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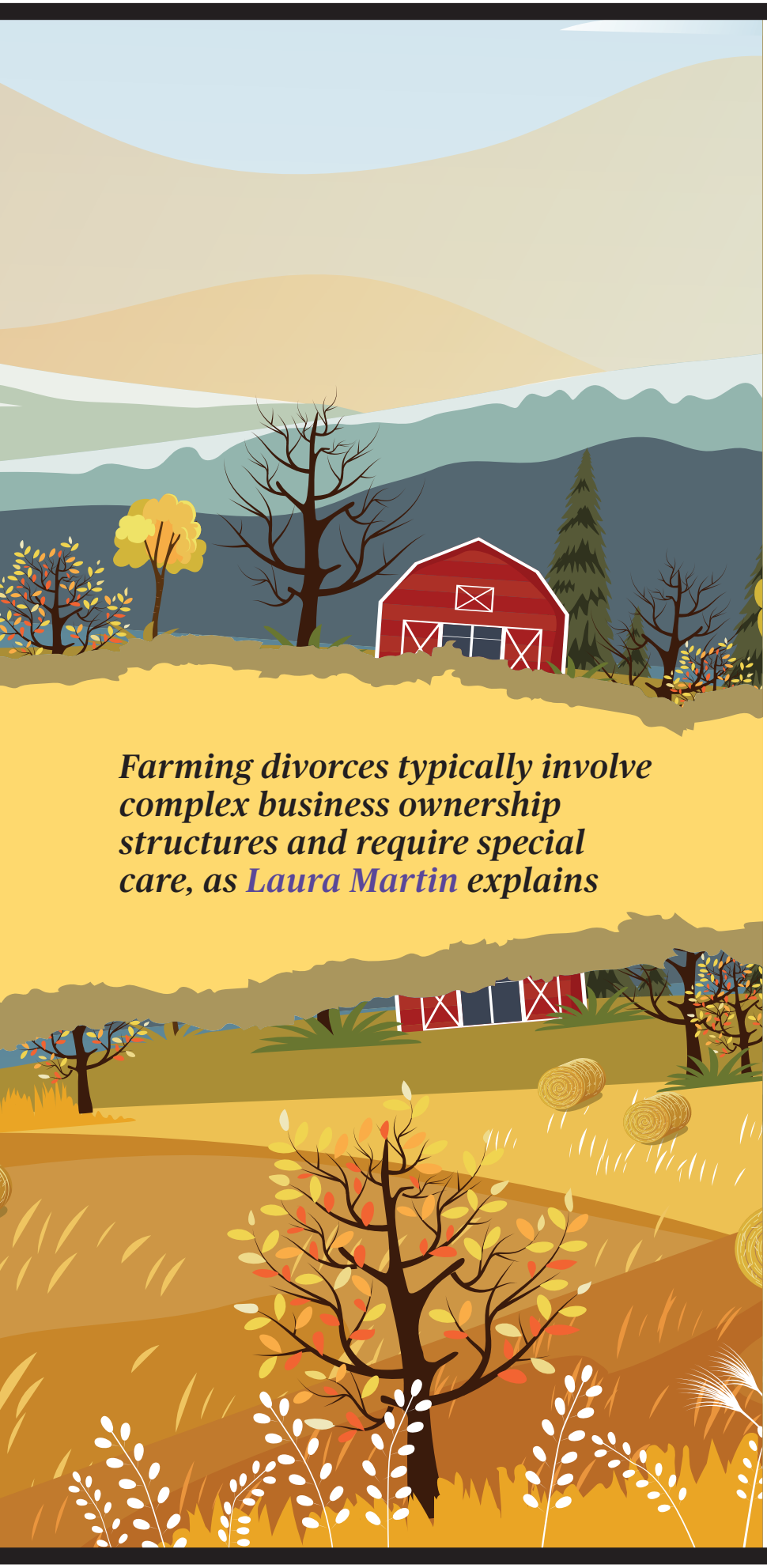
ON THE FARM: HOW DIVORCE CAN IMPACT FARM VIABILITY



Farming divorces typically involve complex business ownership structures and require special care, as Laura Martin explains

A marriage breakup in any family is upsetting, but when there is divorce in a farming family the consequences can often be far reaching. The worst case scenario is the dividing up of the farm, which tends to benefit no one.

According to the Office of National Statistics (ONS) an estimated 42 per cent of marriages in England and Wales end in divorce. The latest figures (for 2017) show there were 101,669 divorces among opposite sex couples. Farmers are not immune from this and the strain on farm marriages is often exacerbated by long hours, physical exhaustion, social isolation, financial worries, red tape and stress.

WHAT MAKES FARMING DIVORCES DIFFERENT?

A farming business may have been in the family for generations, with parents, siblings and children all being involved in the farming enterprise. This complex ownership – often involving family trusts – means that dividing up assets on divorce can be extremely challenging.

Farms are generally inherited assets therefore making them, in principle, non-matrimonial assets with an expectation the farming business will be handed to future generations.

However, with home and work being so interrelated and where spouses are often partners or otherwise involved in the farming business, it throws into question how 'non-matrimonial' the farm can be.

With challenging income streams, farming businesses have had to be innovative and to diversify. This, in itself, creates complex ownership of land and business structures. There may be different forms of occupation of land including farm business tenancies (FBTs); Agricultural Holding Act (AHA) tenancies; share farming; and contract farming – and consideration needs to be given to these business interests and their effect on the value of land and assets.

For example, AHA tenancies supress the value of the land of the landowner, even more so if they have rights of succession compared to FBTs.

A BALANCING ACT

The courts have the difficult task of balancing the prospect of separating one household into two to satisfy the changing needs of the family and any children, as against preserving the substance of the family business. Farming divorces need special care and an experienced legal advisor is essential.

It is important to ascertain at the outset who is the key/main decision maker in the farming business as it may not be the person involved in the divorce. Consideration needs to be given to their intervention and having their own legal advice.

Expert advice will be necessary to value the business and its assets. Involving trusted advisors such as the farm accountant and land agents from the outset is prudent; and their information, including farm accounts, is vital to preparing the Form E. Instructing single joint experts will also be necessary to provide valuations (as explained below).

THE COURT'S APPROACH

The first practical issue for the court to consider is whether sufficient capital can be raised to meet the housing needs of both spouses. For example, if a farmer has inherited the farm from his family, the basic requirement when divorcing is to supply the spouse and any children with a suitable home.

It may be necessary to sell off part of the farm in order to do this, or to borrow against it; but that may damage the core activity of the farm and a court may be reluctant to do that.

If the farm is owned through the wider family, with siblings and/or parents, then this will need to be carefully addressed. Courts are reluctant to damage the livelihoods of other third parties. It is for this reason that farming divorce cases are complex – with even the judiciary commenting:

"this is a farming case; and ancillary relief farming cases are notoriously difficult to resolve... the case is almost, although I believe not quite, insoluble, it is a case where it is far easier to criticise a suggested solution than to devise one" [*Wilson J R v R* [2002] 1FLR 928].

Another key aspect is usually paying maintenance out of the farm income. This can be particularly difficult with farms: the lifestyle sustained by a farm may seem higher than the income it actually produces. When that income is shared, there may be a dramatic fall in the standard of living of the person receiving the maintenance.

Factors that could affect the final division include:

- How was the farm acquired? If it's been handed down through generations and is to be preserved for future generations, the court may be reluctant to order a sale.
- Who else owns a share? Parents, siblings or others may have a vested interested in the business. Advisors need to consider any AHA tenancies, particularly ones with security of tenure. The court will try to avoid any action that impacts on third parties.
- Are there any trusts involved? Is the farm held in trust for one of a number of beneficiaries or for future generations? If so, this is a crucial factor.
- How long is the marriage? Shorter marriages would tend to indicate no sale but are still dependant on the particular circumstances.
- How were the assets treated during the marriage? Pooling or merging assets tends to lean towards sharing of assets.
- Were any agreements entered into prior to or during the marriage?
- Are there any liquid assets in the farm? Could a spouse's needs be met by a sale of part of the farm that would not harm core activity? Being solution-focused at the very beginning is imperative.

Obtaining expert valuations at an early stage is essential and such valuations need to deal with market value of business; assets and land; liquidity; past and future income; tax implications; and business/trust structures – including third party interests, tenancies, quasi partnerships and minority discounts. Consideration needs to be given to planning and development potential and overage agreements.

The leading judgment in farming divorce cases is most probably *P v P* (inherited property) [2006] 2FCR 579. The key features of this case were that this was a long marriage with two dependent children with special needs. The farm and the land were inherited by the husband from his family and the farm had been in his family for four generations. Both parties made a full contribution to the marriage and both the husband and the wife were farmers farming in partnership.

The assets totalled £2.5m which included the husband's assets worth £2.1m (of which land, buildings and the family home were worth £1.75m); the wife's assets were worth £71,000; and joint partnership assets were worth £325,000. In giving judgment, Munby J described the case as "excruciatingly dif-

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ficult" and awarded the wife 25 per cent of the total pot, which included £400,000 plus £175,000 Duxbury.

The award was made on the wife's reasonable needs for accommodation and income. The justification behind this judgment was that the wife's needs were met (as she had stated on her Form E); the generational nature of the assets; the implications of a sale would be devastating to the husband; the property was held separately by the parties during the marriage; and there was a legitimate expectation that assets would be passed down through subsequent generations.

It is interesting to note that the wife's needs as stated in her Form E were met by the Court, rather than her needs being generously interpreted. Real care needs to go into preparing Forms E and any section 25 statements, as these documents form part of the parties' evidence in chief.

Furthermore, could the wife have presented or strengthened her argument to say their joint endeavour throughout the marriage to the farm and the partnership increased its value?

In his judgment, Munby J contextualised his ruling as "not because of any principle that this was the approach to be adopted in farming cases but because in the particular circumstances of this case that was the approach which most closely accorded with the overarching requirement of fairness having regard to all the circumstances of the case".

PROTECTING THE FARM

Discretionary trusts are often used for tax planning purposes (either through a will or as lifetime settlements) as a vehicle to keep farms within the family, while providing greater flexibility than an outright division of parcels of land.

It is quite common for farming families to transfer property and other assets to the next farming generation to minimise their exposure to inheritance tax on death. These transfers are a common feature based on expert advice from accountants and private client lawyers. However, families should consider what will happen to those transferred assets if that next generation marries and then subsequently that marriage fails.

As always, it is prudent to consider a prenuptial or postnuptial agreement. The courts are more likely to have respect for such agreements if they are properly entered into well in advance of the wedding, with the benefit of legal advice and full financial disclosure and where the effect of the agreement is 'reasonable and fair'.

The difficulty with discretionary trusts or nuptial settlements is that they can be varied by the court; and the breadth of the court's discretion to vary such settlements is considerable. This should be compared against a genuine dynastic family trust where the court has no power to vary or make orders directly against trustees.

Where property is not transferred to the next farming generation – and not bequeathed to those undertaking the farming – it is common for a proprietary estoppel claim to be brought, claiming ownership of the farm that was always promised to them. Most claims are made by children following the death of their parent, but such a claim could be made where an individual is likely to lose out on inheriting the farm as a result of a divorce.

As established by the case of *Thorner v Major* [2009] UKHL 18, in order to bring a successful proprietary estoppel claim a claimant must be able to establish three main elements:

- a representation or assurance has been made;
- the recipient of the representation or assurance has relied on it; and
- the recipient has suffered a detriment as a result of the reliance.

THE BOTTOM LINE

Partnerships agreements can be entered into by all those with an interest in the farm (or however appropriate). If there is a partnership agreement, each partner should renew their will to ensure both documents complement each other. Unfortunately, all too often people do not renew or draft partnership agreements in conjunction with one another and this can often lead to disputes.

Interestingly, the court has no power to vary a partnership agreement so the terms of the agreement need to be carefully considered, because limiting or increasing the rights of any partner will be looked at by the court within any divorce proceedings.

We view agricultural work as a sector where we combine skills and expertise from various departments and work collaboratively together to ensure best advice for the client. The bottom line is that farm divorce cases can be notoriously difficult to resolve by the judiciary and there is no substitute for expert advice. SJ

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