

ESTATE PLANNING ESSENTIALS

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The farmer and his will

A farmer's will often tries to accomplish the equal treatment of family members, yet the wording of a will often leads to unenforceable wishes and major liquidity shortfalls in the estate.

Issues that need to be discussed in full with the farmer before the will is drafted are:

Subdivision of Agricultural Land

The Subdivision of Agricultural Land Act prohibits the subdivision of farming land. To overcome this problem, the farmer could consider implementing certain structures, for example an Inter Vivos Trust. Not only can more than one child benefit from the farm that is being held in trust, but the use of such a structure allows for the following:

- Protection of the farm against insolvency
- Protection against divorce
- Estate pegging in the estate of the heirs if the farm is only transferred after the death of the farmer

Whether the farm is bequeathed to the children in their personal names or in the name of a trust, the estate duty and capital gains tax liabilities are the same.

Equal inheritance to all children

More often than not the farmer's intention of providing equal inheritance to all his children and still providing for his surviving spouse, are not enforceable. The problem arises as a major part of the farmer's estate is usually the farm property. Factors influencing the liquidity of the estate and therefore the enforceability of the cash bequests to other children are:

- Living expenses of the surviving spouse
- Income tax that is payable in the hands of the executor
- Outstanding loan accounts due to the farmer at death
- Estate duty and capital gains tax liabilities
- Payment of the day to day cash wages that need to be paid to the farm workers
- Debts in the estate

One of the easiest methods of ensuring liquidity in the estate is by means of a properly constructed life assurance policy. Life assurance can provide the correct amount at the correct time.

Creation of a usufruct in favour of the surviving spouse

Before creating a lifelong usufruct to the surviving spouse in the will of a farmer, the following implications need to be kept in mind:

- The wording of a will only bequeaths the farming land to the son. The result is that the farming implements, livestock, machinery etc. are bequeathed in terms of the residue of the estate.
- The son will then have to rent these other assets, for example the implements and machinery in order to continue with the farming activities.
- The son in essence farms for the spouse's account in that all income from the farm accrues to the spouse and not the son. The question arises as to what income the son will receive in order to support himself and his family?
- The son will have to obtain the spouse's consent for every decision that needs to be made regarding the farm, example, selling of the farm, obtaining a loan where the farm is provided as security. He will only receive the full right of decision making and ownership after the death of the surviving spouse.
- In the event that the farm is sold and both the son as bare dominium and the spouse as usufructuary consent to this, she will have to be fully remunerated for her usufruct right. Will there be sufficient cash left for the son to support his family? For example, the son and the surviving spouse both agree to sell the farm for R5 million. The value of the spouse's usufruct is valued at R2,5 million. The son as bare dominium holder therefore does not receive the full proceeds of R5 million. In the event that the surviving spouse says her son does not need to pay her the value of her usufruct of R2,5 million, she in essence donates a right to which a monetary value is attached and she will have to pay donations tax of 20% on her R2.5 million right.
- In the event of the remarriage of the surviving spouse, the surviving spouse, as lifelong usufructuary of the farm, is entitled to live with her new husband on the farm and the son, as the bare dominium holder, is not entitled to remove the surviving spouse and her new spouse from the farm. Will the son and his step father see eye to eye regarding the farm where the step father becomes involved in the farming activities?
- The surviving spouse as usufructuary holder of the farm has the right to rent out the farm to anyone other than her son. Has it been taken into account that the son might only be in a position to farm after the death of the usufructuary?

It is therefore of the utmost importance that when drafting the will of a farmer, all practical considerations and factors specifically affecting a farming practice be carefully considered.

The next edition will look at the practical issues affecting the estate and estate planning of a farmer.

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