

Who gets the farm?

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The fairness principle is set out in the Family Protection Act 1955, which provides that the deceased should make “adequate provision for the proper maintenance and support” of family members. Where adequate provision is not made the Court can alter the will, following application from an eligible family member.

A recent case *Talbot v Talbot* [2016] NZHC 2382, illustrates how the Courts deal with this

tension, and provides practical guidance for the will maker, their family, and advisors on how to ensure their wishes are respected and ultimately followed. The case is particularly relevant to families where their wealth is concentrated in a single asset; such as a farm, home, or business, but where the intention is to leave that asset to one of the children.

The facts involved a farm, three children; a son identified to take over the farm, and two daughters whose lives had taken them elsewhere. The son had worked on the farm for 25 years, the last fifteen in partnership with his parents, as owner of half the farm (albeit with significant loans from his parents). Both parents died within a year of each other. Their wills made the following bequests: to the son they left the remaining half of the farm and forgave much of the debt on the half sold to the son years earlier. The remainder of the estate was left equally to their daughters. In financial terms the son was left two thirds of the estate while the daughters received about 15% each. A claim was brought by one of the daughters, seeking orders to better provide for her.

In the circumstances the Court found that despite the disparity the parents had not breached their moral duty to provide for their daughter. Of particular importance to the Judge was that:

The parents' intentions were made clear long before their deaths, and remained consistent thereafter. Although unequal, in this case a 15% share was a significant inheritance in its own right, being over one million dollars, and sufficient to meet the "proper maintenance and support" test, the efforts of the parents to maximise "off farm" assets that were ultimately passed on to the daughters, and the daughter did not appear to have any real financial or economic need for a greater share.

Consequently the court dismissed the daughter's claim and left the parents' wishes intact.

What are the lessons here? The central lesson this case illustrates is that estate planning can be complex, sometimes requiring significant consideration and planning, often well before the retirement years.

Where wealth is concentrated in a single asset and it is intended the asset be retained in the family (rather than sold and profits distributed), there is a real risk that unequal treatment will arise if the asset is left to an individual. While most parents would love to treat their children equally it's not always possible.

Starting the process early is important. This includes communicating wishes to family members and where possible selling down stakes in the asset or related assets over a reasonable period while still alive. Doing this is good succession planning anyway but it also assists to build non-core assets which would form the part of the estate that provides for others. In order to keep on the right side of the Family Protection Act principles, some provision for other family members would normally need to be made.

Professional advice is also crucial. Lawyers, accountants, bankers and investment advisors often all play important roles here.

If you would like to discuss your situation and how we can best achieve your wishes for the next generation, please get in touch with us, soon.