

# CRYING OVER SPILT MILK



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**“Farming cases are notoriously difficult to resolve... the case is almost, although I believe not quite, insoluble. It is a case where it is far easier to criticise a suggested solution than to devise one.”**

**Mr Justice Wilson R v R 2004 1 FLR 928.**

Farming divorces can be complex. Typically asset rich and cash poor, they involve property that has been in one family, often, for hundreds of years. Mr Justice Munby in *P v P* in 2004 summarised farming cases as “excruciatingly difficult” and went on to talk of the “creative ingenuity which may on occasion be necessary if a fair and just result is to be achieved.”

In *R v R*, Mr Justice Wilson had to deal with a situation whereby there was no means, either by immediate payment or by borrowing, to provide a lump sum for the wife to rehouse. In the end, he ordered the husband to pay £30,000 immediately and then £225,000 over 20 years (charged on the husband’s shares in his business). In *P v P* Munby J did not order a sale of the farm and the wife received very little.

What is abundantly clear from the case law is that farming cases need creativity and flexibility. Unfortunately, due to

the ever increasing pressure on the Family Justice System and its (lack of) resources, this may not always be found in the family court. Parties in farming cases need to approach litigation with care or they could be faced with disaster. Litigation is a lottery and there is an increasing need for family practitioners to explore alternatives to litigation. Mediation is one of those alternatives and it can be extremely constructive and effective. It also buys certainty and enables the parties to retain control.

Mediation can preserve relationships and ensure that both parties feel heard. It enables one or both parties to air their feelings about a particular issue. The third party impartial mediator encourages constructive discussion and prevents clients from falling back into old habits. If the parties have children, the preservation of the relationship is invaluable.

Mediation is extremely flexible which is of particular use in farming disputes which can often involve more than two people. There may be a child, a sister, or an uncle involved and mediation can address this. Co-mediation, where there are two mediators, can ensure the power balance remains on track.



Resolving farming cases requires creativity and an assessment of the different options. A dialogue needs to be encouraged between the parties to try to work out a possible resolution. There are many issues that need to be considered such as:

- **How is the farm held? Is it within a company structure and are there minority interests? Are assets held in trust? Is the family home a farmhouse that is held on trust? Is that trust nuptial?**
- **If there is a partnership – is all the property partnership property – how do you distinguish between partnership property and separate property even if the owners are co-owners?**
- **Finance may need to be raised against the retained farm or land and what are the cash flow implications of this?**
- **Land might need to be sold to retain the majority of the farm to be passed on to future generations and what are the practical implications of doing this? For example; are utilities and access points being cut off in the division of the land and do new rights of way need to be created?**

- **Are there separate farm buildings that could be developed and hived off as part of a settlement both in order to create liquidity but also to provide a separate income?**
- **Are there opportunities to diversify to raise money – for example solar panel leases to generate regular income or battery storage arrangements?**
- **What are the age of the parties? Are they contemplating retirement from farming? Does the Lump Sum Exit Scheme apply? Could this raise capital?**
- **What are the cash flow and liquidity issues facing the business now but also as a result of the options being discussed?**
- **What are the tax implications of the different options available to both parties and are there more tax efficient ways of dealing with the assets which meets each parties' needs?**

These questions, amongst others, form a crucial part of exploring how a settlement might be achieved and will also, in most cases, require expert third party evidence from accountants and valuers. Mediation provides a forum for

obtaining this information and makes it accessible to both parties.

**Using the mediation process enables both parties to retain control and decide their own fate.**

It buys certainty and avoids entering into a process which could result in a contested hearing. As a process, it can give power back to the clients who know the assets and know the reality of life on the ground.

Finally and most importantly - find the right mediator. An experienced family lawyer with knowledge of the type case that is being dealt with is key. A family lawyer will know how these cases are being dealt with in the courts and also have the knowledge to think creatively about solutions. Does that lawyer mediator understand farming families and different business models (e.g. partnerships, trusts, family investment companies, limited companies)? Do they understand inherited wealth? Do your research and match the mediator to the case.

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