



**It's your
family's legacy,
let us help you
build and
protect it**





Stephen Park



Pacer Legal



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Building a Legacy

LEGACY BUILDING

By adopting asset protection strategies, you enhance the likelihood of leaving a viable legacy via succession planning

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PROTECT YOUR ASSETS FROM:

- ❖ Creditors.
- ❖ Environmental/public liability claims (i.e. escape of fire).
- ❖ R/ship breakdowns – family members/spousal.
- ❖ Incorrect business structuring.

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Assets are Protected

- ❖ By ensuring all parties make informed decisions.
- ❖ Informed decision making comes from understanding your business structures.

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BE INFORMED

“You told me reading my trust deed
would put me to sleep, it didn’t!
It kept me awake all night”

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IS THIS YOU?

- ❖ Want to buy a million dollar farming property.
- ❖ Receive advice to buy in a trust for tax purposes.
- ❖ Accountant purchases trust deed for you.

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IS THIS YOU?

- ❖ Often deed is a generic, off the shelf trust deed costing a few hundred dollars.
- ❖ It governs control of the property for the next 3 generations.
- ❖ Buy farm.

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YOUR OBLIGATIONS

- ❖ Do you understand the structure?
- ❖ Do you know the statutory/formal rules that govern your structure?

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YOUR OBLIGATIONS

- ❖ Ask your advisors the right questions.
- ❖ Control/liabilities.
- ❖ Structure encourage harmonious family relationships between parents/children & siblings?
- ❖ Now/Future?

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THE NEXT GEN & STRUCTURES

- ❖ Formal involvement can create premature exposure to liabilities.
- ❖ Commonly begins as:
 - Joint individual trustee, co–director of corporate trustee;
 - Partner in a partnership.

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REAL LIFE

- ❖ Sons returned to farm, additional land purchased in new trust.
- ❖ Corporate trustee with father/sons as co-directors.
- ❖ Bank took personal directors guarantees.

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REAL LIFE

- ❖ Defaulted on overdraft.
- ❖ Property sold.
- ❖ Personal liability for shortfall – one son lost off farm property to bank.

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CONSIDER

- ❖ Sons had no proprietary interest in the land, control of trust rested with father as Appointor.
- ❖ Sons never sought or were advised to seek, advice on the implications for them of entering the new structure.

CONSIDER

- ❖ Off farm assets didn't need to be put at risk.
- ❖ Structure should have been tailored for specific circumstances.
- ❖ Was real control sought or simply a sense of involvement?

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OPTIONS

- ❖ Advice - exposure to liabilities without control is not a standard commercial practice
- ❖ Co-appointors (**control**), shareholders in corporate trustee (**sense of involvement**).
- ❖ Succession plan?

FAMILY TRUST & SUCCESSION

- ❖ Control passed according to Deed.
- ❖ Control held by Appointor and/or Guardian.
- ❖ Succession often can be by Deed or Will.

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TRUST SUCCESSION TIPS

- ❖ Succession by Deed **cannot** be challenged under inheritance laws.
- ❖ Address beneficiary loan accounts.
- ❖ Forgive loan accounts by deed of forgiveness - **cannot** be challenged under inheritance laws.

FAMILY TRUSTS

- ❖ **Don't ignore Vesting Date.**
- ❖ Primary beneficiaries receive capital in equal shares if no distribution prior to vesting date.
- ❖ If vesting date passes without resolution, this is automatic.

PARTNERSHIP

- ❖ Can be informal or by Deed
- ❖ Informal - Partnership Act applies.
- ❖ Deed - governed by Deed and Partnership Act.

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PARTNERSHIP

- ❖ No Deed then governed by Partnership Act.
- ❖ If Deed then governed by Deed & Act.
 - Read and understand both!

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PARTNERSHIP ACT

SECT 35 - Expulsion of partner

- ▶ Majority cannot expel partner unless a power in written agreement.
- ▶ Written agreement also details expectations, obligations, standards set & how enforced.

PARTNERSHIP ACT

SECT 44 - Dissolution by death

- Subject to written agreement, every partnership is dissolved by the death of any partner.
- Cost of new partnership formation.
- Trading problems when bank freezes partnership accounts.

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PARTNERSHIPS

- ❖ Partners **jointly and severably** liable for debts.
- ❖ Irrelevant if a partner did not incur or agree to debt, liability automatic.

REAL LIFE 1

- ❖ Son returned to farm & entered partnership.
- ❖ Over committed in forward grain sales without agreement.
- ❖ Extensive shortfall & default.
- ❖ All partners (trust and three individuals) jointly & severably liable.

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REAL LIFE 2

- ❖ Son took over running farm after father deceased.
- ❖ Mother retired off farm but remained a partner (but had no real involvement).
- ❖ Son acquired new property & partnership provided guarantees.

REAL LIFE 2

- ❖ Defaulted & action against all partners by bank.
- ❖ Bank eventually released mother's unit, but had no obligation to do so.
- ❖ Notwithstanding, mother incurred significant legal costs.

FAMILY COURT

- ❖ Disputes poses a real risk to the viability of farming enterprises.
- ❖ Court has the power to look through structures and identify who really is in control for the purposes of a property split.

FAMILY COURT - TRUST BUSTER

- ❖ Has power to treat trust property as property of a marriage.
- ❖ Looks at who is in day to day control (as opposed to legal ownership) & patterns of income/capital distributions.

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FAMILY LAW & 3RD PARTIES

- ❖ Can include property owned by 3rd party in property settlement order.
- ❖ Applies to partnerships, families separately farming land owned in 1 trust & assets controlled by parents.

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FAMILY LAW

- ❖ Question of timing the inclusion of children into farming enterprise.
- ❖ Use of employment contracts (pay wages instead of distributions).
- ❖ Use loan agreements by parents when handing over control of assets.

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SECURED LOAN AGREEMENTS

- ❖ Often sit behind bank as a 2nd mortgage.
- ❖ Mortgage is a secured debt is recognised by Family Court.

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LOAN AGREEMENTS

- ❖ Include “payable on demand” provision.
- ❖ Include interest payment provision - protection is greatest when interest paid.
- ❖ Shows it is not a sham.

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FAMILY LAW TIPS

- ❖ Negotiate an Agreement then see Lawyers!
- ❖ Costs of dispute that goes to trial for complex matters - \$150,000 to \$750,000.00.
- ❖ A Medium sized farming enterprises can fall within the complex matters list (Est. 6 day trial).

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FAMILY LAW TIPS

- ❖ Agreement reached then division is documented and submitted to the Family Court for approval (no trial necessary).
- ❖ This can be achieved for as little as \$5,000 in legal fees.

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FAMILY LAW TIPS

- ❖ Costs arise because of financial disclosure obligations.
- ❖ Obligated to ensure that all assets of a marriage/defacto relationship are identified and valued.
- ❖ Need an understanding of the business structure (independent accountant may review the business financials).

TIPS TO MINIMISE COSTS

- ❖ Keep comprehensive financial records (may be have to provide for the last 10 years):
 - Full financial statements;
 - Copies of all invoices and contracts entered;
 - Bank statements for all bank accounts and credit cards;
 - Copies of trust deeds; minutes etc.

TIPS TO MINIMISE COSTS

- ❖ Don't deliver all documents unsorted in cardboard boxes.
- ❖ Documents have to be sorted and put into a list.
- ❖ List is provided to the other parties lawyers for consideration.
- ❖ Requirements for list, are strictly enforced by the Courts.

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IN SUMMARY

- ❖ Ensure all parties fully informed before decisions are made.
- ❖ This requires an understanding of the structures.

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