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Agriculture and Estates

NEWS AND ADVICE FROM BIRKETT LONG

Don't get caught out

Key person insurance is often considered by businesses, but sometimes neglected by farmers. Nicola Ward explains the benefits.

Food for thought

Katie Gibson-Green makes the case for a lasting power of attorney as a safeguard that could have a significant impact on your farming business.

Voluntary registration

Most of us are reluctant to do things we don't have to, yet - as Emma Coke notes - voluntary land registration has very real advantages.

Protecting reliefs

Caroline Dowding illustrates how a tax relief that you may be taking for granted could disappear in an unexpected manner.

Restrictive Covenants

Restrictive covenants or overage agreements are not always as straightforward as you may think, as Mile Coates outlines in this article.

Farm succession

protecting tax reliefs for your family

Farming is usually a family affair and, in many cases, parents want their farm to be kept in the family after their death. Succession taxation relief is essential if that objective is to be realised, particularly in the face of high land values. Caroline Dowding explores how obtaining Agricultural Property Relief (APR) may come under attack from the unlikely source of a farmer with failing health and in need of care.

Long gone are the days where one child (historically the eldest son) received the farm, with the remainder of the family having assets split amongst them. Balancing equality whilst ensuring the farm can continue is difficult and there is clearly no one solution that suits all.

To maximise assets for the next generation it is imperative that tax reliefs are protected. Often the biggest asset outside the farmland is the house and there have been many cases over the years discussing what constitutes a "farmhouse" as well as "the character appropriate" test, both of which are articles in themselves.

What is often not considered, however, is what happens when a farmer falls ill and dies in hospital or a nursing home; a common scenario among an aging population.

In the past, the Revenue accepted that if the family was acting as "agent" of the farmer, i.e. continuing to run the business from the farmhouse on the farmer's behalf, then the test of occupation could be satisfied. This informal concession - notwithstanding the requirement for agricultural property to be occupied for two years prior to death - allowed relief to be granted even if the farmer was absent when he died, so long as there was every expectation that he would return.

'It seems that HMRC now wants to examine each case on its individual merits and nothing can be taken for granted.'

Regrettably, HMRC is no longer so generous. In fact, the current position seems to be that it is a question of fact, extent and degree in each case. Where a farmer is absent due to ill health, the Revenue looks at the length of absence, the reason and how realistic it would be that a

Since 2002, it has been compulsory to register property and land at HM Land Registry upon certain triggering events e.g. transfer, mortgage etc. So is there any benefit of going to the expense of registering your property voluntarily?

Voluntary registration

there are benefits

HM Land Registry's register contains evidence of ownership for approximately 85% of the land in England and Wales. It states that its responsibilities are to provide a reliable record of ownership and interests, and to provide owners with a land title that is guaranteed by the Government. It charges a fee for registering property, based on its value, which can be between £40 and £980. In order to try and encourage owners to register their property voluntarily it offers a 25% reduction on these fees, giving a clear benefit for voluntarily registration.

Despite this fee reduction many wait until they have to compulsorily register their land. The Land Registry is currently quoting an average completion time of just over three months to register property; a period of time that can drastically delay proceedings. In addition, some solicitors are not conversant with unregistered land and will insist the seller return to the farm would be likely. They also take into account the state of the house, its readiness for a return and whether possessions remained there, etc.

In a recent case, Mr Atkinson lived in a bungalow that he owned along with farm land. He was ill for approximately four years before he died, spending much of that time in hospital and in a care home.

He remained an active partner, however, and took part in weekly discussions relating to the farm. He occasionally returned to the house, which remained furnished. Nothing had been done during his lifetime to terminate his occupation.

When the case went to tribunal the issue was to identify what did or did not amount to a significant connection between Mr Atkinson's occupation of the property and the actual agricultural activities being conducted there. In the evidence presented, it became apparent that at no point was it thought that Mr Atkinson would be able to return home. Although he dealt with post and general upkeep of the property, the tribunal did not consider this constituted occupation for the purposes of agriculture.

Such circumstances are, of course, depressingly familiar. To counter their effect, one possibility would be for the older generation to move out of the farmhouse and for the younger generation to move in. Alternatively, the two generations could, in effect, "exchange" their properties. It is fundamental to ensure that you and your family's aspirations are clear. Know what you want to achieve before seeking professional advice, and remember that capital gains tax and stamp duty land tax implications will also need to be taken into account.

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registers it before they advise their clients to proceed with the purchase. It is not uncommon, therefore, for some purchasers or developers to refuse to deal with unregistered land, either by refusing to purchase it entirely, or by refusing to purchase it until it has been registered, which could leave the seller waiting an extra three to four months or even potentially losing a sale.

HM Land Registry's register is a public record and anyone can pay to obtain a copy of your title. Developers looking to develop a certain area of land often utilise this benefit by simply going to the register, gaining a copy of the title and the name and contact details of the owner, and making a direct approach with an offer.

It seems sensible for anyone who is seeking to sell or develop property to register it voluntarily and gain a head start in the process. Such registration gives an opportunity to deal with any irregularities in the title at leisure and, in some instances, can even lead potential buyers/developers directly to your door.

For more information about voluntary registration of property or land please contact Emma Coke.

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Restrictive covenants

a restrictive covenant or overage agreement might not always achieve what you think

It is now very common for landowners to sell their land subject to restrictive covenants or overage agreements – often both – with the aim of securing a share in the profits of any future development. But as Miles Coates explains, increasing your profit is not always that simple.

Even where there is no immediate prospect of land coming up for development, sellers are employing devices to secure a share in the uplift as far as 20 or 30 years in the future.

Restrictive covenants might appear to be an easy way to achieve this aim. They are well-established in law, simple (and therefore cheap) to draft and, though they can be very onerous in the ways that they restrict land use, it is usually easier to deal with land subject to restrictive covenants than land subject to overage agreements. From the seller's perspective, then, it all seems straightforward: impose a restrictive covenant preventing use of the land other than for agricultural purposes, and if the buyer ever obtains planning permission, the seller will agree to release the covenant for a price.

Restrictive covenants, however, are an imperfect device for this purpose. Restrictive covenants must be negative and capable of benefitting the seller's retained land, both at the time they are imposed and at the time they are enforced. They are therefore only of value to the seller for so long as he owns land that can benefit from the covenant. They cannot be used to impose a positive obligation to pay money, and there is no mechanism by which to calculate the amount payable to the beneficiary in a given set of circumstances.

The courts will treat some restrictive covenants with scepticism. For example, the BBC's premises in Southampton were subject to a restrictive covenant preventing the use of the premises other than as a broadcasting centre by the BBC. The covenant also contained a provision for it to be lifted and for payment equivalent to overage to be made to the council. The court found that the council did not have premises that could benefit from such a restrictive covenant and that it was, in truth, an obligation to pay money. It was therefore unenforceable against subsequent owners of the land.

In another case, the court refused to uphold a restrictive covenant where the beneficiary had not taken action against the developer and had instead entered into failed negotiations to release it for a fee. The beneficiary was found

to have accepted the breach by not taking enforcement action immediately and his negotiations for payment were found to be a reason not to uphold the covenant.

There will also be uncertainty about the price that the beneficiary can demand for the release of the covenant. A properly-drafted overage agreement will contain detailed calculations to ensure that during the defined overage period, the beneficiary receives an agreed percentage of the uplift in the value of the land after allowing for deductions of certain costs. Restrictive covenants, however, cannot include provisions of this kind and the price to be paid for a release can vary considerably from case to case. Where disputes have gone to court, awards have ranged from less than 5% to up to 40% of the profits of a development.

Finally, although restrictive covenants are not usually subject to a time limit, it cannot be assumed that they are permanent. They can be removed on application to the Lands Tribunal on a number of grounds, including that they have become obsolete or that they are impeding a reasonable use of the land. Given the difficulty of predicting the landscape in 20 or 30 years, sellers may be better off with an overage agreement of a certain period than a restrictive covenant, which may or may not last longer, and which could result in a court dispute.

Landowners must think carefully about future development whenever they sell land, and consider how best to secure a share in any profits from it. Quite often, it is better to invest time at the point of sale in negotiating a detailed overage agreement, which will give the certainty of clear obligations to both parties and reduce the risk of a costly dispute further down the line.

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in summary

In this issue we cover some important issues that should be part of any farming family's planning; here is a summary:

Succession
Tax relief can be crippling when the farm passes down the generations. Learning about the available tax reliefs and how to protect them makes good sense, especially as HMRC tightens the rules.

Land registration
When land has been in the same family for generations, land registration may never have taken place. But voluntary registration has benefits, not least if you are planning to sell or develop.

Key person insurance
Unlike many businesses, farms often neglect to plan for the eventuality of losing a key person. But just as we wouldn't neglect insurance on our home or our farm machinery, this is an area that deserves attention.

Future land development
If you are planning to sell land in the future, think about how you might uplift your profit. A little investment in time and professional advice could give you a much better outcome and, importantly, avoid the potential for a costly dispute.

Lasting powers of attorney
We all like to think that we are invincible! Sadly, none of us are, and everyone should plan for the possibility of losing capacity at some stage of our life. A lasting power of attorney is a document that can set your mind at rest.

Dividing assets
Cohabitation or pre-nuptial agreements are often thought to be unromantic, even harsh. But such agreements can protect assets that have been within the same family for many generations.

Don't get caught out

by the unexpected

Farmers work tirelessly to run an efficient and profitable business and to provide an income for the family, but what happens if disaster strikes and you can no longer work. Is there anything that can reduce the impact to that loss of income and halt the decline in the profit and output of your business?

Having worked hard to build up your business, quite often from previous generations of family members, it makes sense to protect it. We find that while business owners probably have insurance cover for buildings, fixture and fittings, stock, cars and machinery, invariably they do not cover the single biggest assets – the business owner and the key employees.

Sunnyside Farm

In this fictitious example, Sunnyside Farm is very profitable and has been built up over several generations. John Sunnyside is now 65 years old. His son, David, who is 40, runs the farm and is vital to the business. John wants to insure David to provide cover in case he were to suddenly die or be diagnosed with a serious illness. The following scenarios show the effect key man insurance could have.

Scenario 1

The farm takes out key person cover on David's life - £500,000.

David has a stroke and is forced to retire early.

The £500,000 benefit cover from the policy covers the sudden loss of profits and pays for someone to be recruited and trained.

Sunnyside Farm continues trading and making a profit.

Scenario 2

The farm does not take out key person cover.

David has a stroke and is forced to retire early.

The farm has no budget to cover the sudden loss of profit or to hire new people.

Two options for the farm:-

1. Take out a business loan and risk default.
2. The Farm does not recruit or replace staff and John, at 65, tries to continue the business, putting not only the business at risk but also his own health.

In the same way that insurance guards against the unexpected, a lasting power of attorney can give reassurance that the farm will be in safe hands, regardless of a change of circumstances.

Food for thought

protecting your farm

A lasting power of attorney (LPA) is a legal document that allows individuals to appoint one or more people to act on their behalf to make decisions, or to help make them, should they become unable to do so. There are two types of power of attorney – one to deal with property and financial affairs, and the other to deal with health and welfare.

LPAs are invaluable in protecting the farm should the farmer be unable to continue to take an active role through accident, illness or old age. Without a LPA, there can be significant disruption and cost to the farming business as well as lasting impact on its operations. For example, without access to the bank account, the wages, mortgages, loans and invoices cannot be paid. But with a LPA, attorneys can step into the farmer's shoes and continue to run the farm.

When making a LPA it is imperative that individuals choose attorneys that they trust implicitly.

It won't happen to me
It is very easy to forget, in the everyday hustle and bustle of life, what could happen to the farm if one of the partners or a family member working on the farm died or became seriously ill. However unfortunate, the unthinkable does happen, as these statistics show:

- Cardiovascular disease causes more than a quarter of all deaths in the UK – an average of 435 people each day*
- One in two people will develop cancer at some point in their lifetime**

What would the impact be on the farm in this scenario?

There are various options and types of policies for business protection and key person cover. When reviewing the farm and the farm's business plan, consider how losing a key person would affect continuity and plans for the future.

** British Heart Foundation, CVD statistics UK factsheet, January 2017*
*** Cancer Research UK, press release February 2015*

Birkett Long IFA LLP can provide specialist help with these types of arrangements; if you would like further information please contact Nicola Ward on 01206 217309 or nicola.ward@birkettlong.co.uk.

These can be family members, friends, or professionals. This is particularly important from a farming perspective, as the right 'mix' of individuals will be able to act on the farmer's behalf, having the requisite knowledge.

Up to four attorneys can act; making individual or joint decisions. An extra level of protection is offered by appointing more than one attorney to oversee your affairs.

Farmers notoriously never retire and it is a sad fact of life that capacity may become an issue due to age. However, the younger generation should also make a LPA. Farms can be dangerous places to work and it is wise to have a contingence in place should the worst happen. In all probability the barn will never burn down, but almost certainly insurance is in place to cover that eventuality. Wouldn't anyone, therefore, take the same care of the farm and themselves in the event of incapacity - permanent or temporary? It could allow the farming business to continue, regardless of the circumstances.

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Who owns what is a tricky question when a relationship breaks down and even more so when the assets include the family farm. David Feakins examines the protection offered by cohabitation and prenuptial agreements.

relationships

and the division of assets

Farmers, in particular, look to protect their assets to ensure they remain within the family and are passed down to future generations. A question arises, however, as to what safeguards should be put in place if one of the next generation enters into a relationship, either cohabiting or marrying.

Of course, no one can predict what the future holds, but there is a "belt and braces" approach to make sure assets are protected as far as possible in the event of a separation or divorce.

Cohabiting partners, i.e. those who are not married but are living together, can enter into a cohabitation agreement setting out what their intentions are in respect of one another's assets. Although a cohabiting partner would not automatically be deemed to have an interest in the farm or the property on the farm, they could make a claim to the court following a relationship breakdown and argue that an interest has been acquired.

A cohabitation agreement can state each party's intentions at the outset and what interest either party has in the property and the farm should the relationship fail.

For couples who wish to marry, a prenuptial agreement can be put in place.

Under English law, a spouse is entitled to a share in the "matrimonial assets". These include assets that are owned together as well as those each party may have brought into the relationship independently, such as the farm. Just because a farm has been in a family for generations does not mean that it is protected from a claim by a husband or wife upon divorce. Similar to a cohabitation agreement, a prenuptial agreement allows both parties to clearly set out how assets will be dealt with in the unfortunate event of the marriage ending.

We understand that this is a tricky subject to broach with a loved one, as well as with the next generation who want to come into the farming business, but it is imperative that protection is put in place.

If you would like more advice, please get in touch and we will discuss this further with you.

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