Business Clinic

Whether it's a legal, tax, insurance, management or land issue, *Farmers Weekly*'s experts can help

How do we handle partnership shares and care home fees?

Q My husband lives on our family farm with his father and mother. His father has a 50% share in the farming partnership; his mother and grandmother each have a 25% share. His grandmother has had to go into a local nursing home due to loss of mental capacity, severe dementia and a high risk of falls. She is a temporary resident there, not receiving medical care, but more for residential purposes. She doesn't fit the criteria for NHS-funded nursing care. We cannot find the answer as to whether the family farm must pay for her care in the nursing home. The farming finances are tight.

EVRYMMNT/SHUTTERSTOCK

Jermaine Smith
Associate
Thrings

A Under the Care Act 2014, the local authority (LA) is under a duty to assess both the care an individual requires and their financial resources for funding that care. It will then decide what that capital contribution towards their care should be.

Generally speaking, in England, an individual with assets and savings of more than £23,250 will be required to pay for their care. Individuals with assets of more than £14,250 but less than £23,250 will be means-tested and may have to partially fund their care.

Those with assets less than £14,250 will only contribute what they can afford from their income. The rules vary for those in Wales.

Some assets can be classified as "disregarded capital" in the LA assessment, meaning the assets will not be included in the assessment to calculate how the care should be paid for.

A share in a farming partnership is not classified as disregarded capital and would be brought into account in the LA assessment.

On the facts presented, the share in the farming partnership would, therefore, be included in your grandmother's case. If her assets exceed £23,250 (after being assessed), she will be required to pay for her care.

Q Is there a way for us to take her out of the partnership, as she doesn't have the mental capacity to make decisions?

It is not clear whether the partnership has a formal agreement in place. Modern, well-drafted partnership agreements should include provision for loss of capacity of a partner.

This could then allow the remaining partners to give notice (or be deemed to give notice) to the partner who has lost capacity. Making use of such provisions allows the remaining partners to act without needing to obtain a court order.

If there is no partnership agreement or suitable provision regarding loss of capacity, your grandmother could be retired following an application to the court for an appropriate order.

There will, of course, be costs associated with the application, in addition to court fees, should you decide to instruct a solicitor.

Q Can we restructure the partnership if all agree this? My husband's father has power of attorney for grandmother's affairs.

The retirement of a partner, whether under the partnership agreement or by court order, will not necessarily transfer the retiring partner's capital to the partnership (for example, the partnership capital will not automatically be restructured). As your husband's grandmother has lost capacity, she is unable to make significant gifts herself, including transferring her partnership capital.

A power of attorney confers only a very limited authority to make gifts on someone else's behalf (for example, birthday and Christmas presents). It would not give authority to make significant transfers of partnership capital, and any proposed transfers would require approval from the Court of Protection.

Whether an application to the Court of Protection would be successful will depend on your grandmother's circumstances and all the relevant factors.

Even if the application to restructure the partnership was successful, the NHS or LA might still set aside the gift – however it is made – under the deprivation of assets rules. The care fees would be calculated as if the assets were still owned.

The *Charging for Residential Accommodation Guide*, published by the Department of Health and Social Care, offers useful guidance on how business assets should be treated by the LA. It states that while the share in the partnership (a business asset) does not fall into the category of disregarded capital, it can be treated as such for a "reasonable" period of time.

This is on the basis that your grandmother should be allowed a reasonable period in which to sell, or otherwise realise, the partnership share. Whether that is practical will depend on the remaining partners' ability to realise sufficient funds to purchase your grandmother's share of the partnership.

In what way does mental capacity affect BPR?

Q Is business property relief (BPR) from inheritance tax (IHT) available on the assets of a farming partnership on the death of a partner who lacked mental capacity at death, so was not actively involved in the business? The business was carried on by the remaining partners, who also held a lasting power of attorney (LPA) for the partner lacking capacity.

Craig Tolliday
Associate director
Baldwins

A An LPA can be a particularly useful tool to have in place. In the above scenario, assuming that the LPA had become active due to the mental capacity of the partner, those appointed under the LPA in essence "stand in the shoes" of the partner.

The actions and steps taken by those appointed can, therefore, have a significant effect on the IHT position of the individual concerned.

From a BPR perspective – assuming that those appointed are all involved in the management decisions of the farming partnership – this should ensure the partner lacking capacity is effectively still trading at the time of death, which should assist with any BPR claim on the partnership assets.

Similarly, if the partner lacking capacity occupied the farmhouse – and those appointed under the LPA continue to occupy or take up occupation of the farmhouse in order to care for the partner, it could assist with any agricultural property relief claim on the farmhouse.

Given this, it is extremely important to ensure that great care is taken in drafting any LPA and that the wishes or instructions of the individual are made clear, as any failure to act upon these could have a significant effect on IHT.

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What should I consider for reservoir development?

Q I am considering creating a reservoir on my land to irrigate vegetable crops. I have heard that additional income can be generated by importing inert materials. What does this mean and is this really the case? What else do I need to consider? Is there any funding and do I need planning permission?

Jack Sharpe
Associate
Carter Jonas

A You're certainly not the only farmer struggling with the unpredictability of the weather. Many are looking into abstraction licences and others are exploring opportunities to create a reservoir to store rainwater for irrigation.

You need to properly plan where the reservoir is to be constructed, considering the water requirement, availability, reservoir size and site suitability.

Before getting too far down the line, it is imperative to ensure you have an adequate water source. Engaging in early discussions with the Environment Agency (EA) is essential, as it will have the final say on the details of any water abstraction licence.

The grant funding window has unfortunately closed. However, it is always worth monitoring the farming press, as this may change.

You are likely to require planning permission. There are some exceptions that fall within permitted development – in our experience, though, these are limited.

This is particularly the case when the importation of inert materials or the extraction of minerals for sale off-site is to provide an income stream to fund the construction of the reservoir.

However, this adds a further layer of complexity, so you will also need planning permission for this also.

Colleagues in the minerals and waste management team advise that, in addition to gaining planning permission, there are several other essential steps. First, you will need to gain the correct environmental permit to enable you to import, dispose of, or recover waste materials on your land.

There are various permitting routes (managed by the EA), each with its own pros and cons. A materials management plan (MMP) controlled by the CL:AIRE Protocol governing waste classification will also be required.

The time and cost associated with obtaining a permit or MMP vary significantly and will depend on the site and the permitting route you choose.

We estimate you would need at least three months to obtain an MMP and up to 18 months to obtain a waste recovery permit. Costs again depend upon the permitting route taken and the size, nature and location of the proposed scheme.

To ensure that it is built to the correct standards and complies with relevant regulations, you will need an engineer's design drawing for the reservoir. I recommend that you get specialist minerals/engineering advice for your circumstances.

With all of this, the costs are likely to reach the tens of thousands – though there remains real profit-making potential. It's not a straightforward process, and I recommend considering the investment in the wider context of your farming business before deciding whether or not it's the right step.

If you decide that it is, it might be worth investigating a joint venture with a neighbouring farmer or waste management operator – you share the benefit and profit but, more importantly, the initial capital expenditure.

Your first step should be to seek expert advice – as with any project including minerals, which is a very specialist area. You need to make sure you are not taking any unnecessary risks – in terms of finance, compliance, safety or otherwise.