



Navigating the Succession & Transition Landscape

Andrew Quinn – Rural Aid

Presented by Hamilton Locke

For our mates in the bush 

The rise and rise of the importance of estate and succession planning

A presentation by **Hamilton Locke Private**

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Introduction

As Abraham Lincoln said, “*Laws change; people die; the land remains.*”

- Business succession planning is a **process** on the expectation of an exit event.
- Key **objective** – to promote certainty, prosperity and family harmony for the family and business in the inevitable transition to create a long-lasting for future generations.
- Key **requirement** – consensus from all stakeholders on the **outcome**.
- **Evolution** of succession plans over time.



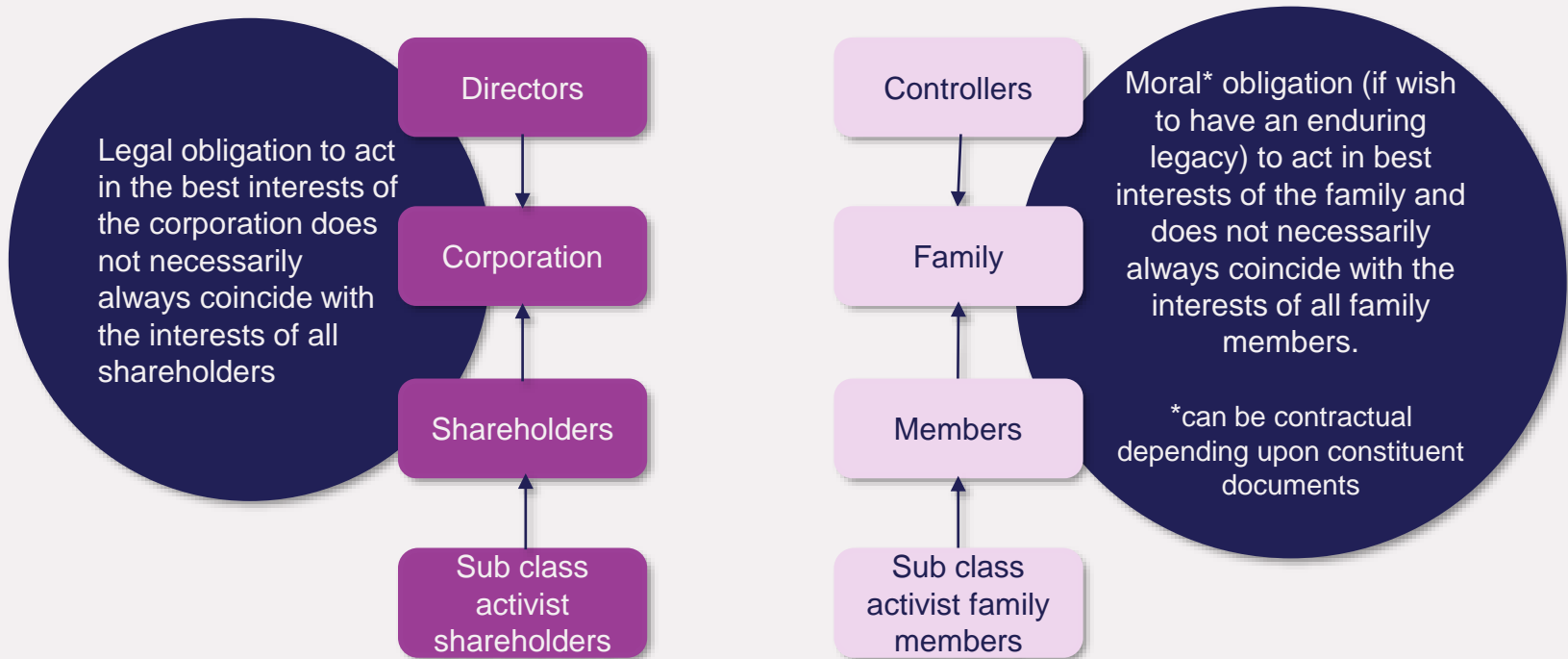
The uniqueness of agribusinesses

How?

- the family property is generally still home to all stakeholders
- there is often limited or no separation between the business operations and home life
- there may be a need to gift and to shelter equity/value
- the use of advisors as part of the succession journey is often critical to minimise tension within the family
- remuneration and other rewards for family members can be based more on who the person is, not what they contribute to a business (and can often be less than market value based on promises and expectations of inheritance)



Corporations vs Families





Macro Estate Planning Trends

Common Elements in UK, USA, Australia & NZ Jurisdictions

Greed

- “*three great forces rules the world – stupidity, fear and greed.*”
(Albert Einstein)

No win no fee lawyers

- removes economic disincentive from pre death and estate litigation

Entitled generations X, Y and Z

Often not prepared to:

- wait until death do us part
- accept the umpire’s (testator’s) decision on the will



Macro Estate Planning Trends

- More complicated due to divorce, blended families and use of trusts structures
- Greed and a sense of entitlement from an often less forgiving generation
 - X (1965 – 1980),
 - Y (1981 – 1996) and
 - Z (1997 – 2012)
- Pre death litigation (proprietary estoppel, statutory wills and constructive trusts) – demand for early inheritance as not prepared to wait
- Post death - family provision applications, proprietary estoppel – no economic incentive as generally the estate bears the costs
- Prenuptial agreements – first marriages and second marriages (important to have in some saddle bags) – parents often concerned about genetic selection of children
- Making size of the prize smaller – loans, joint tenants, gift & loan backs, special constitutions
- Trust litigation – pre and post death. Includes actions against trustees
- An aggressive Family Court on contribution to the matrimonial pool
- Death duties – abolished in 1978. Now – a matter of when, not if?



Macro Estate Planning Trends – cont.

- Enormous increase in wealth in middle class Australia and the intergenerational transfer of funds
- The impact of drugs and mental health issues
- Living longer and aged care costs plus elder care pressures
- Alzheimer's disease and issues of capacity
- Many people (including HNWIs) with no or inadequate wills in place
- Your will is not your own – Succession Acts in each State, family provision applications and trust and equity claims (litigation)
- Estranged children
- The rise and rise of no win, no fee lawyers in Australia
- More families undertaking succession planning; at times at the request of banks wanting to ensure clean intergenerational transfers



Trusted Advisor in estate planning – from a legal perspective

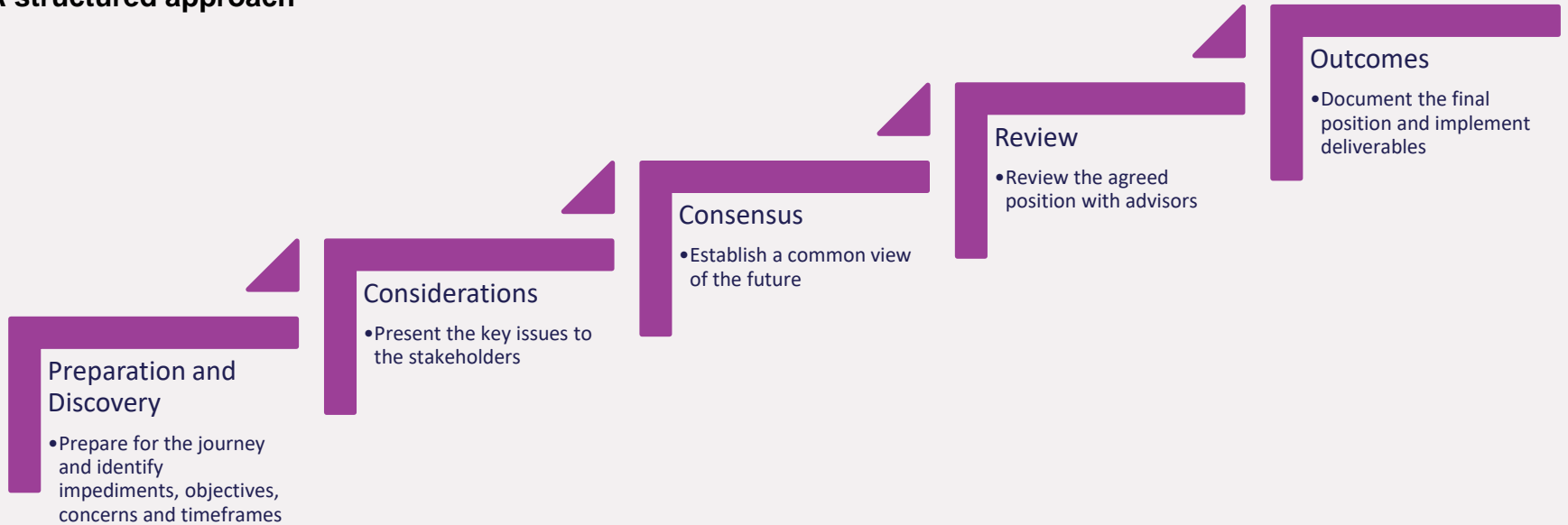


*Rare to be one person: usually and best to be a combination of transition specialist / accountant / wealth advisor / financial planner / specialist lawyer



The Planning Process

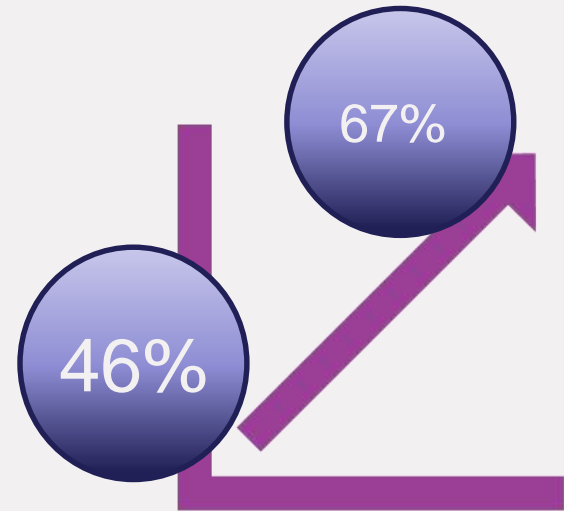
A structured approach



The Statistics

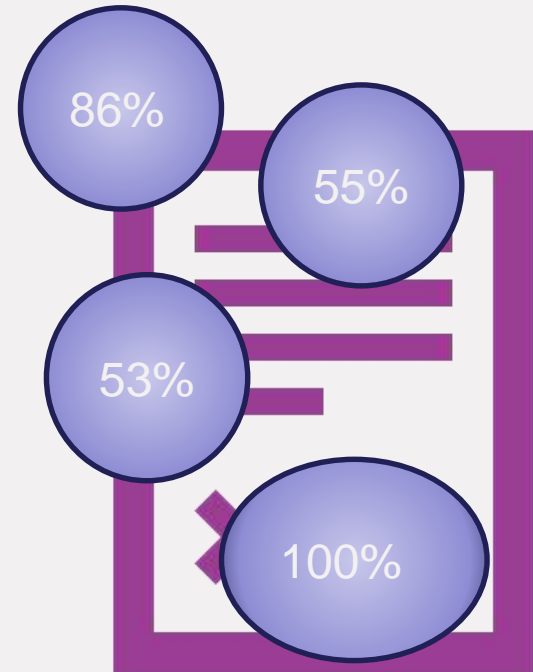
Australian Bureau of Statistics Productivity Commission 2021 report (Wealth Report)

- by 2050, those aged over 60 will account for 46% of the population and will have a 67% share of total wealth in Australia;
- the total amount passed on to the next generation is expected to almost quadruple between 2020 and 2050.
- the average size of inheritances will also increase (due to increased asset values, as well as declining fertility rates and fewer heirs);
- Australians over the age of 60 are projected to transfer \$3.5 trillion, or an average of around \$175 billion per year, in wealth. Across that time, the ratio of received inheritances to existing wealth is projected to increase from 0.16 to 0.78 – a five-fold increase.



Succession statistics cont.

- 86% say have made a will
- 55% have an effective will at death
- Approximately one in two relationships breakdown
- 53% of divorces involve children
- 100% of people die!

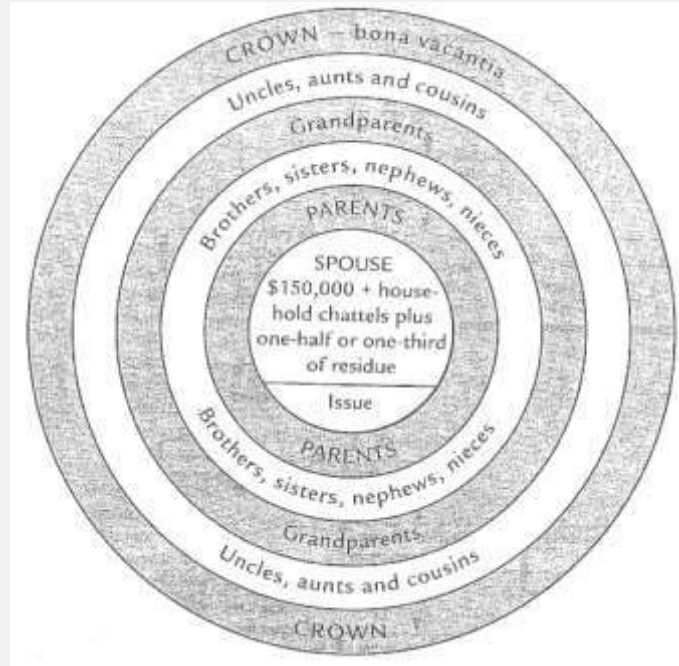


Why make a will?

- No valid will = die intestate
- Property distributed according to rules laid down by statute of the respective States
- Spouses lose out – if there are children, don't receive all of the estate



Intestacy Rules in Queensland



Motivating factors for early estate planning

Key Issues	
1.	Avoiding unnecessary tax and duty consequences
2.	Managing expectations
3.	Reducing the risks of estate litigation



Estate litigation - broadly

- Family provision applications
- Solemn form proceedings
- Trust litigation
- Equity litigation (including the equitable doctrine of proprietary estoppel)



YOUR WILL IS NOT YOUR OWN



Family provision applications - Queensland

- The court's jurisdiction to make an order for provision under section 41 of the *Succession Act 1981* (Qld) is only engaged if:
 - *“in terms of the will...adequate provision is not made from the estate for the proper maintenance or support of the deceased person's spouse, child or dependant.”*
- In *Bosch & Anor v Perpetual Trustee Company Limited & Ors* [1938], the court clarified the distinction between adequate and proper in the context of FPAs, saying that:
 - *‘The amount to be provided is not to be measured solely by the need of maintenance. It would be so if the Court were concerned merely with adequacy. But the Court has to consider what is proper maintenance, and therefore the property left by the testator has to be taken into consideration. So, too, in the case of children, the material consideration is their age.’*



Family provision applications - Queensland

- The court will consider the applicant's 'need' and 'moral claim.'
- In *Collicot v McMillan*, Ormiston J said:
 - *“The expression “moral duty” remains a simple and convenient way of referring to the obligation...resting upon a testator to make a wise and just assessment of the interests of all persons who might fairly ask to be taken into account in determining what adequate provision for proper maintenance and support should have been made for them had the testator been fully aware of all the relevant circumstances...The word “moral”...describes what is generally considered, according to accepted community standards, to be the obligation of a testator to do what is right and proper for those members of his or her family.”*



Family provision applications

- Separate legislation in every State and Territory
- General **two stage test** (adopted in every jurisdiction)
 - applicant must show adequate provision not made
 - if adequate provision not made, consider quantum to go to applicant
- Eligible applicants – spouses (married, de facto, same sex), child (biological, adopted and step-child of married and de facto couples) plus limited range of dependents (parents, foster children)
- Timeframes on serving notice and filing proceedings (in Queensland – 6 months from date of death to file intention and 9 months to commence proceedings).
- Note – in NSW, person may release any rights they may have to bring an application by consent



Family provision applications

Case name	Award as % of estate
<i>Colebatch v Colebatch</i>	Approximately 25% of the estate (\$1.2 million estate).
<i>Mead v Lemon</i>	Approximately 6.14% of the estate (\$1 billion estate).
<i>Menzies v Menzies</i>	60% of the estate to Shelly as she had the greatest financial need (\$860,000.00 estate).
<i>Lowe v Lowe</i>	54.5% of the estate (approximately \$1 million estate).
<i>Kohari v NSW Trustee & Guardian (No 2)</i>	Approximately 9.6% of the estate (\$1,040,000.00 estate).
<i>Darveniza v Darvenzia & Drakos as Executors of the Estate of Bojan Darvenzia and Ors</i>	Approximately 11.1% of estate (\$27 million estate).



Family provision applications

- Factors that the court will commonly consider, include:
 - the ability of the applicant to meet their own financial responsibilities and the amount necessary for their maintenance and survival;
 - the size of the estate – the true value of the estate is a matter of fundamental importance in every application;
 - the competing claims upon the testator;
 - the standard of living of the applicant during the deceased's lifetime;
 - the extent of contact between the deceased and the applicant;
 - the manner in which the applicant conducted themselves regarding the deceased during their lifetime;
 - contributions to building up the deceased's estate; and
 - the deceased's wishes.



Large Estates – FPAs

- In large estates, the deceased's children are often not in a position of strict financial need.
 - These children can still apply or be awarded further provision
- In large estates, the court has the power to make provision for contingencies which it cannot provide in small estates, including:
 - leaving something to the applicant as a hedge against future misfortune and ill health;
 - taking into account the incidence of taxation and inflation on the assets of or provision made for the applicant;
 - providing some other fund to assist with the applicant's superannuation or a fund which may be invested to provide some modest accretion to the applicant's income for his or her life expectancy; and
 - providing a fund to meet future unexpected contingencies and for overseas and domestic travel if desired by the applicant.



What we see day to day

- Rural family – son works on family farm for little or no wages, subsequent falling out with parents, parents die leaving nothing to son
- Blended family – will-maker leaves everything to children from first marriage, new spouse and/or their children bring claim
- Lame duck – will-maker leaves estate to children in differing proportions, lame duck receives less provision than other siblings and brings a claim



Solemn form proceedings

- Attack on validity of a will
- Grounds:
 - Lack of capacity
 - Lack of knowledge and approval
 - Undue influence
 - Fraud/misrepresentation



Perspective of the next generation

- Communication is paramount
- No surprises
- Fairness in approach
- Growth not stuck in the railway tracks



Proprietary estoppel

Based on unconscionability – prevents Person A from unconscionably resiling from the expectation he or she has created in Person B.

Representation must be clear but does not need to be a contractual promise (compare to the stricter standard required for promissory estoppel – comparable doctrine where the interest does not relate to real property).

A court will closely scrutinise purely oral representations not made in the presence of any third parties.

Reliance must be objectively reasonable.

Detriment need not consist of expenditure of money or quantifiable financial disadvantage so long as it is something substantial.



Succession planning may provide the equivalent of 7in1 vaccine for cattle

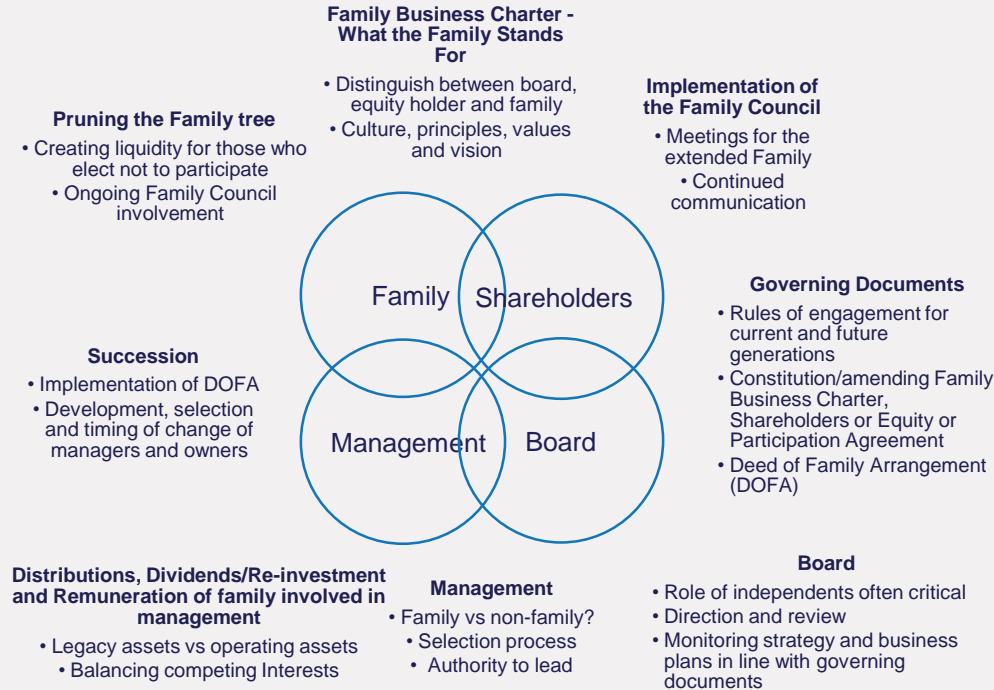


- pulpy kidney,
- black disease,
- malignant oedema,
- tetanus,
- black leg,
- leptospirosis infection,
- minimisation of leptospirosis shedding

1. Proprietary estoppel claims
2. Family provision applications
3. Estranged and divorced children
4. Mental health issues
5. Breakdown in family relationships
6. Minimising taxation consequences
7. Becoming a lawyer's dream



Creating an agribusiness legacy



“The best fertiliser for a piece of land is the footprints of its owner”

President Lyndon Johnson



Succession mantra - Gerald O'Hara (Gone with the Wind)

Many of our clients want their property or properties to be held for future generations. Our role as advisors is to help them facilitate that. For many clients this quote says it all –

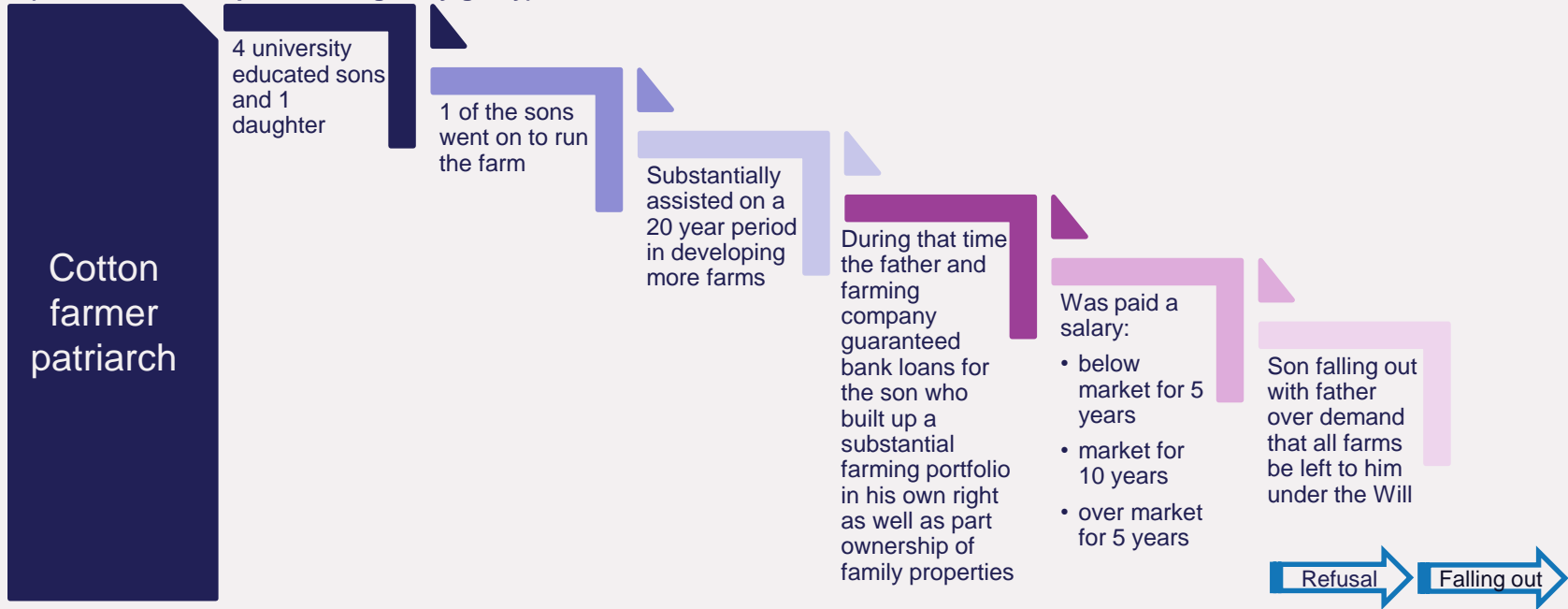
“Do you mean to tell me, Katie Scarlett O’Hara, that Tara, that land, doesn’t mean anything to you? Why, land is the only thing in the world worth workin’ for, worth fightin’ for, worth dyin’ for because it’s the only thing that lasts.”

It is all about creating guard rails to enable legacies to endure, often past the third-generation curse.



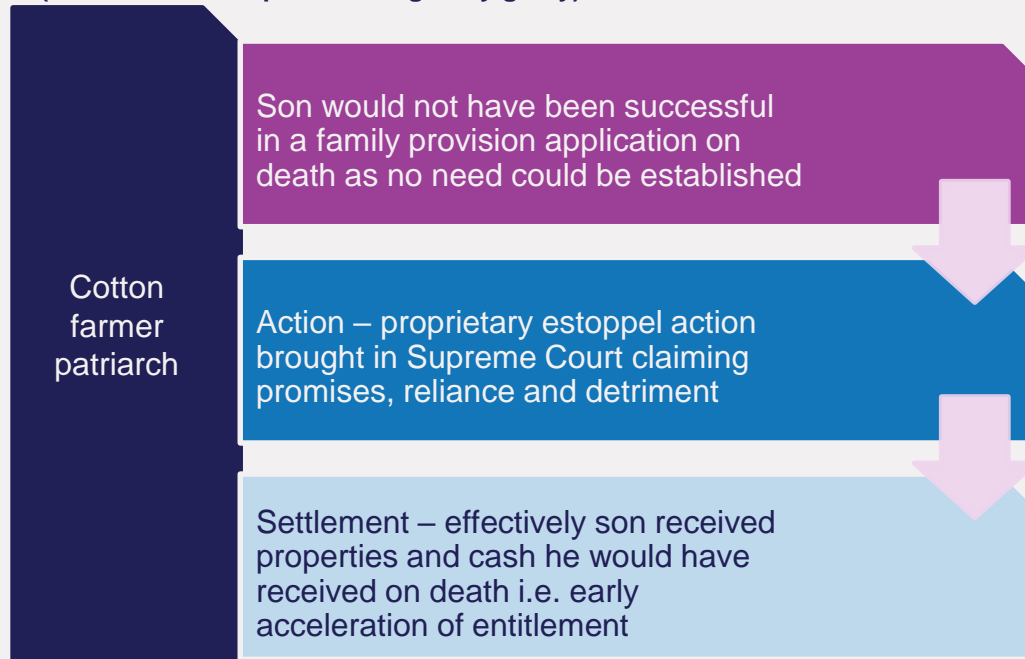
War Story No 1

(sector altered to protect the greedy guilty)



War Story No 1 – continued

(sector altered to protect the greedy guilty)



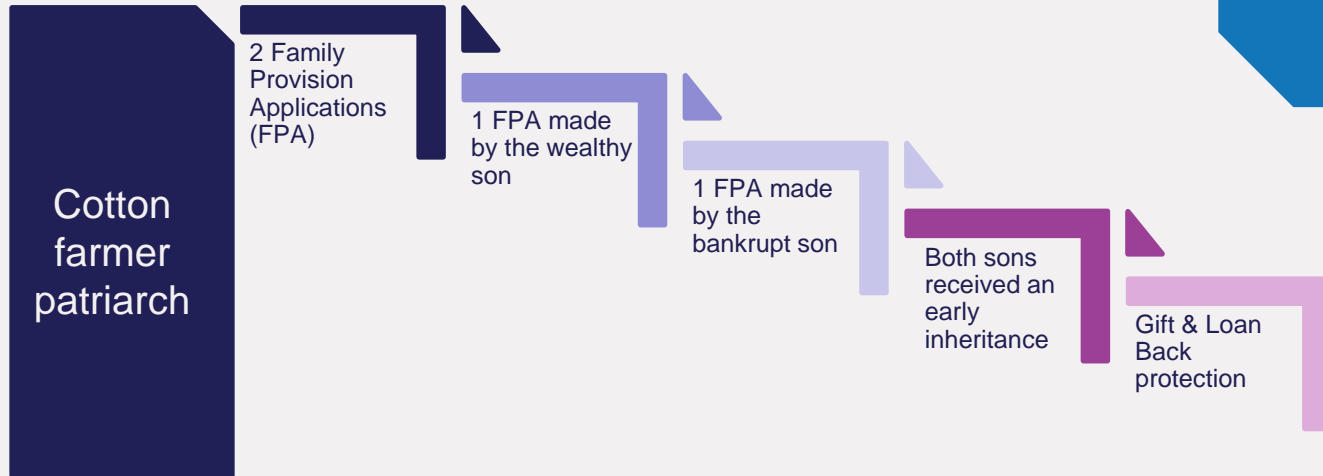
Lessons learned

- communication
- documentation
- greed is not good



War story No 1 – continued

(sector altered to protect the greedy guilty)



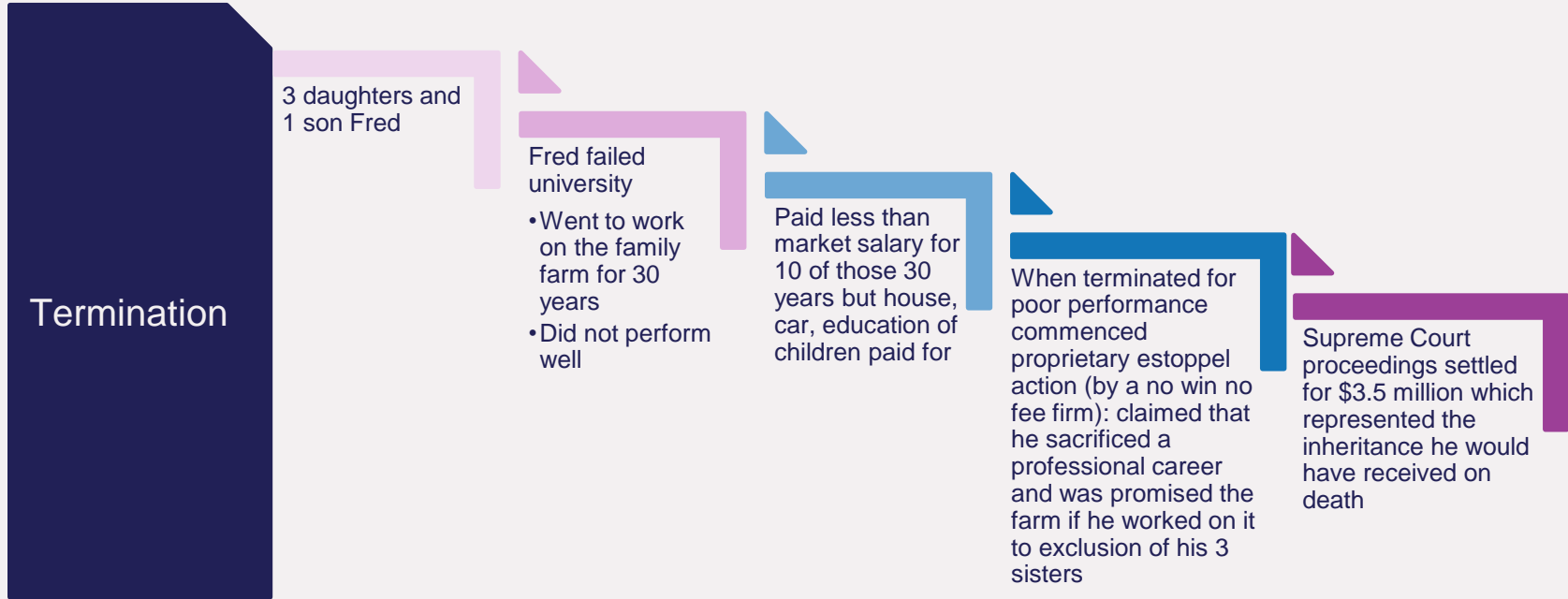
Key issues –

- Dealing with “heritage” assets
- inheritance breeding complacency
- Family Provision Applications



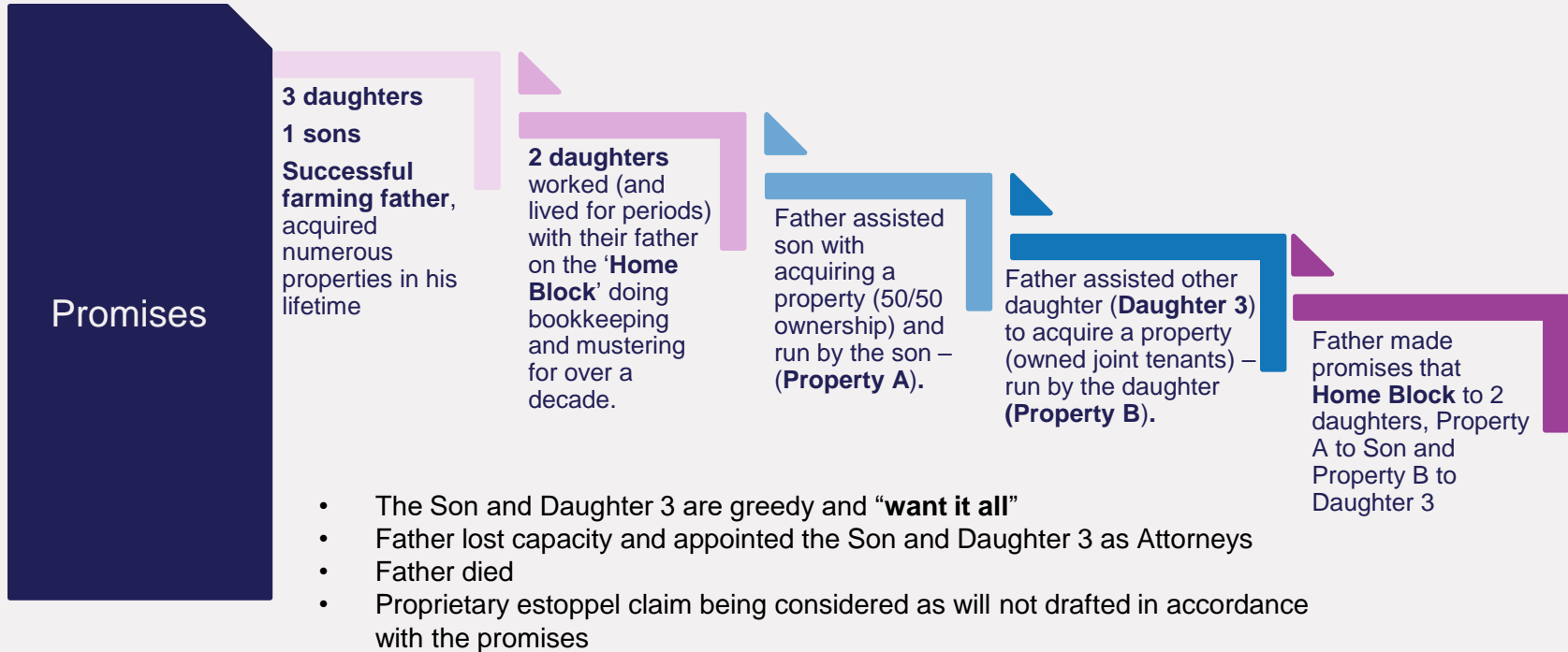
War Story No 2

(geography and sector altered to protect the greedy guilty)



War Story 3 – Proprietary Estoppel

(geography and sector altered to protect the greedy guilty)



How to reduce the risks?



1. Make adequate and proper provision in your estate plan for a potential applicant.
2. Remove assets from an estate so that the assets from which a claim may be paid are reduced. (i.e. **reduce the size of the prize!**)
3. Manage expectations.

Estate planning - what does it involve?

- Transfer of personal assets. How?
- Via a will
- For superannuation, via a **binding death benefit nomination form**
- Provide for possible incapacity through **an enduring power of attorney/enduring power of guardianship**
- Consider an **advance health directive**



Estate assets include

- All assets owned personally
- Share in a company
- Share of an asset owned as a tenant in common
- Superannuation and life insurance paid to the estate
- Interest in any partnership
- Right to recover debts (including loans or UPEs)
- But do not include:
 - Assets owned as a joint tenant
 - Assets held in a trust or company
 - Superannuation and life insurance paid directly to beneficiaries



Entity structures and control of assets

- How are assets commonly held?
 - Sole trader
 - Partnership
 - Discretionary trusts/unit trust
 - Company
- How assets are held has a **significant impact on succession of entities**, and:
 - how much control the testator has over the passing of those assets on death;
 - the tax implications of the death of the testator and the role of the executor and the role of the executor after death;
 - the exposure of those assets to litigation risk.



Passing control of entity structures

Discretionary trusts – dealing with

- The power to appoint and remove the trustee – appointor, principal.
- Control of the trustee (or corporate trustee if relevant).
- Ensuring intended beneficiaries are, in fact, beneficiaries.
- Resolve issues with loans or unpaid present entitlements.
- For all of the above - read the deed and review the financials!

Companies – dealing with

- Passing control of shares.
- Litigation risks where shares form part of estate.
- Consider use, or impact of, shareholders' agreement, constitutions or rights attaching to shares.

Partnerships – dealing with

- Termination of partnership on death.
- Terms of partnership agreement – need for one where individuals in partnership and use of a continuity clause.



The use of testamentary trusts

Testamentary trusts

- are tax effective (particularly where minor children)
- offer asset protection
- protect against risks (except those associated with estate litigation)
- offers matrimonial settlement protection for bad genetic selection by children





Proactive Planning

Estate planning tips

- Joint tenancy v tenants in common
 - The rules of survivorship with joint tenancy can ensure assets do not pass into an estate
- An appointor or not?
 - Where trustee (or control of trustee) is the same, consider if appointor role needed
 - If being used for asset protection, use of trusted advisors or trusted friends can be critical
 - Ability to use a company appointor linking control of that company to shareholdings and a bespoke drafted constitution or governing agreement
- Use of South Australian trust deeds
 - 80 year life span of Queensland based trusts
 - No rule against perpetuity in South Australia
- Perhaps careful use of gifts and loan backs



Family Business Charter and Deeds of Family Arrangement

- Family Business Charter
 - Useful to guide decision-making, outline answers to tough questions and enhance family (and therefore business) communication
- Deed of Family Arrangement
 - Binding/non-binding agreement regarding business, assets and management transition
 - Often deal with:
 - Property ownership
 - Business assets
 - Responsibility for decision-making
 - Options to purchase





Take Home Messages

Final tips and traps

Tips and traps

Ensure there is a "sign-off" from all family members in the initial discovery phase, that all aspects/consideration of the transition plan have been identified/addressed before a consensus is reached

Review structure to confirm it is right for the next generation including for reasons of asset protection. If not, in line with the need to consider tax and duty considerations, consider a restructure.

If an advisor "opens up the can of worms" ensure they have the knowledge, skills and strategies to achieve a successful resolution/outcome.

Is there an "independent voice in the room?" - Independence is often a key to a successful outcome.

Plan and start the process early. Follow due process – creating an agribusiness legacy.

Consider the use of family business charters.



Take Home Messages

1. Avoid being a lawyer's dream
2. If you are happily married with no depressed, estranged, drug taking children, thank the lord or your relevant god or touch wood as that has become a rare package
3. Procrastination – don't be a Robert Holmes à Court or a Ken Talbot
4. A reality risk assessment is required – litigation does happen in “nice” families
5. Avoid surprises
6. Family communication is the key – pillow talk can be unhelpful with spouses/partners of children. It is all about creating guard rails to enable legacy businesses to endure past the third generation curse
7. Some issues may be insoluble because there has been too much water under the bridge for too long but never give up
8. Honour promises and avoid estoppel claims
9. If not you – then who? If you do not address estate planning – you are leaving a mess for your family to sort out
10. Funeral arrangements – do not leave it to grieving family who are not thinking clearly – where, how, music, wake



How to encourage the planning process to start

Ann Sherry when speaking about the importance of change in any organisation quoted Rod McGeoch:

“Status Quo is Latin for bugged”

Pastor Basil King:

““Be bold and mighty forces will come to your aid”

A bank condition may be a sufficient incentive



Hamilton Locke Private - wills and estates offering

Areas:

- Estate planning
- Estate administration
- Estate litigation (including attorney actions)
- Asset protection and structuring advice
- Tax and duty advice (where not provided by the client's accountant)
- Entity establishment
- Wills
- Enduring powers of attorney/enduring guardianship
- Advance health directives
- Superannuation advice
- Trusts advice



Hamilton Locke Private - succession planning offering

- Manage a succession planning exercise for families
- Negotiate family business charters
- Prepare deeds of family arrangements
- Provide tax advice (including revenue law and restructure advice)
- Negotiate and prepare commercial documentation to support business/entity succession including:
 - Shareholders' agreements
 - Unitholder agreement
 - Partnership deeds
 - General ownership agreements (i.e. land ownership agreement)
 - Participation agreements (covering myriad of trusts)



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Having been in practice for 43 years, Brett has had deep experience in corporate law, property, estate succession and tax planning. Prior to joining Hamilton Locke, Brett was a partner at Jones Day and Chairman of Partners at McCullough Robertson.



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Thank you.

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THANK YOU

For our mates in the bush

