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Trust eSpeaking

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Welcome to the Spring edition of *Trust eSpeaking*. We hope you find the articles in this e-newsletter both interesting and useful.

If you would like to talk further about any of the material in this e-newsletter, or about trusts in general, then please don't hesitate to contact us.

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The next issue of Trust eSpeaking *will be published in February 2014.*

'Reading of the Will'

Busting some of the myths regarding Wills

There are a number of common assumptions made about access to a person's Will and what happens after the Will-maker has died.

'Reading of the Will'

Television and movies often contain scenes in which after a person's death, the estate lawyer and all the beneficiaries get together for a formal reading of the Will. While there's nothing to prevent this from happening, there's no requirement to do so and it rarely happens in New Zealand. Usually the estate lawyers write to each of the beneficiaries named in the Will to advise them of their entitlements.

Who is entitled to a copy of a person's Will?

A Will is a confidential document belonging to the Will-maker. It only comes into effect on the Will-maker's death. No-one (without the consent of the Will-maker) is entitled to a copy before the Will-maker dies. Lawyers are required by the rules under the Lawyers and Conveyancers Act 2008 to keep all information relating to a client confidential. A person's property attorney or property manager, however, can obtain a copy of the Will. Property managers and property attorneys can obtain the court's approval of a new Will and therefore need to know what any existing Will says in case, unwittingly, they sell or dispose of an asset that is specifically gifted under the Will.

Of course, you may wish to provide a copy of your Will to certain people while you are alive; for example, the executors you have named in your Will, or your spouse or partner. Alternatively, you may just wish to let them know who holds the Will. This will avoid your family spending time trying to locate your Will after you have died.

On a person's death, the only people entitled to a copy of the Will are the executors and beneficiaries named in the Will. The usual practice in New Zealand is for residuary beneficiaries (those entitled to a share of the residue of the estate once all specific legacies and debts are paid) to receive a full copy of the Will. If you're receiving a specific amount of money or particular item, you are notified about that particular gift but are not usually given a copy of the Will.

Will registry

There is no central registry in New Zealand where all current Wills are held. However, once probate of a Will has been obtained (probate is the process of proving the last valid Will in the High Court and is required for estates with assets worth more than $15,000 at any one institution), a copy of probate with the Will attached is held in the High Court and becomes a public record. Occasionally people record in their Wills the reasons why they have disposed of their assets in a particular way. You should be careful doing this, as the probated Will becomes a public document, and therefore so will your reasons. Providing an explanation for why you have dealt with your assets can be helpful, however, if a claim is made on your estate. An alternative way is to record your reasons in a separate note which is held with the Will but does not form part of it. The note will not be produced for probate and therefore will not become a public document.

Distributing the estate

Many people think that once probate is obtained the proceeds of the estate can be distributed immediately. This is not always the case; best practice in New Zealand is to wait about six months before distributing the estate. This allows time for the executors to be notified of any claims to be made on the estate, property to be sold and estate affairs to be sorted out. In most cases, if a claim is made on an estate, the claimant must notify the executor of their claim within six months of the grant of probate. Executors can be held personally liable if a claim is made within six months and the estate has already been distributed. In some cases the distributions can be ordered back into the estate.

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Can Marriage Equality Affect a Couple's Wills?

Check your Will hasn't been revoked when you marry

When the changes to marriage law came into effect on 19 August 2013, we were asked an interesting question, "If a couple who were in a civil union decide to 'upgrade' to a marriage, will that mean that their Wills are cancelled?" It seems that the risk of accidentally revoking your Will by getting married is no longer reserved only for heterosexual couples. Same-sex couples now have access to the same unintended consequences of marriage.

We're not sure if 'upgrade' is the right word here. The answer, however, is that a Will probably would be cancelled in most cases. We will return to the 'in most cases' point later. First, let us look at why a change from civil union to marriage might affect the validity of a Will.

How to cancel your Will

There have always been a number of ways in which a Will can be cancelled (the legal term is 'revoked'). Section 16 of the Wills Act 2007 lists these, including signing a later Will, ripping up the old Will and getting married.

Section 18(1) of the Wills Act says, "A will is revoked if the will-maker marries or enters a civil union". There are a few exceptions. The main one is a Will that is made 'in contemplation of marriage'. This is where, for example, the Will-maker leaves some of her estate to her fiancé and says that he is to benefit whether or not the marriage takes place before she dies. No specific words are required provided the circumstances make it clear the Will is still to apply after the marriage.

This rule can prove something of a trap. Let's look at Jack and Jill's situation:

> Jack and Jill have been living together for years. They each have children from previous marriages. Their Wills leave everything to each other. Suddenly Jack asks Jill to marry him. They get married but never think about their Wills. If Jack dies, Jill will no longer get the whole estate. Jack has died without a Will and Jill will have to share the estate with Jack's children from his previous marriage.

Civil Union Act 2004

When this legislation was passed, the rules for married couples were also applied to civil union couples. The Act covers the possibility that after a couple have been in a civil union for a while, they might decide to get married. A couple in a civil union can change the form of that relationship (from civil union to marriage or vice versa) without having to dissolve the first relationship.[1] That means that a married couple may also enter into a civil union with each other and two people in a civil union may marry each other.[2]

The civil union law does not affect the basic rules of the Wills Act 2007: if you marry someone, your Will is revoked unless one of the exceptions applies, eg: you made a Will in contemplation of marriage. The recent change to the marriage laws does not really change the rules concerning Wills. Previously a man and a woman who were in a civil union would automatically revoke their Wills if they got married. Now same sex couples have the opportunity to revoke their Wills in the same way.

The message for all couples, including same sex couples, is quite straightforward:

» If you have recently married, check your Will has not been revoked by your marriage; and

» If you are thinking of getting married, your Will should say that it is made 'in contemplation' of your marriage to your intended spouse.

1 Section 17 Civil Union Act 2004.
2 Section 18 Civil Union Act 2004.

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Protecting Grandpa's Beachfront Holiday Property

Keeping it for future generations

When you discover you are going to inherit grandpa's spectacular beachfront property on which your parents have built a beautiful holiday house you need to think carefully about how you can protect this asset for future generations.

There are a number of potential risks which could result in this property not being available to grandchildren and great-grandchildren for their future enjoyment. You should establish a structure that would help to protect this idyllic property from:

» Business risk

» A second/future marriage/relationship situation and/or relationship breakdown

» Claims against your estate by family and others

» Having to sell the property, and

» Any possible future capital gains or similar taxes.

Being aware of the above risks will help allow the beachfront property to pass to the next generation without exposing inheritances to relationship property or other claims.

A number of people in this situation of inheriting significant assets will have already established trusts for the protection of those assets from the above risks. These trusts hold what would be normally regarded as relationship property.

Relationship property

Relationship property is likely to include the family home, family chattels, investments, savings, rental properties purchased and the majority of the shares in the business you may have established during your marriage, civil union or de facto relationship. There is a risk that the inherited beach property could be mixed in with relationship property and so be subject to a claim by a former spouse or partner. Using a separate trust for that inherited property allows you to ring-fence it from other assets. Showing that the property has never been mixed in with the relationship assets helps avoid the risk of a claim against that property.

Steps to follow

The mechanism we would recommend to you is as follows:

» Form a new trust solely to receive the inheritance and any future inheritances you may receive

» Ensure the beneficiaries of the trust are limited to you, your children, grandchildren and future generations, and

» You may also wish to include your widow or widower, or surviving partner on your death, as a potential beneficiary.

The thinking behind such a trust structure is to use the strengths of s10 of the Property (Relationships) Act 1976 (PRA), which states that any gift and anything you inherit or receive as a trust beneficiary is not relationship property. If you do allow your inheritance (or gift) to be mixed with relationship property it's likely be treated as relationship property.

You may also want to consider establishing the new trust prior to your parents' passing and have your parents leave any inheritances directly to this trust, so the assets do not pass through your hands. This is referred to as a 'legacy trust' or it's sometimes called an 'inheritance trust'.

Note that this structure will not be effective where it involves the family home and family chattels due to the application of s10(4) of the PRA, or s12 of the PRA in respect of homesteads[3]. In these circumstances, a contracting out agreement under s21 of the PRA will still be required for the long-term protection of any inherited family home or homestead.

Clearly doing nothing is not a sensible option. Doing so could leave the holiday home open to claims from family and others and, due to the use of such an asset by family members, it may result in it being deemed to be relationship property. Protecting assets for future generations is not simple, but it's essential if you want to retain assets. If you know you'll be inheriting significant property or have done so recently, please contact us so we can help you preserve these assets for your children and grandchildren.

3 *Clark v Clark (2013)* NZFLR534