

# **FARM SUCCESSION**

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## CONTENTS

1. Introduction
2. Farm Succession Plan
3. Procedure
4. Common Legal Entities Explained
5. Case Note: Scott v Scott

## 1. Introduction

- 1.1 Recent events have again tragically illustrated how even the closest of families can break down due to ill planned or delayed farm succession planning. Farm Succession is not a new phenomenon. Legal/Accounting Specialists, together with Stock firms and Farm Advisors have been addressing succession issues for many generations. If anything has changed it is an awareness today that capital value of farms are now counted in the millions rather than the hundreds of thousands, making it most unlikely a farm can be successfully retained by a family member as an economically viable business unless a robust Farm Succession Plan has been put in place and acted upon.
- 1.2 Farm succession planning is an issue for all farming families. It is much more than just the handing over the ownership and control of the farming business to a child by Will. With rising capital values of farm properties over the last decade the cost of “equality” between children all too often results in farm succession planning being placed in the “too hard basket”. As a result the actual planning, let alone implementation, starts far too late with many options limited by time. It is common for families to consult a professional only when the issue arises or presents itself – eg the neighbouring farm comes on the market or a family member (often prompted by a partner/souse) can foresee problems and take active steps themselves to resolve the issue.
- 1.3 It is trite to say that the issue is never considered by family members, but generally those family members belonging to close knit families don't want to appear to “rock the boat” and a lot of the issues appear so complex that the easiest course is to do nothing and hope time will fix it. Unfortunately, more often than not time only makes the issues worse. It can generate an aura of frustration and disempowerment to the very people you the farm owner love the most – your children.
- 1.4 For a lot of parents even the thought of treating children unequally is uncomfortable. If recent events are to teach us anything is that farming families

cannot rely on rural professionals/solicitors, accountants, Bankers, Agents and Farm Consultants to necessarily raise the issue. It is an issue for all members of the family to deal with and provided it is approached in the right way the purpose of this paper is to illustrate there is nothing to fear about the process of dealing with succession planning generally and farm succession specifically. After all, you spend a lifetime developing and improving the farming operation so there is something worthwhile to pass on. The same level of energy and dedication needs to be given to planning for the succeeding family member to take over in a way the whole family supports and provides financial stability for the incoming family member and outgoing parent(s). It is vitally important for all of the family to have a clear succession vision and a combined commitment to implement this vision.

1.5 It is the writer's experience that there are two major legal issues that can very quickly put a successful and solvent farming operation at risk. These are:

1. lack of Estate Planning and farm succession planning,
2. Lack of protection from the Relationship Property Act, and Family Protection/Law Reform Testamentary Promises Acts.

1.6 A good farm succession plan should address both these issues.

1.7 We in the rural team at **Preston Russell Law** believe it is timely to provide our clients with a summary of the issues and to illustrate what **Preston Russell Law** can do to assist. Although we accept that there can be difficult issues to confront by the family we are absolutely confident that with the right approach and good will of the family a robust, "living" farm succession plan can be prepared that deals with the needs and requirements of your unique family. Legal structures will always be an important aspect of any Succession Plan. It is the legal structures that will underpin the plan and will recognise the unique goals of your particular family.

1.8 It is important to recognise at the outset that there can be no "one size fits all" approach to farm succession. The Farm Succession Plan and legal structure

that underpins the plan will vary according to the needs and requirements for your particular family dynamic.

## 2. Farm Succession/Succession Plan

2.1 Farm succession is a process that involves all members of the family and effectively provides for the family farming business to be transferred within the family on terms and conditions that are satisfactory to the parents and which treats all children fairly but takes into account the requirements of the succeeding child to have confidence that he or she can retain the farm long term and by doing so will be able to leave the property safely to subsequent generations.

2.2 At the end of the day, a Farm Succession is about the people that make up the family and their respective goals and aspirations in life. Quite often, and even in the closest of families their respective goals are unknown. If you do not know with real clarity, passion and commitment what you want then it is unlikely you will achieve or get it. How many of us have firm clear goals as to our future? How many of us really know what are children's goals are?

2.3 A Farm Succession Plan is a \_\_\_\_\_ document that completes the Farm Succession process. A successful plan should balance a number of factors.

**Firstly** a primary requirement of the farm succession plan is that the parents remain financially secure and that the level of control to the succeeding child passes on a basis that is comfortable to the parents.

**Secondly**, all family members "buy-in" to the plan and can accept their role and treatment within the overall circumstances.

**Thirdly**, the succeeding child needs to feel confident that the plan is financially viable and that they aren't working themselves into a corner.

2.4 In balancing these factors the family/and its advisors needs to consider:

- (a) Financing the plan, or in other words **the profitability of the Plan**. Existing profitability of the farming operation needs to be considered as does the room for growth. In considering that sub-issue of growth the managerial and farming skills of the succeeding child also becomes an issue in that the family needs to be comfortable that the succeeding child has the ability to meet the obligations of the plan. Similarly, is there sufficient capital/cashflow for the retiring parents to relocate and to receive an adequate income? In some situations an early acknowledgement that the financial position of the farm is going to cripple any farm succession plan may result in the only practicable outcome and that is to sell. Although hard to take, are the children better knowing where they stand whilst they are still young enough to make a business life for themselves.

In considering the income and capital requirements of the plan there needs to be an assessment of off-farm assets and an assessment of the capital and/or income requirements of other children. For instance:

- are the children well settled into their own business/profession?  
and/or
  - are they still requiring assistance to complete their education?
  - what is the housing position of the other children?
  - should the non-succeeding children's interest from the farm succession plan be protected from relationship property claims?
- (b) All family members being involved in the farm succession plan and being privy to the same base information. It is our experience that to produce a strong, resilient Farm Succession Plan there needs to be clear lines of communication between all family members and that the requirements and goals of all family members are tabled. It is possible, indeed likely, that not all family members will agree on certain factors of the plan. It is only when these issues are discussed and resolved, albeit with professional help will a strong, robust and dependable farm succession plan result. It is

important that the person responsible for driving the plan ensures that there are open lines of communication between family members and that all relevant information is tabled. A good farm succession plan is to be seen as a “process” rather than a model imposed on the family.

- (c) An important aspect of Succession Planning is the question of timing. When should a family consider farm succession. Should it be when all children are independent and their education etc has been completed or should a farm succession plan commence when the children are young. It is the writer’s view that it can never be too early to commence the process. Problems or issues can be identified early and it provides time for a pathway for a child to be integrated into the farming business. Similarly, if a lack of non farm assets are seen as a weakness to the plan early enough then there is time available to rectify the situation. Any plan should also have an inherent flexibility that will allow for a change in circumstances.

### **3. Procedure**

- 3.1 In most situations there will be a significant benefit to the family that they appoint an independent person to act as an facilitator in developing a Farm Succession Plan.

It is important to reiterate that most Farm Succession Plans involve Human Issues as well as Legal Banking/Accounting issues. It is therefore in our view vital that the facilitator is truly independent with sufficient skills to allow the family to reach their own outcomes. Seldom will one person have the variety of skills required and often it will be necessary to bring in the required expertise be it, valuation, farm management, Banking, Accounting, Legal.

### 3.2 Process

The secret of preparing a strong farm/business succession plan is to:

- (a) have a strong independent facilitator who will ensure that all family members are involved and invited to participate in the process; and
- (b) Ensure the process doesn't stagnate, keep the process moving towards the ultimate goal – a written Succession Plan signed off by all family members.

The impetus behind a family succession plan can come from a variety of family members but is usually either driven by the parents or by the succeeding child. Occasionally the Family Solicitor, Accountant, Banker etc will also raise the issue.

Because each families situation will be unique we do not believe that we can impose a set procedure to fit all situations and offer the following steps as a guideline only.

To ensure that all family members are aware of the basic information an information sheet will be circulated to all family members with an invitation to attend the **initial disclosure and communication** meeting.

The information package will include, date and details of the initial disclosure and communication meeting together with a summary of the procedure that the individual family member can expect to occur. The information package will also include an up-to-date state of position of the family business/farm.

In addition to the initial disclosure information we, as Facilitators would normally work with all family members to ascertain their individual views about their personal goals and how they foresee the farm business being dealt with in the future.

This communication with the family will also include a questionnaire which will go some way to identifying the possible issues that could arise. In some circumstances we would interview the parties to obtain further information of what was required.

### **3.3 Initial Disclosure and Communication Meeting**

This meeting will be attended by all family members and the facilitator (as Chairperson). To recognise that all family situations are unique there may be other invited attendees. Where we have been asked to chair the meeting we would try and anticipate what issues may arise and if possible make sure that the information is available to the meeting.

The purpose of this meeting is to enable all family members to talk openly about their future plans and aspirations, both personally and for the farm business. The individual family members future goals may well be off-farm and have nothing at all to do with the family business. It is important however that all family members speak openly and honestly about their future goals. It is important that the person ensures this information gets tabled.

It is also an opportunity for individual family members to talk openly about any succession issues that concern them. Quite often other family members aren't aware of these concerns and it is healthy that they are raised and if possible addressed.

It is unusual for this initial disclosure and communication meeting to result in a comprehensive succession plan. Rather it is an opportunity for family members to gain an insight into the family business, the current owner's expectation for the business and what future developments they are considering.

Quite often this meeting having raised the various issues require time for other family members to reflect. Frequently further information is required with quite often a further meeting is required to progress and finalise matters.

### 3.4 Action Plan

At the conclusion of the disclosure and communication meeting and any subsequent meetings an action plan will always be prepared by the facilitator and distributed to all family members. This will also occur at the conclusion of any subsequent family meeting by the facilitator/chairman. The facilitator's report will amongst other things set out:

- Identify the issues that have been raised that are agreed on by all family members,
- Identify the relevant issues that are raised that require further consideration and reflection by family members,
- Detail what further information is required and who is to supply that information, for example it is quite common for a number of legal and accounting issues to arise and in that situation agreement will be reached as to who instructs various professionals to address these issues and provide opinions.

It is important however to note that the business succession plan is a plan devised by the family and not necessarily imposed on them by well meaning professionals. Ideally the professional's involvement should be used to provide information and potential frameworks to accommodate the family plan.

### 3.5 Issues Meeting

It is quite likely that a further issues meeting will be convened with all family members attending together with nominated professional advisors, briefed to report on the issues raised in any prior meeting. Frequently that information will cover such things as budgets, valuation issues, building indications. The purpose of this issues meeting is to flesh out the negotiated family plan and agree on a legal/accounting structure that best meets the immediate and long term needs of the family. It is important to note that each family is unique and

that it is quite likely that the legal structure of a business succession plan will be individualised for that particular family.

### 3.6 **Implementation**

At the conclusion of the issues meeting the facilitator will then prepare and circulate a brief report setting out the agreed family succession plan and a check list as to who is responsible for the implementation of that plan. It is likely that all family members will sign off on that report, having previously agreed to it.

## 4. **Legal Entities**

4.1 A good, resilient farm succession plan may well involve a number of the following legal entities. It is vitally important however to note that the legal structure itself is not on its own sufficient. Too often as advisors we hear from our clients “we have a Trust so it must be okay”.

In fact, the legal structure will only ever be okay if:

- (a) The legal structure suits the needs and requirements of the individual family, both now and in the future, and
- (b) The legal structure underpinned by a sound farm succession plan; and
- (c) The legal entities are drafted with the unique needs of the family in mind and are drafted to specifically implement that Plan.

There is no such thing as a standard Will, Memorandum of Guidance or Trust etc. Each of these legal structures need to fit the personal family requirements.

## 4.2 The Inter Vivos Trust (Discretionary Family Trust)

The latin term “inter vivos is a legal term referring to the creation of a Trust during the Settlor’s lifetime.

### **Discretionary Family Trust (Inter Vivos Trust)**

All Trusts aren’t made equal. The term “discretionary” refers to the fact that the Trustees have a very wide discretion when making decisions in respect to the administration of the assets in the Trust. This discretion is determined by the Trusts Rules (found in the Trust Deed itself) together with centuries of Case Law (Judge Made Law) and legislation such as the Trustees Act.

Unlike a fixed/express/resulting/testamentary trust the beneficiaries have no express right to the Trust property. The only “right” a beneficiary has is a right to be considered by the Trustees.

Because of the extremely wide discretion it is vitally important that there is an up-to-date Memorandum of Guidance supported by the Wills. It is important to remember that a Trust in itself doesn’t make a farm succession plan. Careful consideration should also be given to the replacement trustees when Settlers have died.

Each Trust Deed normally has provision as to whom may appoint (hire and fire) trustees. This is the Appointor. The Appointor as a result has a significant degree of control in respect to the Trust so great care needs to be taken as to who should succeed the current trustees and appointor.

It is important that the Trust Deed has the power of resettlement which refers to the transferring of all the assets of one Trust to another Trust. This provides the ability to resettle the assets of the parents’ Trust for example into the children’s individual Trust. The only requirement is that the combined length of both Trusts does not exceed 80 years.

In respect to a farm succession plan the most important document is the Memorandum of Wishes, closely followed by the Trustee/Appointor's Will. Ian Blackmun in his recent book "Keeping Farming in the Family" goes as far as to say that the Memorandum of Guidance is the "heart of a good succession plan".

A Memorandum of Wishes can be called a Memorandum of Guidance, "letter of wishes". In essence it is a written document by the Settlers, (ie the persons who established the Trust) which is designed to provide new trustees with a background as to why the Trust was established in the first place and how the Trust assets are to be administered in the future. Although it is not binding on future trustees as it is not possible to bind the discretion of trustees of a Trust, it is the writer's experience that most trustees are only too thankful to have a document which they can rely on to express the wishes of the people that established the Trust in the first place.

Although a Family Trust usually plays an important role in any farm succession plan there are clear advantages and disadvantages which the individual family needs to weigh up. In summary the advantages are:

1. The Trust provides flexibility to legitimately distribute income to the various beneficiaries and thereby take advantage of different tax rates.
2. The Trust provides a flexible instrument to ensure Trust assets are left to beneficiaries in such a way that protects the recipients (normally the children) from relationship property and family protection claims.
3. The Trust provides protection from third parties (other than secured creditors).
4. Alienating assets to a Trust can enable the Settlor's family to meet various means tested Government subsidies, for example rest home care/tertiary education costs.

5. The transfer of depreciating assets such as land to a Trust mitigates the danger of future death duty tax or capital gains tax.
6. Enables the transfer of assets without tax consequences, for tax on depreciation recovered.
7. Provided the assets are transferred to a Trust prior to a relationship underpinned by a Relationship Property Agreement the Trust assets are taken out of the ambit of relationship property.

Equally clearly there are disadvantages in Trust:

1. There are costs in setting up the Trust and attending to the transfer of the assets to the Trust with new financial Bank securities. There is also the cost of on-going administration.
2. By setting up another entity such as a Trust it effectively brings a third party into your family or business affairs.
3. There needs to be very careful management required to ensure that all class beneficiaries aren't treated equally where one of the children for example is to succeed the farm.
4. Trust litigation can be complex (and as a result costly).
5. A Trust doesn't necessarily protect the trustee from criminal prosecution in certain circumstances, for example prosecutions under the Resource Management Act.

#### 4.3 Companies

A Company is a separate legal entity which has directors that are responsible for the operation of the Company and shareholders who actually own the Company.

Companies are now commonly used and are operated as a trading entity and as an asset owning entity for investors who are unrelated to each other in large dairy conversions. Companies however are also commonly used as the trading entity owning the stock, plant and shares and other rural supply shares. The Company often has family members as directors with shareholders being owned either the farmers personally or through their Trusts.

There are a number of reasons why a Company is used as the primary trading entity.

1. Companies have a long history of being used as a vehicle for business activity. Companies are well known in New Zealand's business and rural environment. In a Company situation the day to day decision making of the Company is either made by the directors or employees under delegation of the directors. The advantage the Company has over a Trust in this situation is that the law does not allow trustees to delegate decisions in the way that you can with a Company.
2. The transfer of shares even into family however needs to be carefully managed. Although there is no GST issues with a share transfer and does not trigger tax on depreciation recovered the transfer of shares can adversely affect imputation credits and losses. In addition to the Companies Act and the actual Company's Constitution shareholders can impose a further level of agreement called a "Shareholders Agreement". A Shareholders Agreement effectively regulates such issues as governance, sale of shares, dividend policies etc. Often a farm succession plan will incorporate an agreed Shareholders Agreement.
3. A Limited Liability Company as a trading entity does not expose the shareholders directly to the risk of trading. This is a clear advantage where a farm succession plan requires an independent voice in the on-going administration of the business. Most professional advisors will be reluctant to be appointed professional trustees as that can open them up

to personal liability under the Resource Management Act for prosecutions which unfortunately are becoming more and more frequent.

Again there are some disadvantages when operating a Company structure. They can be cumbersome from a compliance point of view. In addition the accountants will tell us that it is difficult to strip capital gains from a Company to the shareholders without incurring tax on those capital distributions. This tax on distribution can be avoided however by either winding up the Company and/or the Company electing to be a qualifying Company.

Recent High Court decision of *Scott v Scott* clearly illustrates the importance of a succession plan. The several hearings of the case were a culmination of many years of ramblings between family members over Scott family land.

**Facts:**

**Family members:**

- Grandfather: Arthur Scott –
- Parents: Roddy Scott - “Roddy”  
Rosemary Scott - “Rosemary”
- Children: Lee McNeilly - “Lee”  
Lewtyn Scott - “Lewtyn”  
Alison Scott - “Alison”  
Cara Clare - “Cara”

**Land: Two farms**

<b>1. Tombstone Station</b>	A 756ha sheep and cattle grazing property in Kaimai, described by the court to have “challenging features”. Inherited and owned by Roddy initially, Roddy transferred a half share of the farm to Rosemary in 1984, as tenants in common. Following Paddy’s death in 1993 his will provided Rosemary with a life interest in respect of his half share, and then on her death would be distributed to the four children equally.
<b>2. Trust Farm</b>	<p>Owned by Arthur Scott Family Trust, on State Highway 24 Kaimai. Settled the 1987 by Arthur Scott, vesting date on 1 March 2002. Trustees were Roddy and Rosemary, and on Roddy’s death Rosemary appointed their eldest child Lee as the co-trustee.</p> <p>The Family Trust also owned property at Tauranga and stock and plant. The Trust income came from the rental/lease income.</p> <p>All four children received financial benefits from the Trust; namely: Lewtyn, Alison and Cara had financial assistance for their tertiary education.</p> <p>Lee lived on Trust property for a while and in 2000 borrowed \$30,000 to purchase an “off farm” home.</p> <p>In later years attempts were made to formalize the ongoing management of the Trust, but these attempts came to nothing, due in part to Lewtyn moving to live and work in London.</p>

**Family Developments:**

- **Late 1999:** Lewtyn wrote to Rosemary and expressed an interest in relocating to New Zealand so he could continue the family’s farming tradition.
- Rosemary moved out of the Tombstone house and in to the Trust farm.
- Lewtyn arrived in New Zealand on 6 April 2000 and took over the running of the farm from Rosemary.

- **July 2000:** Rosemary relinquished her interest and Lewtyn purchased the estates half-share of Tombstone for \$795,000.00. (Value obtained by one valuation.) Security was a first mortgage with a “Marshall” clause.
- **Feb 2001:** Rosemary suggested that she transfer her half share of Tombstone to Lewtyn (with debt back forgiven in her will). In a letter to Lewtyn she promised to forgive this debt.
- **Dec 2001/ Feb 2002:** Unbeknown to Lewtyn, his sisters and moth resolved to transfer the Trust farm and all its assets to the three girls Lee, Alison and Cara. Lewtyn did not accept this, as each of the four children were entitled to a quarter-share of the Trust farm. Litigation ensued.
- **2004:** At this point Lewtyn had paid Rosemary \$30,000 in interest.

### **Solicitor’s Involvement:**

- **2000:** The Solicitor advised the family that the Trustee’s of Roddy’s estate required a registered valuation to establish a price to sell the half-share to Lewtyn. One valuation was obtained (\$1.59 million).

### **Claims:**

#### **Lewtyn’s claim:**

- 1) Lewtyn sought specific performance to require Rosemary to carry out the promise confessed in Rosemary’s letter and the transfer of her half-share in Tombstone to him.
- 2) The transfer of the Trust farm to the three girls was in breach of the Trust and unenforceable. Rosemary and the three girls as trustees were all in breach of the trust.

#### **Rosemary claim (and Lee, Alison, and Cara):**

- 3) Lewtyn as Trustee of Roddy’s Will breached his duty of loyalty to the other beneficiaries and that as a consequence he benefitted unfairly from this purchase of the half share of Tombstone.  
The three sisters claimed this transfer was done under duress, undue influence and breach of Trust and fiduciary duty as trustee (i.e he had an obligation to treat all beneficiaries equally).

#### **Position at time of Litigation**

- 1) Lewtyn owned half-share in Tombstone (acquired from Roddy’s estate).
- 2) The remaining half-share still belonged to Rosemary
- 3) The Trust property had been transferred to Lee, Alison, and Cara.

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**High Court Decision, Tauranga, 2008.**

**CLAIM ONE**

**Rosemary's letter promised her half-share in Tombstone to Lewtyn.**

**a) Breach of Contract**

Lewtyn argues there was a breach of contract in Rosemary failing to transfer him her ½ share in Tombstone as promised in the letter.

While it was accepted that Rosemary agreed to Lewtyn returning to take over the running of Tombstone, there was insufficient evidence to conclude that there was a clear agreement that Lewtyn would acquire her half-share in Tombstone.

Discussions never "matured" to the point where agreement on necessary terms and conditions. I.e No deposit, settlement date, price.

While the general presumption that parties intended to enter into a binding contract for the sale and purchase of land will use a formal written agreement is rebuttable, specific performance of an oral contract for the sale of an interest in land requires a clearly defined oral contract for specific performance to be granted.

This was not the case here - there was only a letter, no clear written or oral contract.

**b) Equitable estoppel**

Lewtyn based this claim on the grounds that Rosemary "created and encouraged a belief on his part" that there was or would be a binding agreement between them for Lewtyn to acquire Rosemary's half-share in Tombstone.

There must be a detrimental reliance on the agreement. Here there was no agreement to being with. Lewtyn was giving up his job and moving home anyway, not because he was relying on the belief and expectation that there was or would be a binding agreement in existence. At no stage was there an agreement between Rosemary and Lewtyn that he would receive her half-share in Tombstone. He may have hoped to receive it in the future.

**CLAIM THREE**

**Was Lewtyn in breach of the Trust and in breach of his fiduciary duties in his purchase of the Will Trust's half-share of Tombstone?**

a) Remember: Lewtyn was the Trustee of his father's estate. Roddy's will contained a life interest in his estate to Rosemary under a standard clause 4. The trustees were also granted a power to apply capital or income for maintenance, education or advancement of the residuary beneficiaries. Notes recorded that Lewtyn would purchase Tombstone in two 'bites'

i. Estate half-share

ii. Rosemary's half-share

He had prepared documentation for (i).

**b) Obligations as Trustee**

A Trustee must administer the Trust according to the terms of the Trust. Particularly, "a person in a fiduciary position is not allowed to put himself in a position where his personal interests may conflict with the interests of those whom he is bound to protect". This is from the perspective of a "reasonable man looking at all the relevant facts and circumstances of a particular case would think that there was a real sensible possibility of conflict".

**c) Disclaimer** - Did Rosemary's decision to leave the running of the farm to Lewtyn have any effect on her life interest?

It was submitted that, while Rosemary's life interest was placed in "suspense" on the basis of a conditional disclaimer, Lewtyn owed duties of protection to Lee, Alison, and Cara in relation to their interests as residuary beneficiaries of the estate.

**There clearly was breach of Lewtyn's trustee and fiduciary duties:**

**a) No second valuation**

At the time of valuation the valuation was procured by the solicitor Mr Reeves who acted on behalf of both Lewtyn and the trustees. No opportunity was given to the beneficiaries to obtain a second valuation, nor was this suggested by Mr Reeves.

**b) No independent legal advice**

All parties to the sale and mortgage transaction were represented by the same solicitor Mr Reeves. Rosemary and Lee were not given the opportunity to obtain independent legal advice as to the legal propriety of the transaction from a fiduciary perspective. Residuary beneficiaries Cara and Alison were not represented at all.

It was obvious to Mr Reeves that Lewtyn was in a position of conflicting interests, and steps should have been taken by Mr Reeves to ensure that Rosemary and Lee in particular, received independent legal advice.

**c) No fully informed consent**

The onus lies on the trustee/fiduciary to show that all beneficiaries, and where appropriate co-trustees, gave a fully informed, independently advised and voluntary consent.

No fully informed or waived consent here.

**d) Personal profit**

Lewtyn made no form of payment for the purchase of the estate's half-share of tombstone, and as property values had increased, it was in breach of the rule against personal profit.

“He profited himself from the transaction to the detriment of the life tenant and the beneficiaries, and did not take steps to ensure that he obtained the best possible price for the estate’s half-share of Tombstone”.

## **CLAIM TWO**

### **Breach of the Arthur Scott Family Trust**

- a) Without consulting Lewtyn, a beneficiary under the Arthur Scott Family Trust, Rosemary, Lee as trustees transferred the Trust Farm to Lee, Alison and Cara. This was the first in a series of transactions that saw all of the Family Trust’s assets transferred from the trustees to Lee, Alison and Cara. These transactions were timed to defeat Lewtyn’s interest before vesting day.  
**1 Feb 2002:** In Rosemary’s letter promising to transfer to Lewtyn her total interest in the Tombstone farm, she omitted to mention that the Trust Farm had been transferred to Lee, Alison and Cara to the exclusion of Lewtyn.  
**8 Feb 2002:** In a family meeting Lewtyn was informed of the transfer of the Trust Farm. He did not accept this, and immediately took legal advice. A lengthy legal battle ensued.
- b) **The transfer was unenforceable.** Rosemary and Lee were in breach of their trustee and Alison and Cara of their beneficiary duties. Rosemary and Lee were the present owners of the property in Trust for four beneficiaries. Rosemary and Lee as Trustees and Alison and Cara as beneficiaries accepted that they were in breach of various trust duties.
- c) **Issue was the nature of relief that should be granted**  
Rosemary and Lee were excused from personally liability for the admitted breaches of the trust. They were acting honestly and in good faith and were relying on the incorrect legal advice of Mr Reeves.

### **Summary of *Scott v Scott* decision:**

- a) Half-share of Tombstone owned by Lewtyn – transferred back to Will Trust.
  - b) Lewtyn didn’t have the right to purchase his mother’s half-share of Tombstone.
  - c) The transfer of the Trust Farm to the three sisters was reversed.  
(i.e. everything back to status quo).
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### **The (failed) succession plan comprised of:**

**1) A life interest will**

- a. Executors: Rosemary, Lee, Lewtyn , (on Roddy's death) were trustees of Testamentary Trust

**2) A Separate Trust, (another Family Trust).**

### **This case highlights the importance of a good succession plan.**

After six years of legal dispute and \$000,000's in legal costs, Lewtyn was told that he had to give back his half-share of the farm and that he couldn't buy the other share.

### **Lessons to learn from this failed succession plan:**

- 1) Life interest will not work well for farm succession
  - 2) Need for clear and open communication
  - 3) Appointing children as Trustees during the lifetime of the parent is dangerous and should be avoided.
  - 4) Law does not always offer pragmatic farming solutions. The law says that equity means equality, which is not always appropriate, especially where one child takes the responsibility of the family farm business
  - 5) Families should avoid the emotional and financial stresses of litigation.
  - 6) If your intention is to pass on the family farm to one member of the family, it is dangerous to this under the will. (Risks future action by others under Family Protection Act, Relationship Property Act and Testamentary Promises Act).
- d) Inter Vivos Trust** (Discretionary Family Trust created during the Settlor's lifetime).
- a. A family trust is not an adequate vehicle for farm succession.
  - b. The succeeding child should not assume that they will receive the farm, as under an inter vivos trust, the beneficiaries only have a right to be considered by the Trustees, not an express right to the Trust property.
  - c. Need a comprehensive Memorandum of Wishes by the settlor that lays out the reasons for the establishment of the trust and exactly how they request the Trust to be administered

### **References**

1. *Scott v Scott*
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