

In Brief from
RAINEY COLLINS
LAWYERS

Summer 2012

WELCOME

... to the Summer 2012 edition of Rainey Collins In Brief newsletter.

In this edition we discuss the consequences of not having your Will up to date, the effect of Contracting Out Agreements on your partner's separate property, the time limit you have on filing leaky homes claims, the requirements for bringing your parents into New Zealand to live, what happens to your pay if you are stuck on leave during a natural disaster and some more information on the changes to gifting rules for trusts.

I trust you find the information of interest and value.

James Johnston
Chairman of Partners



JAMES JOHNSTON

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Avoid the consequences of not having your Will up to date...

Ron and Sarah had been in a de facto relationship for 5 years. They had finally got around to seeing a lawyer to update their wills to include each other, when Ron passed away suddenly. They had not reached the stage of signing the wills, so the drafts were of no legal standing at all. Ron's old Will therefore applied, which did not provide for Sarah, as it had been made years before they had even met.

A Will sets out who is to get your property and possessions when you die. It ensures that your hard earned assets go to the people you want them to go to. It can also appoint guardians for your children, give directions about your funeral, burial, your pets and even set out what music you would like to have played at your funeral!

There are some key events in your life that should cause you to carefully review your Will, and other key planning documents such as your Powers of Attorney:

- Marriage, separation or divorce. When you get married your previous Will becomes void. When you become divorced the provisions of the Will relating to that previous spouse become void.
- Entering into or ending a de facto relationship
- Having children
- Starting a business
- Purchasing significant property
- Inheriting money

If you die without a Will, the law governs how your Estate will be divided, without regard to what you or your family might want.

In the above scenario, because Sarah wasn't included in the Will, she is able to pursue a claim for half of all "relationship property", it can be a lengthy, stressful and costly way of having to pursue entitlements.

In a situation where the deceased dies without a Will and leaves a spouse and children surviving them, everything is divided between the spouse and children in certain defined shares. If you have no blood relatives at all, then the whole of your Estate goes to the Government. Friends or caregivers do not feature in the law.

If you don't have a Will, the process of administering your Estate is much more complicated, can take considerably longer, and will cost more in legal and other fees.



CLAIRE COE

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A recent review of new instructions shows that the majority of Rainey Collins' new instructions come from repeat work for existing clients, or from referrals from our valued existing clients and other referrers, including banks, real estate agents, accountants and other financial organisations. We are most grateful

for both the support and the votes of confidence.

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Happily living in a home that is your partner's separate property... but can you keep living there if your partner dies?

Contracting Out Agreements (previously known as pre-nup) are a lot more common in today's world. But what effect do they have if your partner dies? Are you aware what rights you would have to the home you presently live in – would you be able to continue living there or not?

Michael and Emma were in a relationship for two years when Emma decided she would like to protect the home they lived in as her separate property. Emma had owned the home for three years prior to them living together. Michael thought that was fair enough, and they signed a Contracting Out Agreement.

Twelve years later, Emma died suddenly. Emma's Will left all her property to her adult children from a previous relationship and made no provision for Michael. He had to move out of the home.

Michael was perplexed. They had talked about what would happen if either of them died and Emma had always said he would be able to "retain the home." However, Emma had not realised she needed to

update her Will to give effect to her intentions, and the terms of their Contracting Out Agreement meant that was not the case, and Michael was prevented from making a claim.

What rights you may have in a similar situation will depend on the terms of your Agreement and also on your partner's Will.

So, how do you protect yourself? Ensure that you and your partner understand the provisions of your Contracting Out Agreement (if you have one) and your Wills. Do they accurately reflect your wishes? Are any children you have provided for?

If circumstances have changed you may need to update your Wills or Agreement.

As difficult as it may be we recommend having the conversation with your partner – it is far better to discuss the matter now while you both can!



DEBBIE DUNBAR

10 Year time limit on leaky homes...

In 1996 Mr and Mrs Austin moved into their newly built home. Unfortunately that same year they noticed leaks, and water entering their house.

They decided not to pursue mediation or negotiation through the Weathertight Homes Resolution Service. Instead, they had their home repaired themselves at a total cost of almost \$250,000.

Then in 2009, they brought a case to the High Court to recover the cost of the repairs, as well as \$25,000 in general damages for stress and inconvenience.

Unbeknownst to them, the law under which they brought their claim to the High Court had a time limit. This limit meant that because they were not claiming within 10 years of the leak first occurring (which would have been 2006), their claim could not succeed.

They then tried to have their claim transferred to the Weathertight Homes Tribunal; however, the High Court held that due to the time limit, they were barred from transferring their claim to the Tribunal.

"not claiming within 10 years of the leak first occurring meant their claim could not succeed"

In November 2010, they applied to the Tribunal independently to have their claim heard under a different and more appropriate act, where their claim was still eligible.

Unfortunately, the Tribunal struck out their application, and refused to even hear their claim. It held that because they had already pursued alternative proceedings in the High Court, they

could not now bring a claim to the Tribunal on the same matter.

Mr and Mrs Austin again appealed this decision to the High Court. The Court hesitantly decided that they could pursue their claim in the Tribunal, as there was nothing expressly stating that they couldn't. The judge was clear that their delay, and misjudgement of the appropriate law, made them the authors of their own misfortune, and so while he allowed their claim to be heard in the Tribunal, he did not award them any costs.

They could have easily avoided this unnecessary expense and confusion if they had been proactive about their claim and sought legal advice at the outset.



ALAN KNOWSLEY

Immigration requirements for parents who want to migrate to New Zealand...

David, originally from South Africa, moved to New Zealand 15 years ago. He got married to New Zealander Tracy, and is now happily a citizen of New Zealand. He is content, except for the fact that his mother and father live alone in South Africa. He would love for his parents to retire to New Zealand.

There are two options available for parents wishing to apply for a New Zealand residence visa, based on the presence of their children in New Zealand. These are the Parent Retirement Category and the Parent Category.

For both of these categories, the parent must:

- Be the parent of an adult New Zealand citizen or resident; and
- Show that either:
 - They have no dependent children and all of their adult children are outside the country they currently live in (in our example above, this would be South Africa); or
 - The 'centre of gravity' of their family is in New Zealand. Usually, this means that on balance they have more children in New Zealand than in any other country.

Under the Parent Retirement Category the parent must also:

- Invest NZ\$1m of their assets in New Zealand for a period of four years;
- Show that they have NZ\$500,000 to support themselves; and
- Prove that they have an annual income of at least NZ\$60,000.

Under the Parent Category the parent must also:

- Have one of their adult children who is a New Zealand citizen or resident sponsor them; and
- Meet health and character requirements.

There is currently a significant demand for Parent Category residence places, well over and above the yearly quota, and there is an 18 to 24 month waiting time. Parent Retirement Category applications are given priority and are therefore processed faster.



OLIVIA PORTER

Who pays if an employee becomes stuck away while on leave due to a natural disaster?

If an employee is on leave, and a natural disaster such as a snow storm disrupts air travel, does this come out of the employee's annual leave or the employer's pocket? What happens if the employee has no annual leave left to take?

Many holidaymakers have faced just such a situation in recent times due to snow or Volcanic eruptions closing airports. While it is not the employee's fault that they are delayed returning to work, it is not the employer's fault either.

Without any agreement between the employee and employer, the employee will have to take the days they

are away from work out of their annual leave. If they have no annual leave left then the employer can offer leave in advance, or leave without pay.

If the employee is on business when the disaster strikes then they remain on full pay. The employer cannot force the employee to take annual leave for the days they are stuck away from work. They may be expected to work during that time so far as possible, and are not able to regard it simply as a lucky "holiday".



ANDREW GREIG

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PETER JOHNSTON

Some warnings regarding the recent changes to gifting rules for Trusts...

Michael and Janice had a family trust that owned their family home. They had been completing an annual gifting programme through their lawyers to gift the balance owed to them from the Trust for years and were now nearly at retirement age.

They each gifted \$27,000 per year to their trust (the maximum previously permissible) reducing the original loan balance, to avoid gift duty being paid on the initial amount their house was transferred to the trust for.

Gift duty was abolished in October this year, which means Michael and Janice can now each forgive the whole lump sum owing from the Trust to them without incurring gift duty.

However, making a lump sum gift will most likely have an unwanted effect for them in terms of eligibility for rest home subsidies.

If a person applies for assistance from the Government in the form of a rest home subsidy, they have to go through a means testing process. Generally trust property is not counted as an asset of the person applying, provided a gifting programme has been correctly completed. If a person has personal assets below a particular level, then they are entitled to assistance in paying their rest home fees from the Government.

"If you have a family trust and are considering gifting a lump sum you will need to carefully consider your reasons for having a trust and discuss this with your lawyer."

The terms of the regulations used as part of means assessments for rest home subsidies mean that if someone gifts a lump sum of over \$27,000 at any time before they make an application for a rest home subsidy, they will be seen as "depriving themselves" of assets and will mean they are ineligible for rest home subsidies. This applies regardless of how long before the application the gift was made. There also can be issues relating to both partners gifting.

If you have a family trust and are considering gifting a lump sum you will need to carefully consider your reasons for having a trust and discuss this with your lawyer. Did you set up the trust for creditor protection (for example creditors of your business) or to ensure you were eligible for rest home subsidies? If eligibility for rest home subsidies is important to you, then you will most likely need to continue with a gifting programme to ensure you are not seen as depriving yourself of assets.

Another important consideration in relation to rest home subsidies is the value of any other assets you have in your own name. If you have assets in your own name over the allowed limit at the time you make the application, then you will likely be ineligible for assistance from the Government anyway. In that case a lump sum gift may not create issues for you.

In Michael and Janice's case, because of their stage in life they decided that eligibility for rest home subsidies was important to them and decided that they would continue gifting to ensure they could apply for a rest home subsidy in future.



SARAH BLANELEY

DID YOU KNOW...

There are many things to think about when purchasing or leasing a property. Recent circumstances in Christchurch have led many people to consider issues that previously were not important to them. Do you know that the Wellington Regional Council has earthquake hazard maps on its website? The hazards specified are slope failure, liquefaction potential, groundshaking, tsunami and fault lines. If you order a LIM report for a property, earthquake hazards are not included because LIM's come from the District Council and not the Regional Council, who holds this information.

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