

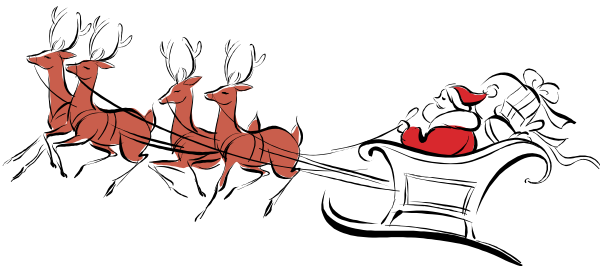
Newsletter

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Dealing with a Deceased Person's Estate

People are often unsure of the process to be followed when dealing with a deceased's estate. Where a deceased has not left a will, the administration of an estate can be complex and costly. However, this article provides a brief guideline of the process where the deceased has left a will.

1. The Will

The original will should be held by the firm of solicitors who prepared it. The first step is to contact the solicitor concerned and advise him or her of the death. The will can then be checked to ascertain who has been appointed as the executor of the will and the identity of those named as beneficiaries. The will may contain special directions as to funeral arrangements.

2. Apply for Probate

The executor must appoint a solicitor to act for the estate who will then make an application to the High Court for probate. Probate is the process whereby the Court determines the authenticity of the will and confirms the authority of the executor named in the will to administer the estate. Generally, it is not necessary to apply for probate where the assets of the estate are less than \$10,000.00.

The application for probate must be supported by an affidavit sworn by the executor who must swear that he or she is the person named as executor in the will. He or she must also provide evidence of the death of the deceased (such as producing a copy of the death certificate) and confirm their belief as to the validity of the will. In addition, the executor must undertake that he or

she will carry out the instructions contained in the will in accordance with the law.

3. Administration of the deceased's estate

The executor administers the estate and the duties include:

- Making arrangements for the burial or cremation of the deceased;
- Preparing an inventory of the deceased's assets;

Once Probate has been granted:

- Paying the funeral expenses and any other debts owed by the deceased from the assets of the estate;
- Paying any gifts or legacies to beneficiaries named in the will; Distributing the remainder of the estate to the beneficiaries; and

- Keeping a set of accounts recording all financial transactions in relation to the estate.



The terms of every will differ. For example, there may be provision for a life interest in a particular asset to be granted to a person during that person's lifetime. This means that the executor will retain ownership of the asset until the person who has the benefit of the life interest has died. At that point the asset then becomes part of the "residuary estate" and can be distributed to the remaining beneficiaries.

Conclusion

The administration of an estate may take some months depending on the number and the nature of the assets involved. The solicitor who has been instructed to administer the estate will be able to provide a more specific timeframe.

Employment Issues – The Bill and John Case Study Continued

You may recall from the last edition of the newsletter that John believed he had been dismissed from his employment as a mechanic due to his persistent lateness to work. He also believed his employer, Bill, had not discussed this issue with him prior to Bill taking action which resulted in John being sent home from work during the course of his employment. Bill, on the other hand, took an entirely different view of what occurred on the day in question. He believed that he had reasonably discussed John's ongoing lateness with John and had reasonably requested that John catch an earlier bus to ensure that he arrived at work on time. Bill also believed that following this request, it was necessary to speak to John on several occasions about his lateness, but that this had not resulted in any improvement on John's part.



You may also recall that for John to successfully establish that he has been unjustifiably dismissed, he will need to establish that he has in fact been dismissed. The onus will shift to Bill to show that there was good cause to dismiss John and that John's dismissal was implemented in a procedurally fair manner.

Assuming that John successfully argues in the Employment Relations Authority ("the Authority") that he was unjustifiably dismissed, the question then arises as to what remedies John may be

entitled to. The Employment Relations Act 2000 ("the Act") sets out statutory remedies that the Authority or the Employment Court ("the Court") may order in John's favour. These are briefly set out below.

Reinstatement

If John has sought reinstatement as a remedy, the Authority or the Court (collectively referred to here as "the Court") must provide for John's reinstatement to his former position or to a position no less advantageous to John. It must be "practicable" for the Authority or Court to make any such order.

Reimbursement of Lost Wages

If John can show that he has lost wages, the Court must order Bill to pay John the lesser of a sum equal to actual wages lost by John or up to three months ordinary time remuneration. However, the Court also has the discretion to order Bill to pay John a sum greater than this.

Compensation

An award for compensation in John's favour can be made at the discretion of the Court. Average awards for compensation are approximately \$5,000.00.

Employee's Contributory Conduct

The Court must consider whether, and to what extent, John's actions may have contributed towards his unjustified dismissal. If John's actions are found to be contributory then the Court must reduce the remedies accordingly.

Lack of Written Employment Agreement

Finally, you may recall from the first article that there was no written employment agreement setting out the terms and conditions upon which John was employed. The Act provides the Court with the full and exclusive jurisdiction for the recovery of penalties under the Act. In this situation, given that John had been employed for

approximately six years, oral terms of agreement must have been in existence. Failure to have a written agreement may result in Bill being subject to a penalty issued by the Authority.

An obvious consequence of not having a written employment agreement is that there is no conclusive evidence to establish the terms upon which John was employed, including a term as simple as John's hours of work.

Best Practice

Employers should ensure that employees sign an employment agreement before commencing work and also ensure that they take legal advice before taking any action against an employee under the terms of their agreement.

Update on Personal Property Securities Act 1999

The Personal Property Securities Act 1999 ("PPSA") came into force on 1 May 2002.

What is the PPSA?

The PPSA is legislation that reformed the law relating to security interests. A "security interest" means an interest created in personal property by a lending or leasing transaction.

In the Act, personal property is defined as all property other than land. All security interests taken in personal property are subject to the PPSA.

Generally, security interests need to be registered to ensure that they have priority over other security interests on a particular piece of personal property. While registration is not compulsory under the PPSA, it does ensure priority over subsequently registered security interests.

Law Changes under the PPSA

The PPSA replaced the Chattels Transfer Act 1924, the Companies (Registration of Charges) Act 1993 and the Motor Vehicles Securities Act 1989. Some security interests that were not able to be registered under the previous law are now subject to the PPSA. Examples include hire purchase agreements, retention of title clauses in supply agreements, and finance and operating leases for a term of more than one year.

Personal Property Securities Register

At the heart of the legislation is a register called the Personal Property Securities Register (PPSR) which commenced operation on 1 May 2002. The PPSR is a form of electronic notice

board recording specific details of security interests held in respect of personal property. Anyone can access the register online at www.ppsr.govt.nz. It is accessible 24 hours a day, 7 days a week.



A security interest is registered with the PPSR by means of a standard financing statement. The term "financing statement" refers to the data which is to be entered on the register. Registering a financing statement with the PPSR enables a security interest to be "perfected" which is critical to protecting the priority of security interests. The general rule under the PPSA is that the first to register a financing statement has priority.

Searching the PPSR

The register allows anyone to check if an individual or company has debts by entering the name and date of birth or address of the relevant person, or by specific collateral details such as vehicle registration, VIN and chassis numbers. However, it is illegal to carry out searches of the register without good reason. Any person attempting to search it out of interest only could breach the Privacy Act. A degree of protection is provided by the requirement for people wishing to search the register being required to first register their details with the Companies Office in order to obtain a user ID and password.

Renewals

A security interest will lapse after five years. Consequently, as the fifth anniversary of the PPSR looms on 1 May 2007, approximately 250,000 security interests will be due for renewal. There will be no reminders sent regarding these. Registrations can be renewed for a further five year (or lesser specified) period for a fee of \$5.00 (GST included). The renewal will need to be completed before the original registration expires.

The date from which the new registration period begins is the date of renewal, not the original expiry date.

If a secured party fails to renew a security interest before the registration period expires, the registration lapses and priority on the collateral may have been lost. If you are the holder of a security interest which was registered around the time the Act came into force, then now is a good time to check whether it will need to be renewed.

Legal Definitions (Wills and Estates)



Codicil: A document (or additional clause), which alters an already executed will. A codicil is executed in the same way as a will.

Testator/Testatrix: The name given to the person who makes a will.

Executor: The person appointed in the will by the testator to administer the testator's estate.

Trustee: A person or trustee company who is directed to hold the assets of the estate in trust for beneficiaries or specific purposes under the will (usually the executor).

Intestate: Where a person dies without leaving a will.

Probate: A High Court decree stating that a will has been proved and that the executor(s) appointed have the authority to act in the administration of the estate.

Letters of administration: A High Court decree which authorises an administrator to administer a deceased person's estate where the deceased did not leave a will.

Debt Collection

Are you owed money or has your property been damaged? Are you at the point where you need to look at your options for recovery? This article will cover in general terms the various options open to you, depending on the nature of the debt and the amount you allege is owed.

Options for Landlords

If you are a landlord and you are owed money by your tenant, you have the option of making an application to the Tenancy Tribunal. Normally parties represent themselves, although in some circumstances a lawyer is allowed.

The application is heard by a tenancy adjudicator who will listen to your side of the story and that of your tenant. They will also hear any other witnesses and evidence you or your tenant want considered.

The decision is recorded as a Tribunal Order. The kinds of orders that can be made include:

- *possession order* – which means the tenancy is terminated and the landlord takes back possession of the property
- *monetary order* – whereby the tenant is ordered to pay the landlord a sum of money.
- *Work order* – which requires the tenant to do specified work on the property.



However the making of an order in your favour does not necessarily mean you won't still be out of pocket so read on for enforcement options later in this article.

Nasty Dispute?

While you may believe you are out of pocket this does not necessarily mean the other side agrees. If there is a dispute about whether, or how much, money is owed you may have the option of filing a claim in the Disputes Tribunal. The Disputes

Tribunal can hear a claim of up to \$7,500 or up to \$12,000 if both parties agree.

Disputes are heard by a referee who will either help you to come to your own solution or if you can't, will determine the dispute for you. The referee's ruling is binding and if necessary, will be enforced by the Courts. No lawyers are involved at the hearing.

There are limitations on the types of dispute the Tribunal can hear. For example, the Tribunal cannot determine disputes about wills, relationship property, or ownership of land.

Claims in the District Court

If you have sent a letter of demand to the person who owes you money and have not been paid, then a further option is to file a statement of claim in the District Court. Most people will instruct a lawyer to assist with this process as there are procedures and rules of evidence that must be adhered to. If the other party does not defend your application you may be awarded judgment by default. If the other party does defend your claim a hearing may be required.

No defence?

Another method of obtaining judgment is through the summary judgment procedure. This can be used if you believe the other party has no arguable defence to your claim.

It can be a more efficient way of obtaining an order in your favour.

Got your Order but still out of pocket?

As stated above, a judgment or order in your favour does not necessarily mean the other side is going to pay up. A common method of enforcement is to apply for the debtor to attend an examination.

The debtor appears in Court and is required to give evidence as to their financial means. If an order is made you can also apply for an attachment order which ensures the money is paid directly from the debtor's wages or benefit to you. If the debtor fails to attend the examination a warrant for their arrest can be issued.



Another enforcement option is a Distress Warrant.

This authorises the bailiff or constable to seize the debtor's money, goods or chattels to satisfy the judgement sum.

Other options include charging orders over land and bankruptcy. Unfortunately some enforcement procedures are time consuming and costly so it is helpful to have an idea of the debtor's means prior to embarking on an enforcement option. Private investigators, credit checks or company and title searches can be used also.

In summary, it pays to research the options before embarking upon the debt collection process to ensure the most cost effective process is used.

Govett Quilliam News



Continuing Education

The following seminars have recently been attended by members of our firm. It is a requirement that all solicitors attend seminars to keep up with legal developments in their fields of expertise. If you would like information on any of the following topics please contact us.

Advanced Litigation Course

- David Anderson

Breath Blood Alcohol Law Update

- David Anderson

Drafting better Pleadings

- Lauren Wallace
- David Anderson

NRLE Estates and Probate

- Judith Bennett



Local Government Act 2002 – Three Years On

➤ John Eagles

Reading Accounts and Balance Sheets

➤ Paul Shearer

Introduction to Family Law Advocacy and Practice

➤ Nina Elliott

A Practical Guide to Taxing Property Transactions

➤ Sharni Kelly



Govett Quilliam continues to sponsor the Monica Brewster Club at the Govett-Brewster Art Gallery, New Plymouth's internationally recognised contemporary Art museum. The Monica Brewster Club meets on the last Tuesday of each month and anyone is welcome to attend. The speakers for the next two months are as follows:

30 January 6.00pm - 8.00pm**David Bornstein: How to Change the World**

New York-based journalist David Bornstein, author of *How to Change the World: Social Entrepreneurs and the Power of New Ideas*, will discuss the subject of social innovation. His first book *The Price of a Dream: The Story of Grameen Bank* was selected as a finalist for the New York Public Library Book Award for Excellence in Journalism and has taken on new currency after the Grameen Bank of Bangladesh and its founder Muhammas Junus were awarded the 2006 Nobel Peace Prize.

27 February 6.00pm – 8.00pm**Fiona Hall: Like There's No Tomorrow**

Fiona Hall is a celebrated Australian artist whose work will be featured in *Turbulence: 3rd Auckland Triennial*, from March 2007. Hall's work has long been concerned with disturbing shifts in environmental conditions globally, the work of the hand, economic botany, and the histories and future associated with ecology and commerce. She will speak about her practice in relation to these wider concerns.



**Merry Christmas
and Happy New Year**



Govett Quilliam will be open during the Christmas and New Year period.

We wish all our clients and friends a very Merry Christmas and thank you for your association during 2006. We look forward to continuing our association in 2007.

Please note that all the Govett Quilliam Guides to many interesting Legal topics and opportunities are available online on www.thelawyers.co.nz. Please download them at your leisure.

Pease call this office if you would like further information on newsletter items