises from the Respondents, in particular so as to afford the Respondents rental income within the partnership for the mutual benefit of the parties?
>
> Is there any assistance that might be afforded by any of the Applicants towards their parents in realisation of any of the assets, if the realisation of assets is necessary so as to satisfy the interests of any of the Applicants in either Trust?
>
> In particular, are the Trustees prepared to appropriate particular assets in their present state towards the satisfaction of the interests of any of the Applicants?

3.14 The lawyer for the parents then wrote to advise that the parents intended to pay an amount equivalent to 20% of the net value for the two Trusts to the sons, with payment intended to be made that financial year. An intention to sell all or most of the assets of the Trusts, including the farming properties, was stated. Various requests/demands were made that the sons return assets to be sold, vacate properties they were living in, and not interfere in the sale process.

3.15 The lawyers for the sons then wrote expressing dissatisfaction with the position being taken by the parents. It was asserted that as a consequence of the Court Orders each son had a "beneficial proprietary interest in the net assets of each trust", and those interests were held on separate new trusts for each of the sons. The obligations of the Trustees were asserted to be as follows:

> The obligation of each trustee, with effect from 5 December 2014, is to either pay or to apply to the benefit of each of the applicants 20% of the net value of each trust fund. **Unless each applicant expressly consents, it is not open to either trustee to deal with any of the assets of either trust in a manner inconsistent with the vested beneficial interest of each applicant.** Consent has neither been sought, nor given. **In particular it is not open to either trustee to:**
>
> - **Sell the assets as a going concern;**
> - Require the vacation of the residences …;
> - Deny to the applicants their proportionate share of the income generated by the use of their assets;
> - Deny to the applicants possession of any plant and equipment, including vehicles;

[7] At paragraph **21**.

STEP ADVISING FAMILIES ACROSS GENERATIONS

- Apply any portion of the income to which the applicants are entitled, to any other beneficiary of either trust and in particular in favour of Mr & Mrs Benson.

[Emphasis added]

3.16 Clearly, the farming sons wished to take a very active role in how the Trusts were administered from that time on, effectively at the same level as the Trustees. The first dot point above is particularly interesting, as in effect it is an assertion that the power of sale of the Trustees could not be properly exercised without the consent of the farming sons.

3.17 An accounting for Trust income was sought on behalf of the sons, some two weeks after the Federal Court proceedings. The response received did not on the face of the judgment respond to that request, but rather made further assertions about the nature of the rights held by the sons in the Trust property, and asserted that, subject to making the 20% payments required, the powers of the Trustees pursuant to the Trust Deeds remained unaltered, and unfettered.

3.18 The nature of the interest of the sons was expressed in the following terms by the lawyer for the parents in January the following year[8]:

> In putting the above we reiterate our clients' position that, in accordance with the Orders of the 5th December, your clients do not have a specific and/or defined interest in the net assets of the Trust. They have a beneficial interest in 20% per son of the net value of the Trust Funds. Thus, each of your clients has a beneficial equitable interest in receiving, by payment or allocation, 20% of the net value of each of the Trust Funds once ascertained in dollar terms.

3.19 The sons applied to the Supreme Court of Tasmania to remove the Trustees, and seeking related relief. They asserted that the effect of the resolutions and related declarations was that three distinct sub-trusts had been created within each of the Trusts, of which the Trustees were also the Trustees.

3.20 The judgment in paragraphs **47** to **84** contains a detailed analysis of the effect of the resolutions and declarations on the nature of the interest of the sons in the Trusts. It is not necessary for the purposes of this paper to consider that analysis in detail. The conclusion reached by Porter J was as follows[9]:

> I am satisfied that **the effect of the consent orders was that each applicant obtained a vested interest in 20 per cent of the net value of each trust fund <u>as it stood at that time in terms of the agreed values</u>.** What that means is that, in respect of each discretionary trust and each

8 At paragraph **31**.

19 At paragraphs **82-84**.

applicant, there is an "imperative trust for distribution" of the relevant amount, to use the words of the court in *Queensland Trustees Limited v Commissioner of Stamp Duties* (1952) 88 CLR 54 at 64.

At least at one point, the applicants asserted that their interests are held by the trustees completely outside the terms of the deeds, and as 'bare trustees' whose only duties are to convey the interest on demand, and to 'guard' it in the meantime. That may be so, but for present purposes, it is not necessary to resolve what the strict situation is. **There are fixed trusts in favour of the applicants, and it is recognised that new trusts occur within the administration of discretionary trusts:** McCarthy J in *Commissioner of Inland Revenue v Ward* at [30]. As to that, **in the case of each deed there are provisions by which amounts come to be held by the trustees in trust for the beneficiary absolutely**. Clause 3 of the first deed operates to that effect when an amount is placed to the credit of any beneficiary in the books of account of the trust fund. Clause 3.7 of the second deed has that effect where the trustee pays, applies or sets aside income for a beneficiary.

The simple end result is that **the trustees must recognise that each applicant has a vested beneficial interest in the net value of the trust fund as ascertained by reference to the agreed values on 5 December 2014, and comply with their obligations accordingly. All of the machinery to enable the trustees to deal with fixed trusts for distribution seems to be exclusively within the terms of the deeds**.

[Emphasis added]

3.21 The farming sons submitted that the Trustees had been in breach of their duties, or had engaged in conduct, justifying their removal[10].

Removal of a Trustee by the Court

3.22 We will depart temporarily from *Benson* to consider the circumstances in which a Trustee may be removed by a Court. *Benson* then provides an illustration of some of the factual issues that may support a removal.

3.23 For many Trustees, removal from office is likely to have serious consequences. For a Trustee of a discretionary Trust, continuing to hold the role of Trustee equates to continuing to have the control of the Trust property, and (often) to hold very broad discretions as to which beneficiaries benefit from income and capital, in what amount, and when. Losing the role of Trustee means losing that control and power.

10 At paragraph **107**.

STEP ADVISING FAMILIES ACROSS GENERATIONS

3.24 It is worth noting that there are other circumstances in which a Trustee may be removed as Trustee without their consent. Broadly speaking, these are **(1)** where the terms of the Trust provide for circumstances in which the Trustee is deemed to have resigned or been removed (e.g. loss of mental capacity); **(2)** where the person is no longer able to act as Trustee (or was never able to validly act); and **(3)** where a person other than the Trustee is given the power to remove and appoint the Trustee (e.g. an Appointor).

3.25 Each jurisdiction in Australia has a statutory provision for the removal of a Trustee by the Supreme Court of the relevant jurisdiction., The Supreme Court of each also has an inherent power to remove a Trustee[11], as part of the role of the Courts to supervise the due administration of Trusts.

3.26 To provide one example of the statutory power, in Victoria Section **48** of the *Trustee Act* 1958 (Vic) provides as follows:

> **48 Power of Court to appoint new trustees**
>
> (1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.
>
> In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who is convicted on indictment of any offence, or is a patient within the meaning of the Mental Health Act 2014, or is a bankrupt, or is a corporation which is in liquidation or has been dissolved.
>
> (2) Nothing in this section gives power to appoint an executor or administrator.

3.27 Subject to the particular wording of the relevant statutory power, the principles and approach to be taken by a Court when asked to remove a Trustee was expressed by Dixon J of the High Court in *Miller v Cameron* [1936] 54 CLR 572 at paragraphs **580-581** as follows:

> The jurisdiction to remove a trustee is **exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee.** In

[11] *Benson v Doloraine Pty Ltd* [2015] TASSC 41 at paragraph **103**.

STEP ADVISING FAMILIES ACROSS GENERATIONS

deciding to remove a trustee the Court forms **a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary.** A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But **in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight**.

[Emphasis added]

3.28 The following general principles/approach can be drawn from the case of *Rosemarie Porteous & Ors v Georgina Hope Rinehart (as Executor and Trustee of the estate of Langley George Hancock) & Ors* [1998] WASC 270 (31 August 1998), with the case authorities referred to by White J in that case omitted:

(a) "'Expedient' here, I think, may be taken to mean 'conducive to advantage in general, or to a definite purpose; fit, proper, or suitable to the circumstances of the case' : OED, vol III, v 426. In the context of appointing a new trustee in substitution for an existing one, I take it to mean then conducive to, or fit or proper or suitable having regard to, 'the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee' . . . "

(b) ...the dominant consideration in exercising either the statutory or inherent jurisdiction to remove trustees must be the welfare of the beneficiaries.

(c) This is a power which will be exercised cautiously.

(d) The rule of Equity that the Court will not permit a party to place himself in a situation in which his interest conflicts with his duty, while not necessarily applicable to the case of a testamentary executor, does operate in relation to a trustee.

(e) ...the jurisdiction of the Court to remove a trustee is ancillary to its principal duty to see that the trusts are properly executed and, if the Court is satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee may be removed. The main guide in the exercise of this jurisdiction must be, not whether the trustee has committed breaches of trust, but the welfare of the beneficiaries.

> **(f)** The court has power to remove one or more of several trustees and executor...
>
> **(g)** The creator of a trust may appoint as the trustee thereof a person whose personal interest will create a conflict with his duty as trustee, and he may authorise the trustee to put himself in a position in which such a conflict will arise ...he may authorise a donee of a power to appoint a new trustee of the trust, to appoint a person whose personal interest will conflict with his duty as trustee.
>
> **(h)** It is rare for a Court to remove an executor or trustee, save in exceptional circumstances.
>
> **(i)** The power to remove an executor or trustee is a delicate one which must be exercised cautiously.

3.29 Ultimately, White J in *Porteous* refused to remove the Trustees at that time:

> I am persuaded that there is no immediate threat of mischief in the continuation of the defendants as executors and trustees of the Will (see: *Gowans v Watkins*, (*supra*)) and that there is nothing to indicate that the trust property of the Estate will not be safe pending the determination of the Action. I have come to the conclusion that, in the exercise of my discretion, I should refuse the application at this stage. In saying that, I do not, however, preclude the possibility of a similar application being made if circumstances warrant it in the future.

Returning to the Analysis and Outcome in *Benson*

3.30 The statutory power to remove a Trustee in Tasmania provides that the Court *may* appoint a Trustee in substitution for an existing Trustee (i.e. by removing the existing Trustee) where it is *expedient* to do so, and it is "inexpedient, difficult or impractical" to do so without the assistance of the Court[12].

3.31 Porter J noted with approval some of the authorities noted above[13], and made the following findings of fact, concluding that those findings supported a removal of the Trustees, and the appointment of independent Trustees[14]:

> ...The trustees have not acknowledged any greater interests possessed by the applicants than those of beneficiaries under discretionary trusts, except perhaps to a very limited degree. The trustees have, in a real sense, utilised the amounts to which the applicants are entitled, by continuing to carry on the business **without any recognition in the**

12 Section **32** of the *Trustee Act 1898* (Tasmania).
13 At paragraphs **102-106**.
14 At paragraphs **108-115**.

STEP ADVISING FAMILIES ACROSS GENERATIONS

books of account that amounts are owed to the applicants. The trustees have used all assets of the trust funds in which the applicants have, in a loose sense, an interest. The **trustees have not accounted to the applicants for the use of their entitlements**.

Despite the request ... **the trustees have not consulted with the applicants** about the payment or application of any amount, or the appropriation of any asset in or towards the discharge of the liability. According to Mr Ian Benson, **they have no intention of doing so**. Similarly, the applicants **have not been consulted about the sale of the properties and the business**, and **again there is no intention to do that**...

Lastly, it seems to me that **there may well have been a failure to reasonably carry out the duties in respect of the discretionary trusts in relation to both the financial years ended 2014 and 2015. The applicants appear to have been excluded from consideration in relation to a favourable exercise of the discretion to distribute.** This follows the breakdown of the relationship in late 2013. The evidence tends to suggest that **the only beneficiaries to receive an exercise of discretion in their favour in the year ended 2015 were Mr and Mrs Benson.** That brings me to the question of hostility.

It is quite clear that there is a **high level of hostility** on the part of Mr and Mrs Benson to their sons...I am satisfied that there are **irreconcilable differences and that the lack of a reasonable relationship will continue**, at least for a considerable period of time...

...I am also satisfied that the trustees are **now irretrievably in a conflict of interest situation.** That has a number of aspects. Mr and Mrs Benson have exclusive control of the trustees. Mr and Mrs Benson are **primary beneficiaries** under both discretionary trusts, the funds of which are now represented by 40 per cent of the net value as things stood on 5 December 2014. The applicants remain beneficiaries under those discretionary trusts. The trustees have made **no distributions to the applicants in the years ended 2014 and 2015.** With the exception of nominal amounts to the applicants' children, all distributions have been to Mr and Mrs Benson.

Additionally, the trustee companies, as controlled by Mr and Mrs Benson, entered into three agreements with FHFT on 30 June 2015. The first is the lease of partnership properties to FHFT. It will be recalled that it retrospectively operates from 1 July 2014, the annual rental being $413,250, although the liability does not appear in the draft financial statements. On its face, it means that **Mr and Mrs Benson had arranged for FHFT to enter into an agreement which benefits them personally, and creates at least a potential liability to be borne by the**

> **trust fund.** Additionally, there are the two farm manager employment agreements. They operate prospectively. **Mr and Mrs Benson have accordingly arranged for FHFT to enter into agreements with them which pay them a salary, at the same time as they control the trustee and the exercise of the discretion to distribute under the trust deed.**
>
> [Emphasis added]

3.32 Critically, the parents were removed from the control of **all** parts of the Trusts, not just the sixty percent (60%) held for the farming sons. They also lost control of the forty percent (40%) of the Trust that it can be readily inferred from the nature of the Federal Court settlement they were to obtain to the exclusion of the sons.

3.33 Further, an Order was made requiring the parents to provide a full accounting for the period from 5 December 2014 (the date of the resolutions and declarations) to the time of their removal. That accounting would therefore cover the 2014/2015 financial year distributions, and the related party agreements, which were the subject of criticism in the judgment and were factors found to support their removal. Interestingly, the distributions in the 2013/2014 financial year, which were also criticised and apparently relevant to them being removed, would not be included in the accounting period. However, that would not prevent the new Trustees from taking action against the parents to recover the benefit of distributions that could be shown to be invalid.

3.34 Whilst much was made of the evidence in the failure of the parents to consult with the farming sons, or obtain their consent to the sale of Trust property, and their stated intention not to do so in the future, the clearest breaches of duty supporting a removal were the failure to distribute or set aside 60% of the trust income since the resolutions/declarations for the sons, and the parents entering into related party arrangements that patently shifted what would have been income of the Trust to salary and rent payments to the parents.

3.35 **Could the parents in *Benson* have avoided removal?**

3.36 Maybe. However, the acrimonious relationships, and the polarised positions as to what should be done with the farming properties would suggest that the implementation of the "settlement" was likely to need Court involvement at some future point.

3.37 The following steps/approach would likely have made a removal (and any breach of trust) much less likely, even if the sons remained dissatisfied with what was ultimately done with the farming properties:

(a) all income since 5 December 2014 should have been accounted for and distributed by sharing it with the three Trusts for the sons (whether or not they were properly categorised as separate Trusts, or were sub-trusts of the main trust);

(b) the income on each of the 20% shares should have been paid out, rather than applied to loan accounts or otherwise;

(c) the lease agreement should have had the sons as consenting parties, or, at the very least, been sent to them and their objections/comments sought before the Trustee entered into the lease. The amount of the lease should have been determined by an independent valuer;

(d) the farm manager agreements should not have been entered into, or the same procedure followed as suggested above for the lease;

(e) the sons should not have been requested to vacate their homes. Regardless of whether it was within the powers of the Trustees to do so, it was not strategically sensible or likely to assist with a workable relationship;

(f) more formal steps should have been taken in relation to investigating a potential sale of the properties, including obtaining independent valuations and in the engagement of a real estate agent. It may also have been prudent to seek the son's formal proposals for them to take particular assets in satisfaction of their entitlements, and to extend to them a "right of first refusal" when any offers were later received to purchase the properties;

(g) a formal accounting should have been provided when it was first requested, particularly as it only likely related to a very short period following the resolutions/declarations and would not have been onerous to comply with;

(h) to both properly consider and appear to properly consider the sons as beneficiaries in the "remaining" Trust for distributions, a process of putting a proposed distribution to the sons for their approval/objection, and inviting them to apply for income if they believed they had a need/want for it could have been effective. If the above steps were being followed, they may have been content not to seek any additional income; and

(i) at the point that the settlement was reached, agree and document the full detail of the arrangement, including the method by which the sons were to be paid their agreed shares, and matters including the approach to a sale or other distribution of the farming properties. Whilst it may seem obvious with the benefit of hindsight, a release/waiver of their rights as

beneficiaries in the "remaining" part of the Trust may also have been a very good idea.

3.38 How could succession planning have been approached on the facts of *Benson* before relationships broke down?

4. Family Provision Claims

"My biggest worry was, I think, they want us off the farm.
And we weren't ready to go"

Melva Waser, Riversdale[15].

4.1 Family provision claims are usually a key issue for those involved in farm succession planning, particularly where the needs and claims of "farming" and "non-farming" children need to be weighed up and addressed.

***Torney & Ors v Shalders & Anor* [2009] VSC 268**

http://www.austlii.edu.au/au/cases/vic/VSC/2009/268.html

4.2 Lyla Shalders died in 2006 at 75 years of age, having survived her husband, who died in 1989. They had six children of their marriage – five daughters (of whom three were the Plaintiffs), and a son, David (who was the Defendant).

4.3 How successful generally are provision claims by non-farming children?

4.4 The provision made by the testatrix for her daughters included the following:

> 3 The plaintiffs, together with their other two sisters who do not make any claim, received benefits under the will valued at date of death in total at about $540,000 (i.e. about $108,000 each)...
>
> 4 By cl.4 of the will, the testatrix gave such of her daughters Anne Maree Ryan, Jennifer Margaret Torney (the first plaintiff – "Jennifer"), Sally Kathryn Hicks (the second plaintiff – "Sally"), Helen Jane Butt and Clare Denise Shalders (the third plaintiff – "Clare") as survived her, in equal shares, the following:
>
> (a) the house and land known as 11 Springs Road, Brown Hill (a residential property in Ballarat);

15 "All in the Family", ABC Landline story transcript, 11 February 2009.

STEP ADVISING FAMILIES ACROSS GENERATIONS

(b) all moneys payable under life assurance policies;

(c) any moneys in any bank account in her sole name;

(d) any AMP shares owned by her.

4.5 The Will also contained an illustration of one type of charge that is not uncommon to see in Wills within farming families:

> 5 In addition, the testatrix gave to each of her daughters a legacy in the sum of $30,000 charged upon the real estate given to David. The testatrix directed that her trustees have five years from the date of her death within which to pay the legacies with interest thereon at 5% per annum calculated from the date of death.

4.6 David received the residuary estate:

> 3 ... The residuary estate primarily comprises real estate used by the testatrix and David for farming operations conducted by them in partnership, together with the share of the testatrix in the partnership business. The total value of the residuary estate left to David under the will was, at the date of death, about $2.1M.
>
> 8 In addition, it was common ground that David, as residuary beneficiary, was also entitled to the interest of the testatrix in the farming partnership business. The farming partnership owns a cropping and livestock business conducted on the various farm properties, substantial crops and livestock and plant equipment and vehicles. The partners' capital accounts and balance sheet for the year ended 30 June 2006 showed the testatrix as having a closing balance of $237,919. That amount represented her share in the net assets of the partnership. The balance sheet showed that the principal assets of the partnership were bank account moneys (totalling some $34,000), Farm Management Deposits (totalling $220,000), plant and equipment ($199,378), "sheep on hand"($20,973) and "land" valued at $97,606....

4.7 Charges in Wills in the farming context: how they work; key elements when drafting; potential to reduce family provision claim risk; and main pros and cons.

4.8 The Plaintiffs gave evidence of their involvement on the farm growing up:

> 44 Growing up on the farm, Jennifer helped with all of the farm duties that she was capable of performing, including driving the utility to

feed the sheep and household chores of cleaning, washing, ironing, vacuuming, chopping wood, filling the wood box, mowing the grass and gathering eggs. Her morning tasks in winter were often to vacuum the lounge, clean out the fireplace and set it for the evening (usually with pine cones that the children had collected from the paddock before going to school). She helped mark lambs, learned to inject them for pulpy kidney disease and round up sheep.

45 Jennifer was a weekly boarder during secondary school. On weekends her time was spent washing, ironing and helping her father. Her summer holidays were spent hay carting. She and David helped their father with this and other farm jobs, including jobs associated with shearing during the September school holidays.

***

49 During her early childhood, Sally spent a lot of time with her father while he was going about his normal farming duties. She was taught to drive when very young and by the age of 12 was driving a tray truck for hay carting around "Fairview." In the early 1970s, when Sally was the eldest child living at home during the week, she was required to carry out many farm duties on a daily basis, including cutting and stacking firewood, feeding chickens, watering animals and milking the family cow. She drove vehicles during the hay carting season and the shearing season. She assisted in feeding stock, herding sheep and cattle, marking lambs, dipping sheep, helping to raise pet lambs and she assisted her father in the completion of fencing in a property that he was leasing from a relative. She helped her father fit out one of the sheds on "Jeitz," a barn that was converted into a grain storage shed. In about 1972 or 1973, the family went on a caravan holiday to Warrnambool and Sally was left for about two weeks to assist her uncle in looking after the various farm properties, including feeding and checking stock and she cooked all of the meals. Sally helped with the family's washing and, when attending boarding school, helped with the washing every Saturday and did other farm chores at weekends.

***

53 Clare spent a great deal of time with her father as a young child and then as a teenager. On weekends she would always ensure that she was up early in order to go with him to help with farming

chores. She was taught to drive the farm utility when very young and helped with stock feeding and hay carting and various seasonal farm tasks. Clare also assisted with many household tasks. She did a lot of cleaning and tidying.

4.9 Is it sometimes a viable option to give farming land to the "non farming" children? Why and how could this be done?

4.10 David's commitment and contributions to the farm and to his parents were found to have been significant and longstanding, with the following extracts being illustrative (see paragraphs **14-43** of the Judgment for the full facts);

> 14. As a young boy, David was expected to and did assist his father with work around the farm whenever he was told to do so. From 1966 onwards, David worked with his father during every hay carting season and his labour contribution increased as he grew older. From an early age he drove a truck and, later, drove a tractor towing a slasher. From about 1970, David assisted his father with land preparation and crop planting and with drenching and jetting sheep, generally during school holidays. From about 1973, David began to assist his father with crutching sheep and he replaced labourers who had formerly been employed to carry out this "very physical" work. David did not receive wages for his work.
>
> 15. David became interested in pursuing carpentry as a trade but his father told him that he was needed on the farm. At the age of 16, David left school to work on the farm and has worked there ever since. From the age of 16, David worked full time with his father which involved 60 – 70 hours per week for about 50 weeks of the year. He worked on Saturday, except when playing football, and they both usually took Sunday off. David did not take annual holidays or sick leave – nor did his father until he took ill during the last 18 months of his life.
>
> 16. David has taken one holiday in his life – spending one week in Surfers Paradise at the age of 25.
>
> 17. Once David joined his father in farming full time, his father employed casual labourers only for seasonal work. David did not receive any wages for doing the farm work but received room and board at no cost. He did not receive any pocket money as a boy or young adult. His father often said to him that "this will all be yours one day." David deposed that he believed that his father meant, by this, the farming business and assets and that, but for these promises, he would have branched out on his own, purchasing land and stock and farming by himself.

18. In about 1974, the parents purchased a property known as "Brophy's" (about 542 acres) at Wickliffe. His father told David that this purchase was in order to expand the business upon David joining him in farming. His father told David that he bought the land at Wickliffe rather than Willaura as it was cheaper but that he planned to sell it in the future and to buy land closer to Willaura when it became available.

19 . From the age of 17, David did the bulk of the sheep shearing, one of the most physically taxing jobs in farming. His father did some shearing and from time to time additional shearers and rouseabouts were employed. The sheep numbers increased from about 2,000 to about 3,200 by 1976, to about 5,200 by 1984 and to about 6,500 by 1988.

20. David received no wages for shearing on the farm but, from the age of 17 to 30, he also took casual jobs doing shearing work or hay carting for other farms in order to earn some money for himself. He earned on average about $10,000 per annum and used this money for personal expenses such as food, clothing, vehicles and "pub money." When he was 17, he purchased a motorbike from his savings and, when he was 19, he purchased a motor vehicle from his savings. David also bought a second hand combine and header from his earnings which he used in the parents' farming business.

***

23. During the drought of 1982, David gave his parents some of his own wool income to assist them with partnership expenses and he took on additional outside shearing jobs to make up that contribution.

24. In 1983, David took up residence in the soldier settler's cottage on the parents' land at "Jeitz" and he still lives there. When he moved onto "Jeitz," there was no heating and the toilet and shower were outdoors. He paid for the furniture himself. The parents' partnership paid for his electricity and telephone expenses and for contents insurance. Later, when he became a partner, these expenses were allocated to his partnership drawings. Over the period of nearly 25 years that David has lived on "Jeitz," he has made numerous improvements and, as he deposed, it is now a simple but comfortable small home.

***

28. His parents told David that all of the income earned from the farming business was to be deposited into the partnership account

and that all the farming expenses were to be paid from that account and that any personal expenses were to be listed as drawings. Any profits made by the partnership were described as drawings for tax purposes but were actually left in the business and not distributed.

29. After joining the partnership and contributing his herd, David was worse off in terms of cash earnings. He did not receive any wages or distribution of profits from the farming business, so he continued to do outside shearing work when time permitted until about the time that his father took ill.

30. In 1988, the father contracted cancer and stopped working on the farm. As a result, David had to work additional hours and, as he deposed, "I was extremely busy and overtired, especially during the busiest seasons of the year on our farm."

***

33. David continued to operate the farming business in partnership with the testatrix. The testatrix assisted by running errands and paying the bills and she also did the clerical work until GST was introduced, when David hired a bookkeeper. The testatrix also cooked and provided substantial meals for David and any seasonal labourers, on a daily basis. As David deposed, he was "the only real farmer" – he conducted the farming business and was aware of the income and expenses.

***

35. David deposed that, after his father's death, the testatrix came to rely heavily upon him not only for running the farm but also to monitor her general health and wellbeing. He checked on her daily. They were confidantes and they could and did talk about everything.

4.11 How successful generally are provision claims by farming children?

4.12 Were there facts in this case that would have supported an equitable claim by David, had he not been left the farm?

4.13 Mandie J found that adequate and proper provision had not been made for the applicants:

120 In my opinion, **having regard in particular to the size of the estate and to the substantial real estate assets that David has accumulated in his own name**, the testatrix, in all the circumstances to which I have referred, failed to make adequate provision for the proper maintenance and support of each of the plaintiffs by her will. **Having regard to the modest financial circumstances of each of the plaintiffs, I consider that, in all the circumstances, the provision by the testatrix for each of the plaintiffs of the share of specified assets plus the legacy (approximately $115,000 each), as provided by the will, fell short of that provision which would have been made by a wise and just testatrix.** The value of the assets in the estate, and David's independent asset position, were such that **the testatrix was in a position to provide to a greater extent for the needs and contingencies of the plaintiffs than she did**.

121 I have taken into account David's reasonable expectation of inheriting the farm properties and his contribution to their preservation and maintenance. I have also taken into account the modest income enjoyed by David, his obligations to Haylee and the need to maintain his income by the operation of all or most of the existing farm properties. However, **given David's substantial independent asset position, I think that a wise and just testatrix would have made a better provision for the future needs of the plaintiffs. A wise and just testatrix would have contemplated that David had a number of feasible options, given the range of assets at his disposal, for the satisfaction of appropriate further provisions for the plaintiffs.**

122 I consider that the testatrix was in a position to better provide for the future needs and contingencies of the plaintiffs beyond the relatively modest amount provided for each of them by her will, **without derogating from her obligations to David.** I turn to give consideration as to the additional amount that should be provided for each of the plaintiffs. This is not an arithmetical exercise but involves the exercise of discretion within the confines of the Act and having regard to the numerous factors, both tangible and intangible, for which the Act provides and to which I have referred.

[Emphasis added]

4.14 Jennifer received an additional legacy of $100,000, making her total provision $238,000:

> 123 Jennifer and her husband have accumulated real estate assets of some value together with some superannuation but Jennifer's income prospects are problematic. They have borrowings, including from a daughter, that indicate a lack of sufficient income. **I consider that the testatrix should have provided a further amount to give Jennifer a modest degree of additional security for her future.** I think that, in all the circumstances, further provision should be made for Jennifer by way of an additional legacy in the sum of $100,000 plus interest at the rate of 5 per centum per annum from 1 January 2010 (in the event that the legacy is unpaid at that date).
>
> [Emphasis added]

4.15 Sally also received an additional legacy of $100,000, making her total provision $238,000:

> 124 Sally and Gerald have also accumulated real estate assets of some value together with superannuation. Sally has a reasonable income but suffers from illness and injury that affects her future income prospects and her husband has a number of serious health problems. **The benefit provided to Sally by the testatrix during her lifetime should be taken into account – however, I consider that the testatrix should have provided a further amount to give Sally a modest degree of additional security for her future.** I think that, in all the circumstances, further provision should be made for Sally by way of an additional legacy in the sum of $100,000 plus interest at the rate of 5 per centum per annum from 1 January 2010 (in the event that the legacy is unpaid at that date).
>
> [Emphasis added]

4.16 Clare received a larger legacy than Jennifer and Sally on the basis of greater relative need, making her total provision $333,000:

> 125 Clare clearly has more needs than the other plaintiffs. She and her husband each have health problems and they have five young dependant children. They have the potential to earn income for a longer period of time but the contingencies affecting them are considerably greater**. I think that the testatrix should have recognised that Clare was in need of a significantly greater provision in order to better equip her to deal with her future exigencies and those of her dependants.** I think that in all the circumstances, further provision should be made for Clare by way

of an additional legacy in the sum of $195,000 plus interest at the rate of 5 per centum per annum from 1 January 2010 (in the event that the legacy is unpaid at that date).

[Emphasis added]

4.17 Costs, estimated in the judgment to be in the order of $300,000, were ordered to be paid from the residuary estate (i.e. David).

4.18 The additional legacies were charged on the real estate to be received by David.

4.19 How can Testamentary Discretionary Trusts be used in the farming context?

4.20 An SBS program in 2015, "Where There's a Will", featured David Shalders as a panel guest.

The program and a transcript can be accessed here:
http://www.sbs.com.au/news/insight/tvepisode/where-theres-will

5. Family Law Disputes

"We've got three boys that are all very keen on farming
and we've got one farm"

Kim Kelly, Mooramook[16].

5.1 A protective strategy commonly seen in farming families is the "older" generation retaining ownership of farming land to guard against the risk of relationship breakdown in the next generation. This can be very effective if and when relationship breakdown does in fact occur, but can cause other problems, and can sometimes unnecessarily defer good and timely succession planning. A related issue is where a "farm child" is in a long term relationship, and wants to ensure that proper arrangements are in place to provide for their own partner.

***Summit v Summit* [2009] FAMCA 371**

http://www.austlii.edu.au/au/cases/cth/FamCA/2009/371.html

5.2 This decision of Murphy J of the Family Court of Australia involved an application by a husband for property related Orders against his wife. The husband's parents were also respondents to the application.

16 "All in the Family", ABC Landline story transcript, 11 February 2009.

STEP ADVISING FAMILIES ACROSS GENERATIONS

5.3 The following extracts from the Judgment provide general background about the family and their farming operations:

> 1. The Summitt family are, and have been for many years, successful farmers. In the 1960s the husband's father ("Mr Summitt") and his wife commenced farming a property, on part of which they have lived ever since.
>
> 2. Initially, the farming was carried out in a three-way partnership between Mr Summitt, his wife and Mr Summit's brother. A decade or so later, Mr Summitt and his wife bought out the brother. In February 1977, the business began trading under the name Summitt & Co.
>
> 3. By then, their son, the husband in these s 79 proceedings, was old enough to become a partner and a one-third interest in the business was gifted to him. The business then (again) operated as a three-way partnership.
>
> 4. Almost four years later, in September 1980, the applicant and respondent to the current proceedings were married.
>
> 5. About three years after that, in November 1983, a property was purchased and registered in the joint names of each of the husband and wife, and Mr Summitt and his wife. Approximately twelve months later, the wife became an equal one-quarter partner in the farming business. Her interests in the land just mentioned and the business, were each gifted to her by the husband and his parents.
>
> 6. In the 24 years until November 2004, when the husband and wife separated, a number of properties were acquired; the properties were farmed; corporate/trust vehicles were created and properties were improved, in one particular case, significantly.
>
> 7. Real property the subject of these proceedings is held both by trustees of trusts and by the parties, the latter in differing permutations. Issues surrounding those facts, in so far as they relate to some of that property, form the basis of the central contentions of the respective parties in these proceedings, who are not only the husband and wife, but Mr Summitt and his wife.
>
> ***
>
> 13. All parties are agreed that the land and farming business (broadly described) is to be retained by the husband (or, as the case may be,

the husband and his parents), and that the wife is to receive two investment properties, her superannuation interest, chattels and a cash sum.

5.4 Potential benefits of Family Law Financial Agreements (FLFAs) for farming families (and some common difficulties).

5.5 As part of identifying and valuing the "property of the parties" for the purposes of Section 79 of the *Family Law Act 1975* (Cth) ("the Act"), Murphy J was required to resolve a dispute between the husband and his parents on one side, and the wife on the other, as to the beneficial ownership of two properties – the N property, and the P property:

> 24. The first, and fundamental, "step" is to identify and value "the property of the parties or either of them" within the meaning of the section. Significant issues in this case attend that first step.
>
> 25. Here, that property includes interests in a farming partnership which has been valued by a single expert, Mr F. Mr F has excluded from his valuation of the partnership the property known as N property, because the registered owners of that property are the husband and wife.
>
> 26. Of course, a partnership, as such, cannot own property. The individuals comprising the partnership can own property, and property owned by only some of those individuals can constitute partnership property. **The husband and Mr and Mrs Summitt contend that the N property is partnership property. As such, they contend that it should be included as an asset of the partnership with appropriate adjustments to the accounts. The wife contends that the whole of the value of the property should be regarded as property for division between she and the husband.**
>
> 27. Mr F has included the husband's one-third interest in the "Home Block" which he owns with his parents. An argument advanced by Mr North SC emerged during cross-examination and submissions that this block, too, was partnership property but, it seems, no such argument attended the instructions provided to Mr F.
>
> 28. **Another property used in the parties' farming enterprise is known as P property. It is also owned by the husband and wife. This property, too, has been used by the partnership for many**

years for its purposes. Yet, no party contends that it is partnership property.

29. The whole of the value of P property might, then, be expected to form part of the "property of the parties or either of them". However, **the husband and Mr and Mrs Summitt contend that P property was bought with, and has been improved by, partnership monies. Prior to these proceedings, no accounting had ever been done that recorded any such expenditure as such.** The farm's accountant, Mr B and a reporting accountant retained by Mr Summitt (Mr C) have undertaken calculations, based on information and figures supplied to them by the husband and Mr Summitt respectively.

30. Those calculations sound in the relief sought in respect of P property by each of the husband and Mr and Mrs Summitt.

[Emphasis added]

5.6 The position taken by the husband and his parents in relation to this issue, in addition to that noted in the extract above, was described as follows:

31. The husband seeks orders (among others) that the wife transfer her interest in N property and P property to him, as well as her interest in the partnership. The argument advanced on his behalf contends that N property is an asset of the partnership. In respect of P property, it is accepted "*that this property is legally and beneficially owned by the husband and wife ...*".

32. However, in written submissions made on his behalf, the husband goes on to argue that:

> "*The parents assert (with some justification) that the fixed improvements should have been charged against the Husband and Wife's loan account as they stay with the land and impact upon its value.*
>
> ...
>
> *... the parents contend ... that the accounts should be corrected ... this will require amended financial accounts and income tax returns...*
>
> *...[the wife contends] that she (and the Husband) should share the benefits that flow from the substantial*

improvements constructed on [P property] by the Partnership notwithstanding the other partners (the Husband's Parents) will lose out as a result"

33. The husband also goes on to argue that, as a result, the court has four options:

"(1) Calculating the necessary adjustment to the capital accounts of the 4 partners so as to make the Husband and the Wife primarily responsible for the capital improvements funded by the partnership. Mr [C] assesses this at $757,995.

(2) Dividing up the current value of the improvements to [P property] such that the value included in the divisible pool is reduced by 50% of that value, namely $300,000. This would require the husband's parents to accept that he will hold [P property] subject to their equitable rights vis a vis their positions as partners;

(3) ... to declare that [P property] is held by the Husband and the Wife subject to a constructive trust in favour of the Partnership, such that the Partnership has the right to continue to use the improvements for farming purposes during the life of those improvements;

(4) [in the alternative to those three options] then in order to do justice between Husband and Wife (i.e. the Husband's Parents have lost out completely), it will be necessary to give far greater contribution weighting to the Husband's contributions (bolstered by the unintentional contributions by the Husband's Parents) and/or making appropriate adjustments under s.75(2)(o) or s 79(2)."

...

34. The position of Mr and Mrs Summitt can be seen to be very similar. They seek, in written submissions made on their behalf, a declaration as to the capital accounts of the partnership that take account of Mr C's calculations, which incorporate the matters already referred to.

35. They also contend that an order should be made that N property is "*held by the husband and the wife on trust for the partners of "[Summitt & Co]".* They go on to seek an order that:

"...the husband and the wife transfer all of their legal interest in the property known as [N property] ... as directed in writing by [Mr and Mrs Summitt] and the husband acting unanimously."

36. But, if there is a trust as alleged, in my view it can only be a trust whereby the husband and wife hold their interest on trust for the husband and wife and Mr and Mrs Summitt. If there is such a trust, the husband and wife will be the trustees and each of the four partners would have a beneficial interest in that trust.

37. In turn, it would seem to follow that those beneficial interests would be partnership property and, in turn, that property of the husband and the wife for s 79 purposes will be their respective beneficial interests in that trust.

38. In any event, paragraph 5 of the Orders sought by Mr and Mrs Summitt provides:

"Further and in the alternative to including in the calculation of the capital accounts of the partners in [Summitt & Co] as declared pursuant to paragraph 1 hereof adjustments to those accounts as currently recorded as at 30 June 2008 having regard to the contribution by [Summitt & Co] to the cost of purchasing and improving the property known as [P property] ...it be declared that the husband and the wife hold their legal interests in that property subject to constructive trust in favour of the partnership to use the improvements constructed thereon for the purpose of farming activity during the life of those improvements."

5.7 The position taken by the wife was that the partnership accounts should be accepted as correctly stating the position:

42. The wife contends, essentially, that the partnership accounts (prepared by Mr F) reflect the reality of the position adopted by each of the parties during the course of the partnership.

...

45. It is argued, then, that the property, and the partnership accounts, should, in effect, be taken as the court finds them. It will be seen subsequently that inconsistencies attend this approach with respect to the "Home Block".

46. The delineations in ownership reflected on the properties' titles are, it is asserted, consistent with the overall intention of the parties. This is especially clear when regard is had to what is asserted as an overriding testamentary or estate-planning intention on the part of

Mr Summitt, which included the husband retaining, as it were, the farm, and where Mr Summitt's daughters were to be treated equitably through the use of whole of life insurance policies.

47. The wife asserts that it is only when the marriage broke down and a property settlement was sought, that claims in respect of "equitable ownership" or other claims emerged.

48. A similar theme can be seen to underpin the attack by the wife on the assertions with respect to improvements made to the P property. Moreover, the quantification of those improvements (which occurred only in the context of these proceedings) is also attacked.

5.8 An issue also arose in relation to two *inter vivos* trusts that owned farming properties:

56. The value of property owned by the trustees of each of the T Trust and the Summitt Asset Trust is included by Mr F as property of husband and wife.

57. He has done so because the trust deeds of two trusts record the husband and wife as joint appointors or principals and the husband and wife as primary beneficiaries. (In the case of the T Trust, Mr and Mrs Summitt are included with the husband and wife as primary beneficiaries, whereas in the Summitt Asset Trust, Mr and Mrs Summitt are listed as tertiary beneficiaries).

58. Mr F has therefore proceeded on the basis that the husband and wife have control of the trust, including the power, ultimately, to distribute all income and assets to themselves and, as a result, has included the property of the trusts as property of the parties. (See, eg *Davidson and Davidson* (1991) FLC 92-127; *Milankov and Milankov* [2002] FamCA 195; (2002) FLC 93-095).

59. The wife was cross-examined about this. She said she didn't know why she and the husband were made joint appointors. She was asked, in effect, "*Mr [F] describes the [Summitt] Asset Trust as being you and the husband, is that your position today?* The wife responded in effect, "*My understanding was that 'it was the four of us. It was set up on advice. My understanding is that it was 'equal among the four of us'".* Subsequently, in respect of the T trust the wife acknowledged that her "*position is that it is partnership",* that is, *"it is a four-way split".*

STEP ADVISING FAMILIES ACROSS GENERATIONS

5.9  **When will an interest in a Trust be property, or a financial resource? When might a Trust funded/controlled by farming parents be exposed to risk of relationship breakdown in the next generation?**

5.10 Murphy J made the following findings in relation to the issue of how the two *inter vivos* trusts should be taken into account for the purposes of Section 79 of the Act:

> 61. I am satisfied, though, that the wife's evidence is to the effect that all of the powers, and any benefits, in either trust were intended to be shared equally between she and the husband and Mr and Mrs Summitt.
>
> 62. Mr B, the farm's accountant whose firm was engaged in the settlement of the trusts, gave evidence that the apparent control given to the husband and wife in the trust deeds was unintended. He said, in effect, that it was always intended that the trusts were to be set up in a way consistent with what the wife said in evidence.
>
> 63. Although I have no evidence of intention from the settlor, I consider I should not fly in the face of the reality of how the trusts were set up by an accountant for the benefit of the four partners.
>
> 64. It seems to me clear that a mistake has been made in the trust deeds, probably resulting from the use of a "precedent" document, and that the deeds as they stand do not embody the trust as initially intended.
>
> 65. The true intention was, it seems to me, that the four partners would be appointors/principals and that all four partners should rank equally as beneficiaries. To the extent that the documents reflect a different position, I consider that equity should intervene so as to rectify the mistakes embodied in the current deeds.

5.11 Murphy J concluded that the P property was partnership property, and that the N property was beneficially owned by the husband and wife in the equal shares shown on title:

> 190. In my view, the parties clearly intended to farm all land owned by family members in partnership, irrespective of the ownership of it, and without any overt recognition of differences in ownership (for example the payment of rent and the failure to credit expenditure on improvements to specific properties). What they did not intend is the consequences of ownership upon unforeseen dissolution. In particular, they did not foresee a dissolution that also involved (an

equally unforeseen) just and equitable settlement of property pursuant to s 79 of the *Family Law Act*. Now that the potential consequences are known, there has been, as I find, an attempt to reconstruct intention by all of the parties.

191. If the discolouration caused by the now knowledge of the consequences of alleged intention is removed, in my judgment a picture emerges from the whole of the evidence which, in general terms, might point to an intention that *all* property used in and about the partnership was intended to be partnership property. Yet, there is evidence (or lack of evidence) pointing to two specific exceptions to that: P property and the "Home Block").

***

194. If, as I consider is the law, **intention governs the question of whether property owned by individuals becomes partnership property, the preponderance of the evidence is, I find, to the effect that N property is partnership property and that the best evidence is to the effect that P property and the "Home Block" are the property of the respective titleholders.**

[Emphasis added]

5.12 Relevance of Wills made by farming parents in family law disputes involving their children.

5.13 The husband and his parents sought in the alternative that a constructive trust be declared in relation to the P property:

234. Each of the husband and the Summitts submit, as an alternative, that a trust should be construed in respect of P property.

5.14 Murphy J did not agree:

246. There is here, no common intention of the type contemplated in *Baumgartner*. Nor, in my view, can it be said in respect of P property and expenditure on it, that there is a joint venture which has failed. The joint venture is the farming business and the business's working of the land. That venture has not failed – indeed, a joint venture will continue (in some form) subsequent to these orders. It is a marriage that has failed and, as a result, one of the four partners will be leaving the partnership.

247. The four partners acquiesced in the use of P property for 18 years until the parties separated. Significantly, the partnership was not then dissolved. It is common ground that the partnership continued and the books of account of the partnership continued to treat P property as they had for the previous 18 years despite the marital breakdown. The position with respect to P property was unaffected. The partners continued, post-separation, to acquiesce in the pre-existing situation with respect to P property in every respect – including continuing to treat it in the same way in the books of account.

248. Furthermore, as I have earlier found, Mr Summitt's labour within the partnership was significantly curtailed from the early 1980s, and certainly during the whole of the time that P property was owned by the husband and wife and used by the partnership as part of the generation of its profits. That continued to be so during the conceptualisation of the greenhouse project and the construction of improvements on the land in respect of that project.

249. It seems that, during at least some of those years, drawings were taken by Mr and/or Mrs Summitt. (I should add that it has never been alleged that Mrs Summitt was active in the partnership). The husband himself says that it was his labour (and, on his evidence, significant and time-consuming labour) that generated profits for the partnership during that time. (In a s 79 context, substantial, indirect family contributions also contribute to the generation of profit, a topic to which I will return).

250. Consequent upon s 79 orders, the property will remain with the husband and will be used within the Summitt farming enterprise.

251. **Unconscionability is the cornerstone of the remedial constructive trust. I am not satisfied that, here, there is the requisite unconscionability such the court should call in aid the proprietary constructive trust.**

5.15 The husband was given a credit for the contributions of his parents for the purpose of assessing the contributions of the parties:

328. ...

- The sums contributed by Mr and Mrs Summitt to the partnership and the contribution by, as it were, their one-half share of the partnership to the cost of improvements on P

property will be considered as a contribution by the husband (in the sense understood by s 79 of the *Family Law Act*).

5.16 In relation to contributions, Murphy J found that the husband's contributions significantly outweighed those of the wife:

> 336. There is a significant imbalance in the contributions made at the commencement of this approximate 24-year cohabitation in favour of the husband.
>
> 337. He contributed to the relationship his interest in the partnership (which was already a vibrant business) and a one-third interest in the "Home Farm" together with a car and insurance policy. The wife was gifted an interest in the partnership (which continued to grow and develop significantly) and a one-quarter interest in the E Farm. She contributed very little directly – a car she had was written off and the insurance proceeds were contributed to the partnership.
>
> 338. The partnership (and landholdings) formed the foundation for the support of the family and for the current wealth of the parties.
>
> 339. During their 24 years, each of the parties, I find, worked hard in their respective spheres. I reiterate the comments made earlier in these reasons in respect of reliability and veracity generally. They are no less true, in my view in this setting.
>
> 340. I have little doubt that the husband has been a hard-working and innovative farmer. The greenhouse project, which I accept was very much his "baby" is testament to the latter.
>
> 341. I equally have little doubt that the wife worked hard in her roles, both on the domestic front, as a parent with predominant responsibility for the parties three children, who are all now adults, and in carrying out her tasks within the partnership. As earlier observed, from the early 1980s the farming burden was essentially the husband and wife's. The husband worked long and hard on the farm; the wife worked long and hard in her roles.
>
> ***
>
> 360. Here, I have come to the conclusion that contributions should be assessed in the proportion 62.5% to the husband and 37.5% to the wife. That sees a disparity of 25% in the respective contributions.

361. That assessment would see the wife taking property (and superannuation) valued at about $825,000, and that entitlement would comprise the property (and superannuation) earlier described totalling about $250,000 and a cash adjustment of about $575,000.

362. That result means that my assessment of all contributions over a long marriage would be expressed by a differential in favour of the husband of slightly more than half of a million dollars in a pool of about $2.2million. I am satisfied that the assessment is appropriate.

5.17 A five percent (5%) adjustment was made in favour of the wife taking into account the section 75(2) factors.

6. Conclusion

Beasts of England, beasts of Ireland,
Beasts of every land and clime,
Hearken to my joyful tiding
Of the golden future time.

Animal Farm, George Orwell.[17]

6.1 Farming families offer so much to an Estate Planning lawyer with an interest in the special succession planning issues that they often face. Things like valuable and often picturesque real estate, sometimes held within the same family for several generations; structures including farming partnerships, family trusts, "probate duty avoidance" trusts, land holding companies, and testamentary trusts created by farmers and lawyers long since retired; multiple generations of the same family (often three, sometimes four) living on the same farm; dealing with unusual things like beloved firearm collections, water rights, the usual contents of "the homestead", and the sort of debt that usually signifies the acquisition of every neighbouring farm as it came available; and (mostly) dealing with lovely genuine people, with beautiful properties, and a real need for expert help, all make for highly interesting, challenging and enjoyable work for their lawyer.

Clients in the suburbs sometimes cannot compete.

6.2 Having a good understanding of the main types of disputes that can arise for farming families, and being able to identify why they might (or will) arise in particular circumstances can assist when providing advice, documents and good

[17] Penguin, New York, 1946.

counsel to (hopefully) avoid, or at least minimise the risk of, those disputes arising.

Sam McCullough TEP

Hobart, July 2017.