BUSINESS

Trust or company?

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More than 50% of farms in New Zealand are owned by discretionary trusts. Rural law specialist Ian Blackman expects there will be an increase in court cases because those trusts are often not correctly managed.

The BlackmanSpargo partner wrote the book, Keeping Farming in the Family, A Guide to Succession Planning. He says he wrote it after dealing with cases of poor planning in the farming sector, and says one of the things that goes wrong is the people who set up the trust lose control.

He likened setting up a trust and then failing to administer it properly to leaving all the gates open on the farm. The idea is right; the execution is not.

Normally the owners set up the trust as a vehicle for their estate plan. At that time they should include a memorandum of wishes, which is where they can clearly state their wishes for their assets, Ian says.

It's important to use the memorandum of wishes as a guide for the trust, he says, which means the family needs to be in control of making those decisions. While he recommends trustees seek advice from professionals, he says those professionals shouldn't be included as appointors. In his firm, lawyers are only included as appointors in rare cases when the usual options are not available.

"You want to be able to make a decision as a family without giving the professional that power," he says.

It's also important the husband and wife, or whoever is setting up the trust, have a will as part of their estate and succession plan.

Farming families should start early, he says, to ensure succession that caters for the parents financially and emotionally as well as treating the non-succeeding family members fairly.

His preference is a limited liability company owned by a discretionary trust. That structure allows the parents to sell shares of the farm to the succeeding child over several decades. This makes it affordable for the succeeding child as well as looking after the parents and providing for fair distributions to the non-succeeding children.

"Any attempt by a farmer to use a trust as the succession vehicle is, in most cases, destined to fail," he says.

"The transfer of shares in a company that owns the farming assets to the successor, over time, is clearly the best way."

Rural law specialist Ian Blackman says farming families often lose control of trusts.

The process is achieved over decades and requires a plan and a commitment by the owner and the successor, he says.

"A lot of advisers in succession planning say 'let's (the whole family) get around the table and talk about it,' but that is tantamount to saying 'we need your permission'. The point at which parents ask for permission is the point at which they lose the plot."

Instead, Ian recommends parents use advice from their accountant and lawyer, and input from the succeeding child, before putting together a plan they can put to the non-succeeding children.

This doesn't mean the children should be entirely excluded from the process. Ideally the family should have been talking informally about the succession plan from an early age so they all understand the process and the reasons for the decisions made, he says.

"It's never too early to put the legal structures in place and talk to all the children about succession when they are young."