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NEWSLETTER

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WILLS WEEK

National Wills Week (18th –24th Aug) served as a reminder to organise or reorganise our personal affairs. Hence the first few articles in this edition are dedicated to wills, enduring powers of attorney, and trustees of estates.

THE STATE AND YOUR (E) STATE

The *Property (Relationships) Act* has made dramatic differences and widened the claimant category for estates, but the basic fact remains that without a will the inheritance you leave your spouse/partner or children may be the inheritance they never wanted.

Despite the very modern flavour of the *Property (Relationships) Act*, the fact is that if you die without a Will (intestate) the State intervenes. A Court will determine who looks after any dependent children (minors) if a surviving parent is unavailable or unfit and any property will be distributed or held in trusts according to a statutory formula set out in the *Administration Act 1969*.

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Illustrations when a Deceased with No Will Leaves ...

- a spouse (defacto partner) and children:

Many are under the impression that the surviving spouse (or partner) would take all the deceased's property, especially if the children are minors. This is not so. The spouse (or partner) is entitled to personal chattels with some exceptions, and a prescribed or statutory amount of \$121,500 plus interest from the residue of the estate. The remainder is then divided one third to the spouse or partner and two thirds to the children.

- a spouse (defacto partner), no children, but one or both parents:

Here again it is often thought that the spouse or partner would take all the deceased's property. The spouse or partner takes the personal chattels - again with some exceptions - and from the residue of the estate a prescribed or statutory amount plus interest goes to the spouse or partner. Any remainder is divided two-thirds to the spouse or partner and one third to the parents or, if only one parent, to that parent.

- a spouse (or defacto partner) only:

Generally the entire estate is taken by that survivor.

- children only:

The estate is held on trust for the children.

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- one or both parents only:

The estate is held in trust in equal shares for the parents, but if there is only one parent, for that parent.

- no one:

In this situation the Crown takes the estate. It is possible that any dependents (family or not) and anyone else whom the intestate might have been expected to make provision for, may be given a share of the estate.

These examples are very general and are by no means exhaustive. There are qualifications and restrictions, particularly in relation to defacto partners. Creditors may also have rights. Unravelling an intestate estate can be extremely complicated.

If you think the above is complicated then you need to consider how the new *Property (Relationships) Act* will impact on existing Wills and intestacies. The new law gives the surviving spouse the right to apply for a division of the relationship property under the Act or to inherit under the will.

If you do not have a Will - make one! If you do have a Will, it may need updating in line with the Property (Relationships) Act. We will guide you through the Will making process in conjunction with general estate planning advice to ensure there is no unnecessary intrusion by the State into your affairs after death. A comparatively small investment now can significantly reduce costs and hassle in the future.

THE GOOD, THE BAD, AND THE ENDURING POWER OF ATTORNEY

What happens when a person becomes mentally incapacitated and/or loses the ability to communicate. We commonly associate these symptoms with the often unforgiving effects of age, but anyone is at risk due to an accident or illness. Just imagine if you're involved in an accident. Who is responsible for looking after your

wellbeing and property in the event that can not do so yourself? And how do you ensure that the right person is responsible for these things?

The answer to these questions may well lie in the timely and considered execution of an Enduring Power of Attorney.

The Documents

Solicitors involved in estate planning have long advised their clients to execute an Enduring Power of Attorney ("EPA") in conjunction with their Will. An EPA allows a person with full mental capacity ("the donor") to grant to another person ("the donee") the power to deal with the donor's property or make decisions about the donor's welfare if they become mentally incapacitated or unable to communicate his/her own wishes. (NB: An EPA in respect of property can take effect before the donor becomes mentally incapacitated if the donor so specifies).

Validity

An EPA remains valid until it is cancelled by the donor. Cancellation is easily achieved while the donor retains full mental capacity, but may pose major difficulties if this is n't the case.

If a person becomes mentally incapacitated without an EPA, family members and/or loved ones can apply to the Family Court for the power to look after that person and their property. This can be costly and difficult for all involved, and can be avoided by the granting of an EPA. The granting of an EPA also means that the donor can ensure that the right person has the power to make decisions that could have life altering consequences.

Clearly, there is great benefit in granting an EPA. However, the power granted to a donee under an EPA is considerable. In the event of

mental incapacity, a donor becomes vulnerable to potential misuse of that power by the donee.

The Cons...

A recent discussion paper identifies a number of ways in which EPA's can be misused, including:

- EPAs being executed by donors who are already mentally incapacitated;
- Embezzlement of the donor's funds;
- Donees helping themselves to, or disposing of, the donor's property without the donor's knowledge or consent;
- Failing to obtain necessary care for a donor, or failing to institutionalise the donor to avoid diminishing the estate; and
- Premature institutionalisation of a donor for convenience.

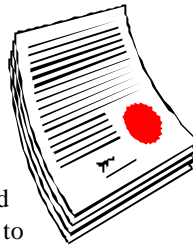
The Pros...

The risk of misuse is real and should be kept in mind by all potential donors. These are serious concerns and it may be that a law change (as suggested by the Law Commission) is required. In the meantime, it must be remembered that EPA's can have substantial benefits, and that many concerns may be avoided by ensuring that EPA's are executed in a timely fashion, with care, and after appropriate discussion with a solicitor, family and loved ones.

OBLIGATIONS OF TRUSTEES UNDER A WILL

Many of us have acted as an Executor and/or Trustee under a Will. Not so many of us are aware of the onerous obligations we have in those positions.

An Executor is obliged to execute the terms of a Will in strict accordance with the deceased's ("the testator's") instructions. A trust under the Will ("the testamentary trust") only arises if expressly declared by the testator. A common



event which sets up a testamentary trust is when children are to receive their share of the estate at a certain age and they have not reached that age when the testator dies. The executor then becomes a trustee with responsibility to administer the estate ("the trust fund") until it can be paid out to those beneficiaries.

Reality Check

The overriding obligations imposed on trustees are called fiduciary obligations. They sit as an umbrella over everything a trustee does.



They can be summarised as follows:

Firstly, trustees must never put themselves in a position of conflict between their duty as trustees and their personal interest. They cannot profit from their role as trustees. So, for example, without specific authorisation or the consent of all beneficiaries, it would be unusual for trustees to buy property from or sell property to the estate. Trustees cannot, without authority, be paid for their work. (Out of pocket expenses are another matter).

Secondly, trustees have a duty to act in good faith and in the interests of the beneficiaries. At its most basic this obligation means trustees cannot sell the estate's property and pocket the proceeds.

Thirdly, trustees cannot delegate their powers and must act personally. All trustees should be consulted about matters and agree before taking action.

Further Do's and Don'ts

So what do trustees do? They must competently manage and administer the trust fund. More specifically:

- Trustees must be acquainted with the terms of the trust and all associated documentation. This is not as difficult when the trust is set up under the terms of a Will. Any specific instructions in that Will must be adhered to.

- Trustees are bound by powers given to the trustees under the *Trustee Act 1956* with any specific powers mentioned in the will.
- Trustees must act impartially between all beneficiaries and different classes of beneficiaries. So, if the estate has income beneficiaries ("...to pay all income to my wife during her lifetime...") and capital beneficiaries ("...and after her death to divide the balance equally among my children...") the trustees would be unwise to invest all the estate funds in high income, low capital growth investments.
- And lastly, trustees must keep proper accounts and full records of all their decisions.

So if you are a trustee/executor of a Will, you have fiduciary obligations which will guide all your actions and a specific duty to manage and administer the trust in a competent manner. If you are in any doubt about your obligations and duties, seek professional advice.

UPDATE ON PERSONAL PROPERTY SECURITIES ACT 1999

The Personal Property Securities Act 1999 (PPSA) came into force on 1 May 2002.

What is the PPSA?

The PPSA is new legislation that reforms the law relating to security interests (e.g. loans, etc) in personal property. Many people would be aware that it has been possible for car buyers to check online whether money is owed on a particular vehicle, but until now a comprehensive register for recording finance on items such as whiteware and furniture was not available. That has now changed with the PPSA.

In the Act, personal property is defined as almost all property other than land. From 1 May 2002 all security interests taken in personal

property will be subject to the PPSA.

Generally security interests will need to be registered to ensure that they have priority over other security interests on a particular piece of personal property. While registration is not compulsory under the PPSA, registration will generally ensure priority over subsequently registered security interests.

Law Changes under the PPSA

The PPSA replaces the *Chattels Transfer Act 1924*, the *Companies (Registration of Charges) Act 1993* and the *Motor Vehicles Securities Act 1989*. The significant difference between the PPSA and the previous law is that the form of security taken is no longer relevant and the same rules will apply to all types of security arrangements. Some security interests that were not able to be registered under the previous law will now be subject to the PPSA, for example, hire purchase agreements, retention of title clauses in supply agreements, and finance and operating leases for a term of more than one year. Registration of these types of agreements and leases will be necessary to ensure the priority of security interests.

Personal Property Securities Register

At the heart of the new legislation is a searchable register called the Personal Property Securities Register (PPSR) which commenced operation on 1 May 2002. The PPSR is a form of electronic notice board recording specific details of security interests held in respect of personal property. You can access the register online at www.ppsr.govt.nz

The PPSR will replace *The Motor Vehicle Securities Register*; *The Chattels Registers at the High Court*; and *The Register of company charges at the Companies Office*. These "existing registers" closed for registration on 30 April 2002. Where possible, secured parties on the existing registers have been

contacted by the Ministry of Economic Development to explain how the new PPSR will affect them.

Secured parties will now register security interests in the PPSR with a standard financing statement. Registering a financing statement in the PPSR is one way of perfecting a security interest. Perfection will be critical to protecting the priority of security interests. The general rule under the PPSA is that the first to register a financing statement has priority.

The Transition Period

The wide definition of personal property under the PPSA means that not all affected securities, for example mortgages of shares, are currently registered in an existing register. It is important for holders of security interests to identify those security interests which were not able to be registered previously and to register those interests with the PPSR during a six month transitional period expiring on **31 October 2002**. Retailers and other creditors have until October to finish transferring to the PPSA details of finance outstanding on property they have previously sold. Records which aren't transferred by then will be wiped.

Consumers and businesses will still be responsible for honouring any outstanding payments in such circumstances, but suppliers would lose their priority with other creditors if the items were seized to pay other debts. Because prior security interests are not deemed to be "perfected" until the end of the transitional period, searching will need to be conducted over the old registers and new PPSR for the duration of the transitional period to get a complete picture of all security interests. From the end of the transitional period the PPSR will be the only register to search.

Retention of Title Clauses

Registration of retention of title provisions in contracts for the sale

of goods will be greatly affected by the PPSA. Provided the interest is registered in time, it will have priority for any amounts owing for the purchase price of the secured property. This priority will prevail over other creditors with security interests in the same property irrespective of when those interests were given or registered.

Searching the PPSR

Basically the register will allow anyone to check if someone has debts recorded by entering the name and date of birth or address of the relevant person, or by specific collateral details such as vehicle registration, VIN and chassis numbers. However, according to the Ministry of Economic Development under the PPSA it is illegal to carry out online searches of the register without good reason. Therefore people who check on friends and neighbours out of interest could breach the Privacy Act. You are given some protection due to the fact that people wanting to search have to register their details with the Companies Office to obtain a User ID and Password.

Key Points for Holders of Security Interests

- The PPSA affects a wider range of transactions than existing law e.g. retention of title clauses.
- Make sure that your terms of trade and loan documentation is altered in line with the PPSA.
- Ensure that you have all the necessary information to register prior and new security interests.
- Register new security interests in the PPSR.
- Ensure that all prior security interests are registered in the PPSR before 31 October 2002.
- The maximum registration period for a financing statement is 5 years.

- Search existing registers and the PPSR during the transitional period.

Key Points for Debtors

- Information on all security relating to personal property except land will now be stored in one place - the PPSR.
- Subject to privacy restrictions, the PPSR can be searched by debtor name and other details such as vehicle registration numbers.
- People should search the PPSR before purchasing goods that may be subject to a security interest.
- Secured parties must supply debtors with a copy of a verification statement, unless the debtor waives in writing their right to receive one.
- Debtors can use the debtor PIN contained in the verification statement to demand corrections to a financing statement.

In Summary

The PPSA is a new law that commenced on 1 May 2002 and affects a wide variety of financial transactions. If you think that you might be affected by the law change or your business needs to alter its terms of trade in line with the PPSA, please contact us, we're only too happy to assist.

If you have any questions on newsletter items please contact us, we're only too happy to help.