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NEWSLETTER ▼ OCT 2002

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

What happens when a person becomes mentally in-capacitated 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 you cannot 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 isn'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.

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FENCES

Fencing is often the subject of dispute between adjoining property owners. Two issues that commonly arise are:

1. Whether or not there is a legal obligation to fence.
2. Whether or not occupiers are liable to contribute to the cost of fences erected by their neighbours.

Obligation to Fence

An occupier of land is under no general duty to fence his or her land from a neighbouring property or from public access ways. A duty to fence may arise from the use of the land, for example, if the absence of fencing may cause a nuisance to neighbours or the public. Adequate fencing is required on farms to prevent stock wandering.

Fencing is also required around swimming pools. The rules set out below do not apply to swimming pool fences.

Placement of Fences

The middle of the fence must be on the boundary line, except where a fence is supported by posts. Then the posts must be placed on the boundary line or as near to it as practicable.

Liability to Contribute to the Cost of Fencing

Neighbours may be obliged to contribute up to half of the cost of the fence bordering their property, providing the landowner wishing to build the fence follows certain procedures set out in the Fencing Act.

Procedures

If you want a neighbour to contribute to the cost of a fence, you must serve a notice on the neighbour setting out:

1. The boundary along which the work is to be done.
2. The nature of the work proposed and the materials to be used.
3. The consequences of failure to comply with the notice.

A neighbour who objects to proposals set out in a notice may, within 21 days after receiving the notice, serve on you a cross-notice. The cross-notice must set out any objections and counterproposals. Any work proposed in a cross-notice must be specified the same way as is required in the original notice.If a cross-notice is not served within the 21 day period, the neighbour is deemed to have accepted the proposals in the original notice.

Serving Notices

Notices and cross-notices must be delivered personally or by registered letter addressed to the person at his or her last known address or business in New Zealand.

Failure to Agree

If an agreement cannot be reached within 21 days after the date of service of the last notice or cross-notice, the matters in dispute may be determined by a District Court or Disputes Tribunal.

When to Proceed

Where a person serves a notice under the Act in respect of work on a fence, he or she may proceed to do the work:

4. After the expiration of 21 days from the date of the service of notice if he or she is not served with a cross-notice; or
5. If he or she is served with a cross-notice, as soon as all the differences between the parties are resolved either by agreement or by the court.

If the work is done prematurely, the neighbour is not liable to contribute any costs incurred erecting the fence.

Contribution Where Immediate Work is Required

If any fence is damaged or destroyed by sudden accident or other cause and requires immediate work, either of the adjoining occupiers may do that work without any notice, and may recover half the cost thereof from the other occupier. This rule does not apply where the destruction of the fence is the fault of one of the occupiers, in

HAVE YOU CONSIDERED A FUNERAL TRUST?

If you are interested please contact your solicitor.

which case, that occupier will be liable for the full cost of the work. If you have any doubts contact us first.

Fencing Agreements and Covenants

A fencing agreement or fencing covenant can be drawn up to protect occupiers from being liable for contributing to costs of work on a fence. If the person selling land to you retains adjoining land (for example in a subdivision) then the seller may as a condition of the sale exempt the seller from liability to contribute towards the cost of fencing.

GET OFF MY JETTY

For Sale: Tidy Waterfront property with private jetty

Many would probably think that because they built the jetty or bought it off someone who had built it that the jetty was theirs and because it was theirs they could prevent the use of it by others. Not necessarily so says the Court of Appeal. In a recent decision in respect of a jetty built under the Resource Management Act regime (Hume -v- Auckland Regional Council) the Court upheld the High Court decision that members of the public had a right to use a jetty built by Mr and Mrs Hume to give access to their property on Kawau Island. As the Court said, the price which the Humes have to pay under RMA for the right to construct and use their jetty is that it be available for use by the public in a reasonable manner for the purpose of gaining access to, from and along those parts of the coastal marine area which are adjacent to the jetty. The only consolation for the Humes was that the Court ruled that in using the jetty for that purpose the public could not unreasonably impede the Humes' access to and use of the jetty.

In 1994 the Humes were given a coastal permit to construct a jetty on and over foreshore and/or seabed to give access to their property. When differences arose between the Humes and others about public use of the jetty the Council applied to the Environment Court for a declaration to resolve the matter. At the end of the day it was held that unless the coastal permit expressly limits or limits by necessary and reasonable implication the class of persons who may access the part of the coastal marine area (foreshore, seabed and coastal water of which the landward boundary is the line of mean high water springs) to which the permit relates the permit holder may not exclude the public or any class of persons. In the Humes' case the permit contained no such limitation. In arriving at its conclusion the Court of Appeal was influenced by one of the matters declared by the Act to be of national importance and that was the maintenance and enhancement of public access to and along the coastal marine area.

What does all this mean in practice? What about moorings or marine farms? In the Marlborough Sounds and Tasman/Golden Bays and probably elsewhere too few, if any, permits to erect jetties contain an express limitation on the right of others to use them and just as the Humes were not able to persuade the Court of Appeal that it was reasonable to imply such a limitation so it will be difficult for anyone else to do so. Thus, if I want to tie my boat to your jetty and walk across it to get to the beach I will be entitled to do so. But I must make sure that I leave room for you to tie up to the jetty. The position is different, however, in the case of your mooring. As the Court of Appeal observed it is a reasonable and necessary implication that a mooring be excluded from general public use. So too in the case of a marine farm or a restaurant built out over coastal waters.

And what of the jetty that pre-dates RMA (1991). That will be an article for another day.

DON TURLEY

Don has joined our Litigation team and is based at our Richmond office. He comes from Wellington and has many years' experience in a wide range of commercial litigation and general dispute resolution. Don is a qualified mediator and a member of the LEADR mediators panel.

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COMMONLY ASKED EMPLOYMENT QUESTIONS

Overpayments

If an employer overpays an employee, can the overpaid amount be deducted from subsequent wages?

Under the Wages Protection Act 1983, it is unlawful to make deductions from wages except in the following circumstances:-

- With the employee's consent; or
- At the employee's request; or
- Under s (6) of the Act where "it was not reasonably practical for that employer to avoid making that overpayment" and the specified notice is given.

The overpayment must have been made because the employee was absent from work without the employer's authority, on strike, locked out, or suspended. Notice must be given to the employee and the overpayment must be recovered not later than two months after notice has been given.

In all other circumstances, if the employee has been overpaid it is unlawful to recover that overpayment without the employee's consent. The overpayment cannot be offset against another entitlement.

Minimum Wages

What is the minimum wage?

On 18 March 2002, the minimum wage rates were increased. The changes are:-

- The adult (all persons aged 18 years and over) minimum rate has increased from $7.70 to $8.00 per hour.
- The youth minimum wage rate (all persons aged 16 and 17 years) has increased from $5.40 to $6.40 per hour.

Written Employment Agreements

Do employees employed since the Employment Relations Act came into force (October 2000) have to have a written employment agreement?

It is a requirement that all employees have a written employment agreement. Just recently the Employment Relations Authority imposed a penalty of $500 on an employer for failing to provide a written employment agreement.

The Act sets out the minimum matters which must be covered in the agreement. For an individual agreement these are:-

- The name of the employer and the employee;
- A brief description of the work to be carried out;
- An indication of where the work will be carried out;
- An indication of the hours the employee will work;
- The wages or salary the employee will receive;
- A plain language explanation of the dispute resolution services available if there is an employment relationship problem and a reference to the 90 day period for submitting a personal grievance.

PHIL BELLAMY

Phil is the Litigation Solicitor based in the Nelson Office. He attended University in Wellington but has spent the last twelve years working in Dunedin. He has a wide range of experience in litigation matters generally, but his particularly area of practice will be advising the firm's clients in employment and estate matters, commercial and contractual disputes as well as appearing before various Tribunals (including the Coroner's Court). He looks forward to being of assistance to you.

The Health & Safety in Employment Act 1992 requires every workplace to have a health & safety programme.
CALL FOR ADVICE ON HOW TO SET THIS UP.

DR MICHAEL UNDERDOWN

Michael has recently joined the Fisheries and Maritime Group at Fletcher Vautier Moore, where he will be dealing specifically with port and competition law issues, as well as with general maritime matters. He has a varied background with the United Nations, as a public servant, staff officer in the Australian Army and academic, most recently as a law lecturer in Sydney.

SHOP TILL (WHO?) DROPS

Those entering retailing are reminded/cautioned about the contingent liability remaining after they have sold up and transferred their lease to the new owner.

History

The two main elements in a lease - the "contract" and the "property" have together generated a wealth of Court decisions in the past few years. They remind us that tenants negotiating leases with landlords must be alert to the risks.

Most orthodox leases contain provisions allowing tenants to transfer the lease on certain conditions - for example, if they can show the landlord that the incoming tenant is responsible and can pay the rent. There are sound commercial reasons for these provisions.

If a shop proprietor knew his lease could not be transferred he may feel trapped in a business. Landlords might not attract tenants. On the other hand the landlord wants protection against a tenant introducing a ne'er-do-well as the next tenant. The landlord wants business as usual.

Changing Times

The difficulty for a landlord is that they do not know who in the future the "first" tenant they signed up will transfer the lease on to. So a landlord will almost always retain the right to claim against the first tenant (and all subsequent tenants in the lease chain) if any tenant defaults. This is understandable for the protection of the landlord - but not a happy situation for that retired "first" shop owner receiving a nasty letter from the landlord calling upon him to pay rental for a defaulting tenant who has flown the coop.

The risk for retailers in the past may have been manageable - a standard shop lease may have been for a short term. However in recent times the large mall landlords have tended to want tenants signed up to longer terms. These mall leases are lengthy documents and place comprehensive obligations on tenants bringing more commercial risks for the tenant.

Caution Please

If you are an outgoing tenant:

- Place your own measure of worth on the person buying the business and lease. Don't rely on the landlord's measure - they may base their decision on still having you in their sights if something goes wrong. You may only have one round in the chamber, i.e. against the person you sell to if he/she defaults under the lease. Make inquiries about your purchaser's background. Weigh up the commercial risks of the ongoing contingent liability you have under the lease with the benefit of selling the business for the right price.
- Ensure the documentation is correct. Professional advice will be required to guide you on appropriate indemnities. Attention to detail at this point is all important.
- Inquire if you can keep insurance cover in place to protect you against future tenant default.

Bear in mind that if the term of your lease can be extended your contingent liability may remain a live issue until the end of any extension.

TRAVELLING ON HOLIDAY?

Consider a power of attorney so that your personal affairs can be managed smoothly in the event of an accident.

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.

CHRIS ROYDS

Chris joined our Commercial Team at our Nelson office. Before joining Fletcher Vautier Moore Chris was a senior associate with a large Commercial Firm in Christchurch. Chris spent his childhood in Hope and attended Waimea College and then completed a double degree in law and commerce at Canterbury University. Chris has a broad base of commercial law experience including trusts, property, company law, joint ventures, leasing, financing and business acquisitions. His particular specialisation is in subdivision developments and complex property matters.

HAVE YOU UPDATED YOUR WILL RECENTLY?

If interested, you might like to contact your solicitor to discuss.