

Welcome to our Spring 2008 newsletter



It has been an exciting time of change for Layburn Hodgins. The Public Trust Building where we have been housed since 1973 is currently being given a much needed renovation. Having recently finalised the interior design we are confident that the new look offices convey a fresh and modern approach while incorporating the heritage value of the building. We are hoping to return to the Public Trust Building in early 2009 and aim to provide you with a precise date in our Summer 2008 newsletter.

There have been changes to our Layburn Hodgins team that saw us recently farewell Liam Glubb to travel overseas, welcome back Daniel Quirk, and welcome new team member Amanda Fitzgibbon. Congratulations to Richard McGuire who has just completed his two year tenure as President of the Criminal Bar Association of Canterbury. Congratulations also to Susie Tait

who has been nominated in the family law category of the 2008 New Zealand Law Awards.

Our Spring 2008 newsletter focuses on asset planning, family trusts and Will making. The wisdom of a thorough approach has been highlighted during a year which has seen radical domestic economic change and natural disasters across the globe. In short our message is — given the modern complexities of family relationships, the uncertain domestic economic climate, and various pieces of legislation such as the Property (Relationships) Act, thorough consideration must be given to the way you acquire assets and the way in which you deal with them both during your lifetime and on your death. It is no longer appropriate to suggest that a simple Will is all you require when considering how to best plan for the future. We would welcome the opportunity to provide you with comprehensive advice on how to best protect and promote your assets for your loved ones.

John Abbott
Partner

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Susie Tait

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Judith Field
Joy Woodward
Christine Smith

TRUST ADMINISTRATOR

Emma Bryson

ACCOUNTS ADMINISTRATOR

Taryn Stevens

REMINDER

We expect to remain in our current Armagh St location until early in 2009.

Please see the back page for our locations.



THE WILLS ACT 2007 — Introducing new modern language wills



Trevor Quirk

The Wills Act 2007 re-states the law in plain English and modernises law relating to Wills.

The Wills Act 2007 (“the Act”) came into force on 1 November 2007. It repeals the old Wills Act dating back to 1837 which codified a restrictive approach to Will making where the proper effect was frequently not given to the intentions of the person making the Will. The Wills Act 2007 re-states the law in plain English and modernises law relating to Wills.

The terms “testator” and “testatrix” have been replaced by “Willmaker”. Of prime importance in the Act is the underlying principle that the intention of Willmaker is given full effect. To this end the Act contains provision for the Court to correct clerical errors in the Will that alters the true intention of the Willmaker and also to use external evidence to interpret the words in the Will to clarify the Willmaker’s intention.

The requirements for a valid Will under the Act are essentially the same. A Will must still be in writing, signed and at least two witnesses must be present when the Willmaker signs the document. The witness must also state they were present when the Willmaker signed the document.

The importance of a current and valid Will cannot be overrated. We strongly recommend you to make a Will ensuring that you have financially secured the future of your family. By not having a Will you risk that your property and possessions are divided contrary to your intentions.

Every year we see Wills that have been prepared without advice, perhaps by using a ‘write your own Will’ list. Invariably the Will is either invalid, unclear or leads to assets passing to an unintended person. A self written Will usually leads to more administrative costs. Layburn Hodgins has been preparing Wills since 1934 and have the expertise to prepare a suitable Will for you or your family members.

Amanda Fitzgibbon



We are delighted to announce that Amanda Fitzgibbon has joined the firm as a Solicitor in our Litigation Team.

After graduating from Canterbury University Amanda has practised in Criminal, Traffic, Limited Licences and Family Law. Amanda's family law work has included Parenting, Domestic Violence and Relationship Property. Amanda has developed a reputation as a passionate advocate for her clients.

A subsequent tenure as a property lawyer gave Amanda an in depth knowledge of conveyancing and other property matters. Since joining Layburn Hodgins in November 2007 Amanda has expanded her practice to include Mental Health Law and Civil work including Leaky Buildings claims.

Out of the office Amanda is a keen multisporter who spends her spare time outdoors running, biking and kayaking. Amanda is proving a real force to be reckoned with (both in and out of the court room).

Daniel Quirk



It is our pleasure to welcome back Daniel Quirk after a four year absence while on his OE.

While in London Daniel worked as an Investigations Examiner at the Official Receivers Office investigating misconduct in personal and corporate insolvency, a role which complimented his commercial law background.

After a four month jaunt home via the Trans Siberian Railway and South East Asia Daniel has returned to the Commercial team at Layburn Hodgins to focus on commercial and residential conveyancing.

It is no secret that it is the ski fields of the South Island that lured Daniel back to Christchurch. On the weekends expect to see Daniel and his snowboard carving up Mt Hutt.

Susie Tait



Layburn Hodgins congratulates Susie Tait for her recent appointment as Associate of the firm. Susie joined the Layburn Hodgins litigation team in 2006 specialising in Family Law particularly matters of parenting, guardianship, adoption, surrogacy, domestic violence and relationship property. This often includes associated advice regarding trusts and property matters in general. Susie is also experienced in all aspects of employment law including personal grievances, mediations, investigation meetings, restructuring, disciplinary issues, compliance advice and employment agreements.

Unlike Amanda and Daniel, Susie never seems to find the time for exercise and on the weekend is more likely to be found at home with her family and friends with a sauvignon blanc in one hand and barbecue fork in the other.

FARM SUCCESSION — Planning ahead



John Abbott

➔ The most important decisions pertaining to the family farm are made when the boots are off and the kettle is on.

There are many difficult questions that must be discussed and resolved by the farming family, including how to achieve the most tax effective outcome while reflecting an ownership structure that meets the needs and is fair to the farming family now and in the future.

Farm succession differs from non-farm based estate planning in that the farm is the major asset. As such it needs to provide retirement income for the retiring generation, as well as employment and income for the younger generation. The farm is often the family home and may have been for previous generations also.

Elements of a good succession plan

The starting point of any succession plan is to consider what the goals and aspirations are for each member of the family. These will include business, personal and financial goals.

In planning for these goals you will need to consider the following issues:

- ▶ the possibility of keeping the farm in the family
- ▶ what age the older generation wish to retire – are they going to wind down slowly on the farm or retire to another property?
- ▶ the desired level of retirement income
- ▶ is the younger generation ready to succeed and do they have the skills and commitment to run a farming business?
- ▶ will the younger generation take on an acceptable debt burden and how will they pay out the other siblings?
- ▶ fairness to non-successor siblings
- ▶ business structures – whether it will be a trading/family trust, sole trader, partnership, a limited liability company or a combination of two or more of these
- ▶ tax implications for all of the above
- ▶ the distinction between the farm operating as a business and the ownership of farm assets

Implementing the plan

Once the family goals have been developed and outcomes agreed, the next step is to seek professional advice regarding business structures and tax implications. Your lawyer and accountant should work closely together to discuss options with you in order to implement the best structure to enable your family to achieve their goals. The long term benefits achieved by restructuring correctly outweigh the short-term associated costs.

It is prudent to start early as it may take some time to put the structure in place and to transfer assets. The final structure must be able to adapt to changing needs.

Plan maintenance

Ensure the plan is revisited regularly, especially when there are new additions to the family, marriages or de facto relationships, or deaths. Make sure all family members have an up-to-date will.

Enduring powers of attorney are also important to have in place, of which there are two types, a 'property attorney' and a 'personal care and welfare attorney'. In both cases these are people who you trust to make decisions and act for you when you are unable to make decisions for yourself.

Throughout the whole process remember the key to success is careful, well informed consideration of all the issues, and effective and early communication with each other and your advisers.

If you have any questions about rural or general estate planning please contact **John Abbott** on **JBA@layburn.co.nz** or ph **366 2332**.

John not only has an extensive knowledge of the legal issues facing farmers but, coming from a rural background himself, John understands the practical issues.

FAMILY PROTECTION CLAIMS — Where the moral duty lies



Richard McGuire

There is a generally held opinion that you can put whatever you like in your Will and leave your worldly goods to anyone you care to.

There is a generally held opinion that you can put whatever you like in your Will and leave your worldly goods to anyone you care to. In reality, you can certainly put whatever provisions you like in your Will but you need to be aware that in certain circumstances the Court has the power to alter your Will.

The current Family Protection Act 1955 has earlier grounding in the socially responsible Testator's Family Maintenance Act 1900 which aimed at ensuring that poor dependents of the deceased did not become a burden on the state. The effect of the Family Protection Act 1955 ("the Act") is that a claim can be made to the Family Court where a claimant feels that they have not been adequately provided for in the Will of the deceased person. Although Judges sitting in Family Protection cases say that their function is not one to rewrite Wills; the reality has always been that the purpose of the Act is to empower Judges to undertake testamentary rewriting.

Over the years the Courts have developed the concept that a Willmaker owes a moral duty to consider the wellbeing of the family as a priority. In other words anyone making a Will needs to consider whether the contents of that Will breaches a financial or sentimental duty to a family member that amounts to a "manifest breach of that moral duty which a just, but not loving" Willmaker might owe the family member (re Allardice; Allardice v Allardice (1910) 29 NZLR 959 at 973). The result being that anyone who ignores a moral duty to provide for family members makes a Will at his or her peril.

Of course, occasionally the Court will consider that the conduct of the family member will disentitle that person from a claim.

However, the onus of proof rests on the family alleging that misconduct and clear evidence will need to be adduced. It is clear that for conduct to be disintitling it must go beyond being serious in nature to something verging on outrageous. Even physical or psychological abuse might not always be enough. Various cases have shown that behaviour such as hostility and violence would fall short of the test to be excluded from a Will (DSH v JMC at [10]).

The people that may claim under the Act are the Widow or Widower, children including any adopted children and any other children borne outside the marriage, grandchildren, parents and in some circumstances step children. The Court will take into account numerous factors, such as how the claimant conducted him or herself during the lifetime of the Will maker, the size of the estate, the age and financial position of the claimant and any assistance given by the claimant to the Willmaker. If there is a breach of a moral duty then the Court will disturb the Will only to the extent necessary to remedy that breach.

The clear warning is that extreme care needs to be taken when giving instructions for a Will. If professional advice is not taken prior to the preparation of Will it may well be that a Family Protection claim may be made against that Will incurring substantial legal fees, Court costs, inconvenience and delay.

For further advice regarding a claim under the Family Protection Act 1955 please contact Layburn Hodgins litigation Partner **Richard McGuire** on **RDM@layburn.co.nz** or ph **366 2332**.

THE PROPERTY LAW ACT 2007— More certainty in property dealings



Duncan Macintyre

This new legislation seeks to clarify and modernise many old, complex and technical Rules



As a result of the enactment of the Property Law Act 2007 from 1st January 2008 New Zealanders will find it easier to understand and apply the Rules governing their property dealings.

This new legislation seeks to clarify and modernise many old, complex and technical Rules applying to dealings both in land and other property contained in the old Property Law Act 1952. As a result the Property Law Act 2007 will affect the everyday lives of New Zealanders when buying and selling houses or, if they run a business, when borrowing money or leasing commercial premises. The 2007 Act also applies to mortgages and guarantees to secure loans.

The 2007 Act therefore brings certainty for people and protects their rights over property transactions as well as ensure the relationship between landlords and tenants are reasonable and fair.

Three examples of reforms within the new Act include:

Sale and purchase agreements

A right for the purchaser to recover its deposit in specific circumstances, for example where there is a defect in the property the purchaser was unaware of. This right extends the current law where the vendor had no legal duty to disclose information not a serious enough to allow cancellation. This relief will be available for any contract coming into operation after 31 December 2007.

Mortgages

There has been a significant expansion of the scope of mortgages to cover not just land but other property such as motor vehicles, domestic appliances, or as diverse as manufacturing equipment, shares or even crops. The extension to the definition of mortgaged property therefore brings added obligations on lenders to ensure compliance before enforcement. In particular, specific notice to be given before enforcement of any security in the event of default. Added obligations now also extend to borrowers to: maintain insurance over assets for their full insurable value (including naming the lender as the insured

party), maintaining and repairing assets to a particular standard, and informing the lender of any material change regarding the control of management.

Leases

The most significant change in the area of commercial leases removes the previous right of landlords to seize tenants property when rent has been overdue (called distraint for rent).

Greater flexibility is also given to tenants to undertake certain businesses within a tenanted property or assignment or sub-leasing of the premises. Landlords must now not unreasonably withhold consent to these matters.

There is also greater protection where landlords exercise rights to cancel the leased premises for default. Landlords can no longer exercise rights to terminate the lease for simple non payment of rent without having given the tenant reasonable notice. These powers extend also to mortgagees and receivers of tenanted properties. Previously tenants bore the risk of damage caused to tenanted properties. The 2007 Act now prohibits landlords (and their insurers) from tenants bearing all the risk from damage to the property whether tenant negligence or otherwise. The obvious effect of this will however be likely borne by landlords with increased insurance premiums which landlords no doubt may wish to recover with increased rentals.

Conclusion

The Property Law Act 2007 brings significant changes while creating uncertainty both as to how those changes will affect other existing consumer legislation and how the Courts will deal with that conflict. Therefore, good legal advice is essential to ensure proper procedures or habits are correctly followed. We would strongly urge anyone with an interest in this area to contact us prior to taking any steps.

For a more in depth analysis of your situation contact **Duncan Macintyre** on **duncanm@layburn.co.nz** or ph **366 2332**.

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