



LEGACY LAW

Protecting the assets in your family tree

### **(E)stop(pel) making sense**

You may ask yourself, "What is that beautiful house?"

And you may ask yourself, "Am I right, am I wrong?"

And you may say to yourself, "My God, what have I done?"

("Once in a Lifetime" – Talking Heads)

You may have asked yourself "how will my adult kids (with their own families) share the fruits of my life's work?" And you may say to yourself "My God, what have I not done?"

Have you noticed an increased number of articles about families having difficulty sharing assets (Cue Clothing – the Levis family, the Murdochs, the Pratts)? It is nothing new sadly. Cain and Abel, anyone?

The more traditional way for family disputes to happen in Australia was to wait until a parent died and then claim their Will did not make adequate provision for you – some call it "family law for dead people"!

However, this requires patience (til the person dies) and the increasing risk that your claim may not be successful if the truth is you have been very well provided for through an education, financial support etc. Not everyone has that patience and sometimes a dispute should be heard now rather than later. This often comes up when an adult child has worked in a family business or farm and feels that an equal division of that asset among themselves and other siblings is manifestly unfair given their respective contributions to that asset.

Since the 1980s, lawyers have been dusting off a nineteenth century concept of "estoppel", to assist people who claim that they relied on certain facts (statements, promises, actions), to their detriment, and now are reasonably entitled to expect that other parties will honour certain "promises".

We have learned from doing a lot of family dispute work to look for such expectations and even smoke them out so we can deal with them early before they are too difficult to unravel. Without appropriate acknowledgment, the issue cannot be properly dealt with. As a school friend of mine told me about poker, "you cannot see a blind man"!

We also see both sides and that helps us find middle ground and explore options that may be acceptable or save face. Sometimes, we act for the child who put their dreams on hold to work

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around the clock for below-market pay to manage a farm in a drought or a business through an economic crisis. Sometimes, we see an entitled child claim they were promised full control and present one side only of alleged discussions. The historical truth will not simply and with relief come out in a Court. Timelines can be blurry, honest recollections of the same discussion are genuinely different and accusations, once uttered, cannot be taken back.

It does not help that families often informally document their arrangements, if at all. Discussions are not all out in the open and sometimes there are secrets and alliances. Not all promises are intended to create binding legal obligations. On top of that, families often have unacknowledged rules or unspoken assumptions. In addition, there is usually a lot of emotion and different perspective. Why would anyone want to work in that area?! I have spent a lot of time thinking why I crave making an impact in this area but that is for another day.

I read an analysis in the AFR last weekend about the latest high-profile dispute which closed with a quote from a lawyer, “they’re really, really hot areas of conflict. The sooner they can get into the mediation process, the better the chance of everyone getting out alive”.

I have to say, lawyers often do not aim high enough. Why not aspire to being able to have open discussions about family matters, make financial decisions together respectfully and if that fails, after training and informal attempts, agree to disagree well? How about “Get out with important relationships intact and even thriving”?

I understand that it is all too easy, if your brother or sister is not replying to your requests for financial independence in an email or at a family meeting, to decide that it is too hard to make progress and ask a trust-busting lawyer to get your rightful share of a trust (which is discretionary, not fixed – another story there). That way lies a last-minute agreement at mediation, if you are lucky. The better chances lie with prevention, rather than cure. We all know that but the medicine can be less palatable than the disease. It does not have to be.

The good news is that many families anticipate these risks, take advice from people who are not in the weeds with them and have seen more and resolved similar situations, document plans which have clear roles (with appropriate commercial remuneration), regularly meet to discuss and deepen relationships, build a family culture and have some emergency plans as life rarely goes smoothly or as expected.

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So, if you have a family business or asset, what is going to be your first step? What discussions can you facilitate to manage expectations that would make you all feel more positive about sharing an asset without rancour into the future? Can you model how to have a difficult conversation and be clear that family relationships are as important to you as financial assets?

Be warned that you may have to have a grown-up conversation about possibly separating assets so that adult children can keep their relationships connected. This can be done with an agreed valuer and paid out over time in a way that does not kill the golden goose.

If the discussion has not gone well for some reason in the past, what are you going to do differently this time? Might some more preparation or an experienced facilitator assist?

You can of course do what many do and leave them to fight it out with separate lawyers. Know this, if you choose this path, they and their families are unlikely to be able to share time under the same roof or at the same table.

If you would like to know more, we have written a book about this called “Be A Better Ancestor – Build one of the Great Families”. You can find it [here](#).

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