



BarltropGraham LAWYERS Bulletin

MARCH 2007 • NEWSLETTER FROM BARLTROP GRAHAM LAWYERS

GREETINGS

The New Year has begun well for us with settled staff, fine weather and enough new work to keep us out of mischief. We hope this will be a “steady as she goes” year, without too much drama. After a great (late) summer, a short mild winter wouldn’t go amiss either.

This issue continues with a range of articles which we hope you find interesting. We try to keep to subjects which cover work we are regularly involved with. In this issue Geoff Baker summarises what is involved in administering a straight forward Estate. Subdivisions and Trusts are also covered. The article on Civil Unions is of general interest – we are not anticipating a huge rise in work in this area.

Throughout the year we receive a number of comments and compliments about our newsletter. These are much appreciated, even if the bulk of them relate solely to the cartoons and jokes!

We hope you have a good year.

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TRUSTS – THE PAPERWORK IS CRUCIAL!

Trusts are a popular choice for people who are concerned about protecting their assets for themselves and for their children. However, the formation of a trust by the execution of a trust deed and transfer of assets to the trust is only the start. A successful trust is one that is regularly monitored by the trustees and where there is a clear paper trail evidencing the ongoing administration of the trust by the trustees.

Why the need for paperwork?

If the trust is not properly administered, there is a risk that it may be seen to have either “lapsed” or that it is simply a “sham”. This usually occurs where the assets which form part of the trust fund are treated by the trustees as if they are their own personal property held for their own benefit rather than assets held by them for the benefit of the beneficiaries of the trust. Given that trustees are frequently both trustees and beneficiaries of the trust, it is all the more important that a clear distinction exists in the minds of the trustees regarding assets which are held by them personally and those which belong to the trust.

Essential paperwork

The administration of a trust will depend very much on the nature of the assets which make up the trust fund. A

trust fund that consists of the family home in which the beneficiaries reside will not require the trustees to do a great deal for so long as that situation continues. If there is a debt owing by the trust to the settlors of the trust (ie. the persons who originally set up the trust and transferred assets to it) then the debt should be gifted by the settlors in annual increments of \$27,000 (for each settlor) until the entire debt has been forgiven. As house prices continue to rise, the gifting process is taking longer and trustees should be vigilant in ensuring that gifting continues as this will maximise the benefit of the asset for the beneficiaries of the trust.

In addition to gifting, trustees should meet at least once a year to review the trust fund and the manner in which the trust fund has been applied for the benefit of the beneficiaries. There may be no need for the trustees to make any decisions but the important point is that:

- a. The trustees have turned their minds to their duties and responsibilities; and
- b. A trustee resolution records how those duties have been discharged over the previous 12 month period.

In the case of trusts that hold income producing assets (such as investment

properties and shares), the matters which trustees should attend to include:

- Regularly reviewing the performance of investments;
- Preparing and filing a tax return;
- Ensuring that the trustees meet at least annually and possibly more frequently, depending on the nature of the investments which they are monitoring;
- Ensuring that any new investments and/or transactions that the trust may enter into are properly documented and supported by appropriate resolution.

Minutes of trustees’ meetings should be kept and particular care taken to record decisions taken concerning investment of trust funds and distributions to the beneficiaries.

Conclusion

In summary, the advantages of keeping the paperwork for your trust up to date cannot be overstated. A trust which is properly administered will provide a much greater degree of protection than one which is effectively dormant because the trustees have not turned their mind to their duties and responsibilities under the terms of the trust deed.

If you have any doubts as to whether your trust is being properly maintained, consult your lawyer.

LEGAL DEFINITIONS – (TRUST DEEDS)

Below are some of the terms commonly used in trust deeds:

Trustee(s): The person(s) who are responsible for ensuring that the trust is administered correctly and who hold the trust fund on trust to be applied for the benefit of the named beneficiaries.

Settlor(s): The settlor(s) are the person(s) who establish the trust and transfer assets to it.

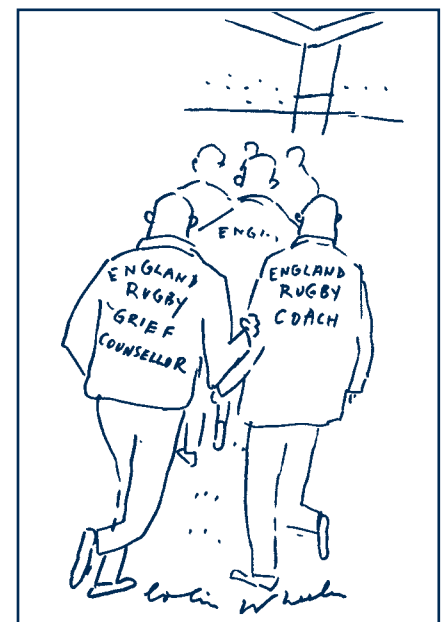
Trust Fund: The assets that are transferred to the trust by the settlor and held by the trustees for the beneficiaries.

Beneficiaries: The persons or entities who are entitled to benefit from the trust fund.

Distribution Date: The date upon which all assets held on trust by the trustees must be distributed to the beneficiaries. A distribution date cannot exceed eighty years from the date the trust is established.

Appointor: The person who has the power pursuant to the trust deed to appoint a new trustee or advisory trustee and/or to remove any or all of the trustees.

Frustratee: The person who set up a trust years ago and still doesn’t understand why? And is too embarrassed to ask!





MANAGING A SUBDIVISION

Subdivision of land is a complex and expensive process that requires careful planning. Oversights in the process lead to delays which inevitably impact on costs. So a subdivision requires a team effort from those involved, your surveyor, the local Council, your lawyer, your accountant and various contracting companies.

Ideally, you should instruct your lawyer to oversee the process from the very start. This will minimise delays by ensuring a line of communication exists between the various parties involved.

Some key issues

If you don't already own the land:

- a. An agreement for the purchase of land that is to be subdivided will need to be prepared. This can be a complex document. In particular, there may be cash flow and taxation issues to consider and your lawyer and accountant will need to work together to ensure those issues are adequately dealt with in the agreement.
- b. A due diligence investigation will need to be undertaken. This

is usually completed after an agreement has been signed as most developers don't wish to incur costs unless they are able to secure the land. The purpose of due diligence is to investigate the feasibility of the subdivision, taking into account the costs, the time it will take and the ultimate return to the developer.

Existing landowners should check whether the current ownership status is appropriate for the subdivision, particularly given tax implications.

Confidentiality: Subdivisions can be a sensitive issue, particularly where neighbours are concerned. Parties involved in the due diligence process should be aware of the importance of not disclosing the proposal to third parties until a decision has been made whether or not to proceed.

Check the title: Your lawyer can provide you with a detailed analysis of the title at the outset. Analysis can include information on restrictions that run with the land (eg. easements) and whether or not those restrictions are compatible with the layout of the subdivision.

Sale of Sections

Regardless of whether the subdivision involves the sale of one or fifty sections, it is prudent to decide at the outset how sales will be managed. This process includes:

- Setting a date for the sale of sections.
- Ensuring the agreements for sale of the sections reflect the stage which the subdivision has reached.
- Briefing and appointing real estate agents.
- Setting the amount of the deposit to be paid by a prospective purchaser and the point at which those funds can be released to fund the ongoing costs of the subdivision.
- Settling on any Restrictive covenants to be imposed on the sections.

Conclusion

Planning and co-ordination are vital for a successful subdivision. Your lawyer's involvement throughout the subdividing process will ensure that delays are minimised and benefits maximised.

REVERSE MORTGAGES

For many New Zealanders, the family home is their most valuable asset. Many people are asset rich but cash poor. Such people are being targeted in marketing campaigns for reverse mortgages. These mortgages are relatively new in New Zealand and have serious implications for the home owner.

Reverse mortgages usually involve a loan borrowed against the equity in the home owner's property. Generally, the loan is repayable on the sale of the property or upon the owner's death. They are particularly attractive to retired people.

Reverse mortgages costs?

Reverse mortgage schemes are often advertised on the basis that there are no regular repayments. Whilst this is true, interest and fees are still charged for so long as the loan continues and are added to the balance, which will ultimately have to be repaid. The interest rate will usually be higher than an average bank loan. There may be

fees in addition to interest, including a valuation fee, commission (eg. to a broker), early repayment charges and other costs which may be payable in the event that the home owner decides to sell the home.

Be aware of the downside

Advertising for reverse mortgages is often presented in attractive terms which suggest that money can be made available to fund things that most people desire such as holidays, home renovations and travel.

While reverse mortgages can make it possible to obtain money from the family home for these purposes, the cost is significant.

Most important, the increasing value of your home may not keep pace with the debt owed under the terms of the mortgage. Interest may compound. The amount owing will continue to increase the longer the loan remains unpaid. This will not present a problem so long as you continue to live in your home.

However, if you wish to sell your home then the mortgage will be repayable and you may find that the amount you receive after repaying the loan is insufficient to enable you to buy another home of an equivalent standard.

Seek advice

If you are contemplating taking out a reverse mortgage, it is absolutely vital that you obtain independent advice from your lawyer, fully understand the terms of the loan and the long term implications for you. Reputable companies offering reverse mortgages will require you to take independent advice before proceeding.

Although the Government has indicated that a code of practice is to be established for reverse mortgages, it is not yet in place. Home owners should be wary of any reverse mortgage scheme which does not state that it is mandatory for them to obtain independent legal advice before proceeding.



THE CIVIL UNION ACT 2004

The Civil Union Act 2004 (“the Act”) has been in force since 26 April 2005. The purpose of the Act is to enable a same sex couple, who wish to enter into a legally binding recognised union, to solemnise their relationship with marriage-like formalities. A civil union, however, is not a marriage. It is still not possible for a same sex couple to marry under the Marriage Act 1955.

The Act has created another type of relationship in the nature of marriage. In many circumstances there is no practical difference in the rights and obligations of couples in marriages, civil unions or de facto relationships. Before the passing of the Act, same sex couples enjoyed many of the same rights and obligations under the umbrella of the de facto relationship status. However, there are now circumstances where a civil union partnership can be distinguished from a de facto relationship and from a marriage. This article mentions some of these.

The Act sets out who is eligible to enter into a civil union and the formalities to be undertaken in order to solemnise and register a civil union. In these respects it mirrors the Marriage Act 1955. Amendments to the Family Proceedings Act 1980 provide for the dissolution of a civil union in the same way that a marriage is dissolved. The following are some of the consequential amendments made to other statutes, or noteworthy lack of amendment to other statutes.

The Property (Relationships) Act 1976 (PRA) has been amended to apply to civil union couples. The new definition of de facto relationship in Section 2D(1)(c) makes it clear that a de facto relationship cannot exist where the parties are in a civil union.

The PRA now applies to civil unions of short duration in the same way as it applies to marriages of short duration. Orders can therefore be made under the PRA for division of relationship property between civil union relationships of short duration. Contrast this position with de facto relationships of short duration where orders for division cannot be made unless the court is satisfied that there is a child of the de facto relationship or that the applicant has made a substantial contribution to the de facto relationship **and** the court is satisfied that failure to make the order would result in serious injustice. So in this respect a civil union partnership is on the same footing as a marriage.

The spousal maintenance provisions of the Family Proceedings Act 1980 have always distinguished the obligations of spouses and de facto partners to maintain one another. Any obligation to maintain the other partner to a de facto relationship arises only when the de facto partners cease to live together, whereas parties to a marriage also have an obligation to maintain the other party during the marriage. The Act now extends to civil union partners as well as spouses, the obligation to maintain during the relationship.

The Wills Act 1837 (UK) still only provides for revocation of a Will on marriage and revocation of gifts to spouses on dissolution of marriage and has not been amended to extend such revocations on entering into or dissolution of a civil union. Therefore, even after a civil union has been formally dissolved, the gifts under a valid Will remain until revoked by the testator, as is the situation with de facto relationships that have come to an end. With a married couple, however, the gifts

under a Will are deemed null and void if, upon the death of the testator, there is in force an order for dissolution and the Will under which the gifts were made pre-dates the order for dissolution.

For the purposes of entitlement to an intestacy under the Administration Act 1969, both marriages and civil unions retain the entitlement until dissolution or judicial separation, whereas the entitlement of a de facto partner ceases at separation when the relationship comes to an end prior to the death of the intestate partner.

In a criminal trial, a civil union partner is a competent and compellable witness against the accused (unlike a spouse).

In a civil matter the evidence of both a civil union partner and a spouse is compellable and competent.

The Adoption Act 1950 has not been amended and therefore it is only a married couple who can make a joint application for adoption of a child.

The Civil Union Act itself contains amendments to other enactments beyond the scope of this article. Many of these amendments simply add the civil union partnership to the existing relationships of marriage and de facto relationships. Where reference is not made in legislation to a civil union partnership, the question may remain: Is that relationship covered by reference to a de facto relationship? If the statute defines de facto relationships in terms of Section 2 PRA, then civil union partnerships will be excluded from that definition.

A Greek and an Italian are arguing as to who has the superior culture. The Greek says, “Well, we have the Parthenon.”

Arching his eyebrows, the Italian replies, “We have the Coliseum.”

The Greek retorts, “We Greeks gave birth to advanced mathematics.”

The Italian, nodding in agreement, says, “But we built the Roman Empire.”

And so on and so on until the Greek comes up with what he thinks will end the discussion.

With a flourish of finality he says, “We invented sex!”

The Italian replies, “That is true, but it was the Italians who introduced it to women.”

Sam was a witness in a burglary case. The defence lawyer asked, “Did you see my client commit this burglary?”

“Yes”, said Sam, “I saw him plainly take the goods.”

The lawyer said, “This happened at night. Are you sure you saw my client commit this crime?”

“Yes”, said Sam, “I saw him do it.”

Then the lawyer said, “You are 80 years old and your eye sight might be failing. Just how far can you see at night?”

Sam quickly replied, “I can see the moon, how far is that?”



ESTATE ADMINISTRATION

INTRODUCTION

People are often unsure of the steps to be taken when a person dies. Different rules apply depending on whether the deceased had made a valid Will or died without making a Will ("intestate").

This article sets out in simple terms the process necessary to administer the estate of a deceased person who has left a legally valid Will.

Firstly, it should be noted that a Will only takes effect on death. This may seem obvious! Until death, the persons appointed to take legal responsibility for administering the deceased's estate – the executors and trustees – have no legal authority to do anything. While someone is living, their Attorneys under an Enduring Power of Attorney for Property are the people responsible for looking after a person's financial affairs if they are unable to do so.

JOINT ASSETS

Any asset owned jointly passes automatically to the survivor regardless of the terms of the Will. This means that any joint bank accounts or jointly owned interests in land pass by survivorship to the other owner. There are usually less formal requirements for the change of ownership to be noted.

THE WILL

It is very important not only that the Will is drafted correctly, but also that it is signed and witnessed correctly. This is why we recommend that Wills are signed in our offices. We can then be certain that the legal requirements have been met.

It is a fact that most home made Wills are invalid because they are not properly signed and witnessed. Also, many home made Wills which are properly signed, give rise to expensive Court proceedings to determine what the Will means.

*Never be afraid to try something new:
Remember that a lone amateur built the Ark.
A large group of professionals built the Titanic.*

PROBATE

If the deceased person's assets (excluding joint assets) include ownership of an interest in land or assets worth more than \$11,000.00 then it is necessary to obtain a Grant of Probate of the Will from the High Court nearest to where the deceased person lived. This involves the executors named in the Will applying to the High Court for a Grant of Administration which will enable them to deal with the assets and liabilities. Probate is a piece of paper signed under the Seal of the High Court with a copy of the Will attached. It directs that the executors can deal with the assets.

Before granting Probate, the High Court needs to be satisfied that the person has died, that the Will has been validly signed and witnessed, and that it is the last Will. The Court also requires an undertaking from the executors that they will administer the estate in accordance with the law and will prepare accounts if required to do so.

While Probate is granted by the High Court, with a properly drafted and signed Will it is usually a relatively straight forward matter which takes about a month to be issued by the Court.

ADMINISTRATION OF THE ESTATE

It is this firm's practice to apply for the Grant of Probate as soon as possible after the funeral has taken place. While awaiting the issuing of the Grant of Probate, details are obtained of the assets and liabilities in the estate. A copy of the Will is sent to all of the beneficiaries who will share in the residue of the

estate. A schedule of the assets and the liabilities is prepared and issued to each of the residuary beneficiaries.

Once Probate has been obtained, the executors can realise all of the assets and make payment of all of the outstanding bills. Once all of the known bills have been paid it is usual to make payment of any legacies and then to make a distribution of funds to the residuary beneficiaries.

Funds are retained in order to meet further liabilities which may arise, including the necessary final taxation liability. Even by using an Accountant, it can still take some months for the Inland Revenue Department to decide that all of the necessary returns have been filed and for it to issue its final assessments. Once the final assessments and a tax clearance have been obtained then a Statement of Account is prepared and a final distribution to all of the beneficiaries is made.

CONCLUSION

This article deals only with a very straight forward Will and Estate Administration. Of course there are as many variations in the course of an estate's administration as there are Wills. This article has set out as simply as possible the basic steps and procedures in administering a straight forward estate. There are many issues which may arrive such as potential claims against the estate by family members, de facto partners and people who have been promised something under the Will. These are complex issues which are outside the scope of this article





EMPLOYMENT ISSUES – THE BILL AND JOHN CASE STUDY CONTINUED

You may recall from the last edition of the newsletter that John believed he had been dismissed from his employment as a mechanic due to his persistent lateness to work. He also believed his employer, Bill, had not discussed this issue with him prior to Bill taking action which resulted in John being sent home from work during the course of his employment. Bill, on the other hand, took an entirely different view of what occurred on the day in question. He believed that he had reasonably discussed John's ongoing lateness with John and had reasonably requested that John catch an earlier bus to ensure that he arrived at work on time. Bill also believed that, following this request, it was necessary to speak to John on several occasions about his lateness, but that this had not resulted in any improvement on John's part.

You may also recall that, for John to successfully establish that he has been unjustifiably dismissed, he will need to establish that he has in fact been dismissed. The onus will shift to Bill to show that there was good cause to dismiss John and that John's dismissal was implemented in a procedurally fair manner.

Assuming that John successfully argues in the Employment Relations Authority ("the Authority") that he was unjustifiably dismissed, the question then arises as to what remedies John may be entitled to.

The Employment Relations Act 2000 ("the Act") sets out statutory remedies that the Authority or the Employment Court ("the Court") may order in John's favour. These are briefly set out below.

Reinstatement

If John has sought reinstatement as a remedy, the Authority or the Court (collectively referred to here as "the Court") must provide for John's reinstatement to his former position or to a position no less advantageous to John. It must be "practicable" for the Authority or Court to make any such order.

Reimbursement of Lost Wages

If John can show that he has lost wages, the Court must order Bill to pay John the lesser of a sum equal to actual wages lost by John or up to three months ordinary time remuneration. However, the Court also has the discretion to order Bill to pay John a greater sum than this.

Compensation

An award for compensation in John's favour can be made at the discretion of the Court. Average awards for compensation are about \$5,000.00.

Employee's Contributory Conduct

The Court must consider whether, and to what extent, John's actions may have

contributed towards his unjustified dismissal. If John's actions are found to be contributory then the Court must reduce the remedies accordingly.

Lack of Written Employment Agreement

Finally, you may recall from the first article that there was no written employment agreement setting out the terms and conditions upon which John was employed. The Act provides the Court with the full and exclusive jurisdiction for the recovery of penalties under the Act. In this situation, given that John had been employed for approximately six years, oral terms of agreement must have been in existence. Failure to have a written agreement may result in Bill being subject to a penalty issued by the Authority.

An obvious consequence of not having a written employment agreement is that there is no conclusive evidence to establish the terms upon which John was employed, including a term as simple as John's hours of work.

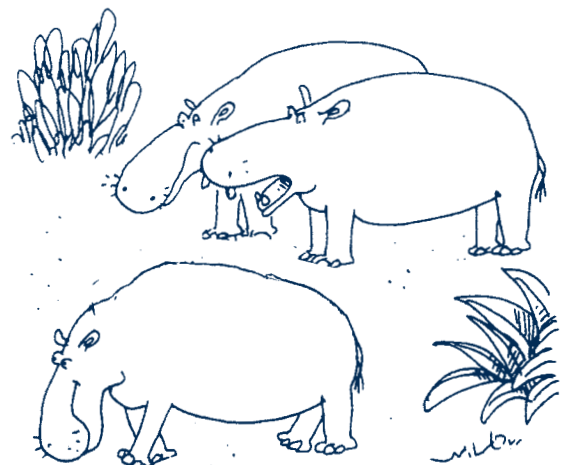
Best Practice

Employers should ensure that employees sign an employment agreement before commencing work and also ensure that they take legal advice before taking any action against an employee under the terms of their agreement.

The hedgehog made his way down the riverbank and very slowly walked into the water. As it got deeper, he soldiered on, gasping for breath. Suddenly he disappeared under and was only just able to get back to the bank.

After resting quietly for ten minutes, the hedgehog tried again; after going under twice more he managed to get back to dry land before collapsing. This time it took him much longer to recover but, once he felt fit enough, he started back into the water. Two ducks were watching from the other side of the bank and one said to the other:

"Come on George, don't you think it's time we told him he was adopted?"



"In a way he's just too good-looking"