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Spring Issue

Welcome to our Spring Newsletter. Bruce Fraser explains Limited Licences. Chris Royds discusses the benefit of a Family Trust in mitigating your will from being contested.

Michael Ducray highlights the proposed amendments to the law applying to Wills, anticipated in the draft Wills Act. Chris Royds revisits the risks of pulling out of a conditional contract. Our new staff, introducing solicitors Michael Cochrane and Shelley Chadwick.

Limited Licences

Limited licences enable a disqualified person to continue to drive. However, the grant of a limited licence is not an automatic right, it is a privilege.



Bruce Fraser
Partner
Nelson Commercial Team
DDI: (03) 539 1735

For some time Land Transport Law in New Zealand has provided that a person's licence to drive a motor vehicle can be suspended. This arises from a variety of situations ranging from an excess breath alcohol conviction to accumulation of over 100

demerit points within a two year period.

Loss of licence can have significant consequences for a person, depending on their licence. The Court has a discretion to grant a "limited licence" to alleviate the hardship which arises.

As the name of the licence implies, any licence issued on this basis will be "limited". A licence may be limited as to time, geographical area, and vehicle. A limited licence is not an unrestricted right to continue driving as if the licence disqualification or suspension had not occurred.

Jurisdiction

Limited licences are only available for disqualifications arising out of certain types of offences. For example, a person disqualified from holding a driver's licence for repeat offences involving alcohol or drugs is prohibited from applying for a limited licence. Similarly, a person disqualified as a result of "reckless driving", "dangerous driving", "careless driving" or "inconsiderate driving causing death" is also prohibited from applying for a limited licence.

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In other situations, a limited licence can only be granted after a 28 day stand down. This is the case where, a person has lost their licence for reckless or dangerous driving or an offence involving alcohol or drugs.

Basis of Application

In order for the Court to make an order granting a limited licence the Court must be satisfied that the disqualification has or will result in:

- Extreme hardship to the applicant; or
- Undue hardship to a person other than the applicant; and
- The order granting a limited licence is not contrary to the interests of public safety.

Extreme or Undue Hardship

If driving is a fundamental part of a person's job then the Court will usually be sympathetic to the argument that such a person will suffer extreme hardship if they are unable to drive.

Undue hardship may also arise to an employer where the employee who has lost their licence is a key employee who needs his or her licence to carry out their tasks as an employee.



Undue hardship may also arise as a result of family circumstances. For example, where regular

medical attention is required for a family member and no other viable alternative transport is available.

Public safety

In the context of public safety, the Court will look closely at the existing record of the person seeking the limited licence. If the applicant has a number of previous convictions for drunk driving or repeated speeding infringements then the Court may decline to grant the limited licence on the basis that granting the licence would be contrary to the interests of public safety.

Summary

In appropriate circumstances a limited licence can be obtained to

enable a disqualified person to continue to drive.

However, a limited licence is not an entitlement but rather a privilege. Further, limited licences are not available in all situations.

The Court will look closely at all circumstances relevant to the offending, the offender's history and the impact on others in assessing whether or not it is appropriate for the grant of a limited licence. Only if satisfied that hardship exists and public safety is not compromised will a limited licence be granted.

For specialist assistance and advice, contact Bruce Fraser, or Phil Bellamy of our Nelson office. ▲▲

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Can we prevent our Will from being contested?

We are often asked what can be done to prevent a Will from being contested or challenged. Chris Royds discusses this issue.



Chris Royds
Partner
Nelson Commercial Team
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When assisting our clients in preparing Wills we are often asked what can be done to prevent a Will from being contested or challenged once the person preparing the Will (the Testator/Testatrix) has died.

In terms of drafting the Will itself our answer is typically, “not a great deal”. However, an increasingly popular option is to establish a family trust and transfer large or significant assets to the trust during your lifetime. Once the transfer of those assets to the family trust is complete then the value of your individual estate is reduced. As a result, the benefit to a disgruntled beneficiary or potential beneficiary in challenging the Will will be reduced.

The principle is that you have established a separate legal entity - the family trust and ownership of some assets are transferred out of your name to the trustees of the Family Trust. The process

will take some time to gift the asset's across to the Trust (ie. \$27,000.00 per twelve month period or \$54,000.00 for couples).

This raises a further commonly asked question. Can a family trust be successfully challenged? The answer to that question is generally no. We are aided here by some recent case law which has reiterated this point. The case involved disgruntled discretionary beneficiaries of a family trust who applied to the High Court for orders stemming from complaints and criticism of the operation of the trust by the trustees. In general terms the discretionary beneficiaries sought a greater share of the trust assets.

The Court reiterated that the operation of a trust is determined by what the trust deed provides. In this particular case the trust deed provided that any income or capital from the trust was to be distributed by the trustees to the beneficiaries at the trustees' discretion. Therefore, there was no obligation to distribute any fixed sums to the beneficiaries, annually or at all. This was reinforced on appeal by the Court of Appeal which stated “under a discretionary trust, there

is no right to distributions but only a right to be considered”.

In the decision, the Court criticised the lack of accounts, lack of resolutions, lack of memorandum of wishes and general poor administration of the trust. The High Court reiterated that a family trust must be properly administered, including resolutions kept, annual accounts completed, the minute book maintained and the trust actions clearly documented. Further, an important aspect for the settlers is to document a memorandum of wishes to provide guidance to the trustees as to the intention, rationale and objectives for operating the family trust.



If you would like to discuss a family trust with any of our trust team members please feel free to contact: Chris Royds, Roger Slade, or Chris Wright in our Nelson office or Fiona McConnochie in our Richmond office. ▲

Amendments to the law applying to Wills

Article on the impending changes to the Law of Wills, from Michael Ducray, Estates Nelson.

Recognising that “the current legislation governing wills is often expressed in archaic terms and is set out in several enactments the first of which dates back to 1837” Government is currently finalising The Wills Act 2006.



The principal aims of the new Act are to restate the existing law in a statute using plain, and modern language. Further, reforms to enhance and modernise the law around wills and remove existing anomalies are proposed.

Alterations to the current law include:-

- allowing people under 18 to make wills with the approval of the Family Court
- permitting a person appointed as executor of a will to witness the will.
- Provision to ensure that the validity of a testamentary

document is not affected by the fact that a witness did not know that the document he or she was signing was a will;

- Creating a new rule to provide a gift to a child who dies before the testator/testatrix will be passed on to grandchildren unless a contrary intention is expressed in the will.
- Granting the High Court authority to declare that a will or testamentary document is valid, even if improperly signed or witnessed, if the court is satisfied that the will expresses the testator's intentions.
- Extending application of the rule that a testator's/testatrix's marriage revokes his or her will, so this rule will apply to civil unions, (unless the will is expressed to be made in contemplation of the marriage or civil union).
- If a marriage or civil union is the subject of a separation order, the surviving spouse or partner cannot take under the deceased's will.

Allowing a person to make a gift to an unincorporated

society which is not a charity or which does not have a charitable function.

- Increasing the High Court's power to correct errors in a will and to allow the Court to make use of external evidence to interpret a will that is meaningless, ambiguous, or uncertain.

Summary

The Wills Act will allow for more flexibility to amend wills that do not accurately express the wishes of the deceased. It will also allow for recognition of wills which do not meet the current formal requirements for a will to be admitted to probate.

Despite these changes, there still is no substitute for having your will prepared by a legal professional to correctly set out your last wishes and, in most cases, avoid expensive litigation for your family regarding the interpretation of your last will.

For specialist assistance and advice, contact Chris Wright or Michael Ducray. ▲▲

What is “Probate”?

“Probate” is the Court order granted to executors of Wills by the High Court. It is Judicial authorisation to deal with a deceased's estate before distributing assets and paying liabilities according to their will. Obtaining a Grant of Probate is the first step an executor needs to take in administering a will. Probate is not required for small estates.

We've Changed Our Minds - Can We Pull Out?

This question is excellent fertiliser for the growth of grey hairs among Lawyers and Legal Executives.

If you sign a conditional contract to purchase either a property or a business subject to conditions, then you have an obligation to make reasonable efforts to satisfy those conditions. The vendor can require you to prove that you have used reasonable endeavours to satisfy the conditions. If you have not satisfied this obligation, you may be liable for the loss or damage that the vendor suffers in on-selling the property or business as a result of the collapsed sale to you.



A recent Auckland case is a timely reminder of a purchaser's obligations to satisfy their conditions under a conditional contract. Mr and Mrs Fleming contracted to purchase a new property, subject to the sale of their existing property. Their "silent marketing" efforts to sell their existing property included:

- Contacting two local agents with a request that those agents find buyers.
- Advising several local residents that the property was for sale.

- A further agent was contacted who had successfully sold a property in close proximity and asked if they had any interested buyers.

Mr and Mrs Fleming did not advertise the property, did not put signs outside, did not put pictures in an office window or organise any open homes because they did not wish to openly publicise the fact that they were selling their property. Mr and Mrs Fleming considered that such actions would be detrimental to their lawn mowing and gardening business and so covertly and silently listed their property for sale.

The High Court, (subsequently endorsed by the Court of Appeal), did not consider that these attempts satisfied the requirements of the purchasers to use their reasonable endeavours to satisfy the condition regarding the sale of their dwelling. In particular the High Court stated:

"It has been demonstrated that Mr and Mrs Fleming, judging their actions objectively, failed in their legal obligation to take all reasonable steps to try to obtain an unconditional contract for the sale of their property by the timeframe stipulated in the contract."

Note the High Court reflected what the standard form Agreement for Sale and

Purchase of Real Estate provides, in clause 8.7(2) :

"The party or parties for the whose benefit the condition has been included shall do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment."

Unfortunately for Mr and Mrs Fleming, this case is a vivid example of how the Court will interpret the positive obligation on the part of the purchaser to do all things to satisfy the condition that is inserted for their benefit. This resulted in significant legal costs for Mr and Mrs Fleming, interest at 14%, their own legal fees, a High Court costs award and a Court of Appeal costs award. The total costs could reach \$400,000.00 for Mr and Mrs Fleming.

The lesson is simple. If you wish to purchase a property or a business then proceed on the basis that you have an obligation to use your reasonable endeavours to satisfy any conditions that are inserted for your benefit. If you simply change your mind, you run a risk of the vendor seeking damages for any losses that they may suffer arising from a resale.

If you have any questions regarding this article, please contact Chris Royds of our Nelson Office. ▲▲

Staff Announcements

Introducing two new solicitors



Michael Cochrane, Solicitor

Michael is a new solicitor working in our Commercial department alongside Chris Royds in our Nelson office.

In addition to an LLB, Michael holds a Bachelor of Commerce which complements his developing commercial practice.

E-mail: mcochrane@fvm.co.nz

Phone: (03) 548 1469



Shelley Chadwick, Solicitor

Shelley Chadwick has joined the local government team, and will be working in the Richmond office. She has previously worked at DLA Phillips Fox in Wellington, and prior to that, at the Environment Court.

Shelley specialises in local government, environment and resource management issues.

E-mail: schadwick@fvm.co.nz

Phone: (03) 543 8301

Christmas Office Closure



Nelson, Richmond and Motueka

Our offices at Nelson, Richmond and Motueka will close for the Christmas vacation at 5pm Friday 21st December, and will reopen with skeleton staff Monday 7th January 2008 at 8.30 am.

Takaka

Our final weekly visit to Takaka for 2007 will be Thursday 20th December 2007, commencing again on Thursday 7th February 2008.

Emergency After Hours Service

Should you require legal assistance during our office closure periods, please call Sue Gardener, 021 222 7602 who will have details of legal staff available over the Christmas break.



Would you prefer to receive our newsletter via e-mail?

If so, please contact Sue Gardener, Partnership Secretary, Nelson Office

E-mail: sgardener@fvm.co.nz Telephone 03 548 1469



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Visits to **Takaka** every Thursday/Friday

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