

# Newsletter

October 2007

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## The Importance Of Having A Will

### What is a Will?

A Will is a document (or sometimes a series of documents where there is one or more Codicils or a list of belongings referred to in the Will) which has been completed according to the law, and which states how the assets of the testator (the person who made the Will) are disposed of. The Wills Act 2007 has replaced the word “testator” with the more user-friendly “Will maker”.

Any Will is capable of being revoked (or cancelled) by the person making it. A Will is automatically revoked by a new Will made by the Will maker at a later time. If a person marries or enters into a civil union subsequent to making a Will, that normally means the Will is null and void. However, a person can make a Will in contemplation of marriage which states that the Will is not to be revoked by that particular marriage. Previously a divorced spouse could not inherit under a deceased's Will but the Wills Act 2007 has extended this so that a spouse or civil union partner will also be disinherited under a deceased's Will if there was a separation order in force at the time of death.

Many people are anxious about making a Will. In fact, surveys have shown that people generally have to summon up more courage to make their Will than to visit the dentist!

When a person dies their estate is administered by the person or persons named in the Will as executors or trustees.

In most cases the executors or trustees are family members who will request a solicitor to assist in the legal aspects of administering the estate but the executors or trustees are responsible for carrying out the wishes of the Will maker. This may include funeral arrangements and possible organ donation. The executors or trustees are legally responsible for bringing in the assets and satisfying liabilities, as well as distributing the balance of the estate to the beneficiaries.

If there are assets such as an interest in property, or any bank account or investment of more than \$11,000.00, a legal representative will have to be appointed to deal with these assets through the High Court. Only assets which are owned by the Will maker in their own name are taken into account – assets owned jointly with any other person or persons pass by survivorship to the surviving owner or owners without the necessity for Probate of the Will being obtained through the High Court.

Where there is a Will, the executors apply through the High Court for Probate of the Will which gives the executors the legal right to deal with the assets.

If a person dies without leaving a Will they are said to have died "intestate" and, where the assets are such that a legal representative must be appointed, Letters of Administration are applied for through the Court. This is a more complex procedure than obtaining Probate as there is an order set down in law of persons entitled to apply. It may be that the person entitled to apply to be the legal representative would not have been the person of choice by the deceased person. This is one very important reason for making a Will.

Probably the most important reason however is to be able to dispose of assets in the way a person desires (subject to any challenges permitted by law), rather than a formula set down by law where there is no Will.

In a Will there can be a "life interest" given to a spouse or partner in the family home where that home is owned by one

partner or where it is owned by both partners as "tenants in common". This is particularly relevant in the case of a second marriage or partnership where a Will maker wishes to provide for a spouse or partner but still make provision for the children of a first marriage, who can be the beneficiaries of the proceeds of a share of the home after the life tenancy ceases.

Wills prepared by Govett Quilliam use plain language so that the intentions of the Will maker are clearly understood and the use of the archaic language found in older Wills is discouraged.

Govett Quilliam's partners and staff have a great deal of experience and skill in advising clients regarding relevant legislation and drafting Wills to clearly reflect the wishes of each individual client. If you would like to talk to someone about a will please contact your usual lawyer or our Estates Team of Fleur Jones and Judith Bennett.

*Written by Judith Bennett of Govett Quilliam*

## Evicting a Troublesome Tenant – The Salt Case

The rights and obligations of tenants and landlords in a tenancy have been placed under the microscope recently with the case of Sharon Salt and her family. The Salt family was initially ordered to leave their state house in Auckland after the Tenancy Tribunal found serious breaches of their tenancy agreement with Housing New Zealand.

On appeal, Sharon Salt was granted a rehearing that subsequently resulted in the Tribunal ruling in her favour and determining that there was insufficient evidence to terminate the tenancy. The Tribunal adjudicator criticised Housing New Zealand for a lack of specific evidence concerning complaints made about the family following the issue of the original breach notice earlier in the year. The adjudicator considered that the evidence presented was neither specific nor sufficiently recent and that it would therefore be unjust to terminate the tenancy.

Housing New Zealand has indicated an intention to appeal the Auckland Tenancy Tribunal decision to allow the Salt family to remain living in their state house. It is likely that the appeal and resulting decision will be significant in further defining the exact nature of the relationship between landlord and tenant.

### Tenancy Tribunal

The Tenancy Tribunal is a court charged with the responsibility of determining disputes between landlords and tenants. Decisions of the Tribunal are made in accordance with the Residential Tenancies Act and those decisions affect the interpretation and application of the Act.

A hearing before the Tribunal is a public hearing and parties may attend with support people. Generally lawyers will not appear although there are special circumstances where they may.

At the hearing, the adjudicator hears evidence from both parties together with any relevant witnesses. In most cases the adjudicator will give a decision immediately after the hearing. In more complex cases a written decision may be provided at a later date, such as in the Salt case.

The Tribunal has authority to make a variety of orders. The most common are described below.

### Possession Order

This involves the termination of the tenancy. This can happen where a tenant is behind in rent, has substantially damaged the property, has assaulted the landlord, other tenants or neighbours, or is in default under the tenancy agreement. To obtain a possession order, the landlord must give at least 10 working days notice to address breaches and the tenant must have failed to remedy the breaches within the designated time.

### Monetary Order

This requires either a landlord or a tenant to pay money to the other. For example, a payment could be for rent arrears or refund of overpaid rent, payment for damage, cleaning, reimbursement of costs, payment of exemplary damages for legal breaches, or payment of compensation for loss of goods or loss of use through poor repair.

### Work Order

The Tribunal can make an order requiring a person to remedy damage or repair the property.

### Conclusion

The Salt case highlights that the relationship between landlord and tenant is not always a smooth one. It also illustrates that the eviction process can be time consuming and stressful for those involved. In the final analysis, prevention is almost always better than cure and therefore tenant selection is everything.

## Heritage Trees

During June 2007, a public debate erupted in Hamilton about the protection of trees. What gave rise to the debate was the felling of trees by a developer in the middle of the night on a historically significant Hamilton location. Debate centred on the tension between a landowner's freedom to fell trees at will and the degree of heritage protection that should be afforded to significant trees. It is the role of District Councils to determine the degree of heritage protection afforded to trees.

### Tree Register

Hamilton City Council's policy on heritage protection protects some trees through its District Plan. A register of protected trees known as the "Significant Tree Register" ("the Register") set out in the District Plan currently lists approximately 400 protected trees that cannot be felled without resource consent. New trees can be placed on the Register by agreement with private owners although most of the trees that are registered are located on Council reserves. The trees felled in Hamilton were not on the Register and the Hamilton City Council, if it had known and taken issue with the felling, would have been powerless to prevent their destruction.

Councils within the greater Auckland region including Manukau City, Waitakere City, Rodney, and North Shore City have a far less relaxed regime. These Councils place severe restrictions on what landowners can, and more specifically cannot do, with trees on their property. In the greater Auckland region, a schedule of notable trees exists together with a general tree protection policy that protects trees which meet certain size criteria.

Two categories of trees are protected by the general tree protection policy in Auckland.

The first category is exotic trees over 8 metres in height or girth of greater than 800mm and the second is New Zealand native trees over 6 metres in height or girth of greater than 600mm.

Thus, the aforementioned situation in Hamilton could not have occurred in Auckland.

### Protecting Trees

For those Councils that operate a register such as the Hamilton City Council, an arborist's assessment is required before the tree can be listed. This involves assessing the tree against a set of criteria contained in the district plan so it can be categorised. These categories include the size of the tree, the importance of position, presence of other trees, occurrence of the species, role and location of setting, usual life expectancy, form (overall appearance), scientific, historical, cultural, functional, ecological value, and stand landscape value (in relation to stands of trees). If a tree meets the criteria then a landowner can choose to protect it under the district plan. A member of the public can also nominate a tree for protection. However, the Council cannot have the tree assessed unless the landowner gives their approval for this to happen. The only other option is to covenant trees for protection on certificates of title.

### A Change for Hamilton?

The Hamilton City Council is currently considering adopting Auckland's tree protection policy, which some consider to be in the best interests of the general public. Others consider that Auckland's tree protection policy is too restrictive and involves excessive bureaucracy. The issue that arose in Hamilton has wider implications for other Councils throughout the country that are grappling with this problem and do not currently have a general tree protection policy such as the one that operates in Auckland.

## Relationship Property – Contracting Out Agreements

Increasingly New Zealanders are becoming more alert to the implications of the Property (Relationships) Act 1976 ("the Act") and are seeking legal advice about the preservation of their hard-earned property.

### Who can enter into an agreement?

Section 21 of the Act provides a husband and wife, civil union partners, de facto partners, or two persons in contemplation of entering into a marriage, civil union or de facto relationship may contract out of the provisions of the Act.

### Why enter into an agreement?

In a recent decision of the Court of Appeal, *Harrison -v- Harrison*, the court commented, "the paradigm situation in

which a contracting out agreement will be sought is where one party has pre-relationship assets of a significant magnitude to render justifiable the social awkwardness of insisting on a contracting out agreement..."

There are numerous reasons for electing to contract out of the Act. Usually, it is to avoid the presumption of equal sharing of property that arises when the relationship ends. However, an agreement may also assist with asset, estate or tax planning.

It may be a desire by one or both parties to preserve all of the property owned or acquired by them prior to the commencement of the relationship as his or her own separate property. Alternatively, the parties may simply wish to record their decision to treat certain property differently.

### What can be included in the agreement?

Section 21D of the Act sets out what can be included in an agreement. An agreement can

- a) declare property to be separate or relationship property;
- b) define the share each party to the agreement has in any part or all of the relationship property;
- c) define shares on death;
- d) provide for the calculation of the shares; and
- e) prescribe the method by which the relationship property is to be divided.

Section 21 of the Act permits parties to an agreement to make any arrangements they think fit with respect to their property, including property acquired in the future by one or other or both of the parties.

“Property” is specifically defined in Section 2 of the Act and includes the following:

- a) real property (i.e. land);
- b) personal property;
- c) any estate or interest in any real property or personal property;
- d) a debt; and

- e) any other right or interest.

### How is the agreement made valid?

Section 21F of the Act records an agreement will be void unless it complies with certain requirements. Those include the following:

- a) The agreement must be in writing and signed by both parties.
- b) Each party to the agreement must have independent legal advice before signing the agreement.
- c) The signature of each party to the agreement must be witnessed by a lawyer.
- d) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

### Future Considerations

It is important to recognise that an agreement contracting out of the provisions of the Act needs to be revisited on a regular basis. It is impossible when drafting an agreement to anticipate every eventuality just as it is impossible to foresee, at the outset, the longevity of a relationship.

## Update 1: Anti-Smacking Legislation

The controversial new Crimes (Substituted Section 59) Amendment Bill (or anti-smacking legislation as it has been dubbed) was finally passed by Parliament on 16 May 2007 by 117 votes to 7. The new section 59 removes from the Crimes Act the statutory defence of “reasonable force” to correct or discipline a child.

The somewhat controversial legislation has been tempered by the recognition of some circumstances when the use of reasonable force is justified.

Such circumstances include trying to prevent or minimise harm to a child, preventing a child from committing a criminal offence, preventing a child from engaging in or continuing to engage in disruptive behaviour or in the course of performing the normal daily tasks incidental to good parenting. Coupled with this is the discretion conferred upon the New Zealand Police not to prosecute a complaint against a parent where the offence is considered inconsequential.

## Update 2: “Party Pills” to be Banned

On 28 June 2007, Jim Anderton, Associate Minister of Health announced that the Cabinet had agreed to his recommendation to ban pills containing Benzylpiperazine (“BZP”) more commonly known as “party pills” or “dance pills”.

BZP is a stimulant that has a hallucinogenic-amphetamine effect. Until recently, pills containing BZP were classified as a Class D drug, which meant they could not be sold to people under the age of 18 years. Over 40 million pills were legally consumed in New Zealand up until the middle of 2007. It is reputedly a \$35 million-a-year industry.

### New Classification

The Expert Advisory Committee on drugs has

recommended to the Minister that BZP and related substances should now be classified as a Class C1 drug.

This means a ban on the manufacture, supply, sale, export or import of “party pills”. Anyone supplying, manufacturing, exporting or importing these products will be liable to a penalty of a maximum of up to eight years in prison. Those found in possession of a Class C1 drug are liable to a maximum of three months jail and/or up to a \$500 fine.

The Minister has advised that the classification of party pills to Class C1 will be made through an amendment to the Misuse of Drugs Act. The legislation is to be introduced and passed into law by Christmas 2007.

## Update 3: Wills

A Bill updating the law relating to wills is currently in its final legislative stages. Once passed into law, it will be known as the Wills Act 2007 ("the Bill").

The existing law is enshrined in a statute dating back to 1837. It sets out the formal requirements for signing or revoking a will as well as the rules concerning interpretation and correction of wills. However, some considered the existing law too restrictive and that proper effect was not given to the intentions of the person making the will (currently known as the "testator"). The requirements for signing a will under the existing law are strict. There have been instances where a will has been deemed to be invalid because of the lack of formal validity arising from the manner in which it had been signed, despite the testator's intentions being very clear.

The new Act will apply to the will of any person who dies in New Zealand on or after 1 July 2007. One of its purposes is to restate the law in plain modern language. The Bill, once passed, will go some way towards modernising the substantive law but it is not intended to be a wide ranging reform of the current law.

### Key Changes

The term "testator" is replaced by the term "will maker". One of the underlying principles of the new law is to ensure that the intentions of the will maker are given full effect. To this end the Bill contains a provision for the court to correct clerical errors in a will that alter the true intention of the will maker. Furthermore, the court may take into account external evidence in interpreting a will

where the wording of the will is such that the will maker's intention is "part meaningless, ambiguous or uncertain".

The requirements for a valid will under the new law will be essentially the same. The Bill restates that a will must be a document signed in the presence of two witnesses. Those witnesses must:

- a) be together in the will maker's presence when he or she signs; and
- b) each state on the document, in the will maker's presence, that he or she was present when the will maker signed; and
- c) each sign the will in the will maker's presence.

However, the Bill does contain a new provision whereby the High Court can make an order declaring a document valid where it appears to be a will but does not comply with the above requirements. This does not apply to wills made before 1 July 2007.

### Conclusion

The onus is clearly on the will maker and his or her lawyer to ensure that the intention of the will is very clear.

Nevertheless, the Bill will give some flexibility to the court with the interpretation of a will where the intention has not been stated as clearly as it should be. It will be interesting to see how widely or restrictively the court will interpret its powers under the new legislation.

## New Zealand Law 2007™ Awards

We have been nominated for

### **Regional Law Firm of the Year**

in the prestigious **New Zealand Law Awards**.

There are 10 finalists throughout New Zealand and the winner is determined by client voting.

So if you would like to tell us how good you think we are go to

<http://www.lawawards.co.nz/VoteNowNEW/tabid/285/Default.aspx> and register to vote for us!

**Voting concludes 17th October 2007**

## Govett Quilliam News



The Partners are delighted to announce that Fleur Jones has joined the Estates Team as Estates Legal Executive assisting Judith Bennett. She is in the process of completing her Legal Executive Certificate. Fleur is involved in acting and directing local theatre and does makeup for both Repertory and Operatic Society productions. She says she also enjoys travel and walking.

### \*\*NEW\*\* GQ Profiles \*\*NEW\*\*

The Partners of Govett Quilliam have decided to include a profile on one Partner and one support person in each newsletter. Govett Quilliam are proud of their people and understand the importance of retaining motivated and happy staff who are success orientated. Our profiles for this newsletter are on our senior Partner and his Personal Assistant. Between them they have clocked up over 50 years with GQ!



John in Hamburg after finishing his race

**John Eagles**, Senior Partner at Govett Quilliam and fitness fanatic, has recently returned from Hamburg where he was representing New Zealand in the World Age Group Triathlon. The Hamburg BG Triathlon World Championships from 30 August to 2 September 2007 brought over 8000 athletes from over 60 different nations to the Hanseatic City. The event involved a 1500m swim, 40km bike ride and a 10km run. John finished a respectable 66<sup>th</sup> out of 80 competitors. The highlight of the race, says John, was finishing in the same lanes as the elites, like kiwis Terrenzo Bozzone (finished 7<sup>th</sup> in the Elite men's race) and Bevan Docherty (finished 9<sup>th</sup> in the Elite men's race). John enjoys the camaraderie that his sport engenders, something that came through strongly in Germany with the team all proudly displaying the silver fern and typical Kiwi passion for our country. John has been competing for a number of years and says he's too scared to stop as it

would mean losing his fitness – and he knows how difficult it is to get his fitness to the level he's at now. John is now training for the World Masters Swimming which is in Perth in April 2008. We asked John how he manages to fit his training in with a very busy work schedule and family commitments. John says he manages to do so "with a very understanding wife and a supportive family".



Jeanie and hubby Malcolm in Prague

**Jeanie Oxley**, PA to John Eagles (and help-desk to everyone!), is another GQ fitness freak, enjoying walking most lunch times and cycling to work in the summers. In the past Jeanie has played netball, basketball, squash and tennis. She has also organised the GQ Team for the Relay for Life and the Body Balance classes held at our offices twice weekly. Jeanie was born in Australia and moved to New Zealand at 10 years of age. She is the second youngest of six children and has an interesting ancestral connection to Napoleon Bonaparte! Jeanie's great, great, great, great grandfather was Napoleon's aide-de-campe on the island of St Helena. After Napoleon died he became the first colonial treasurer in Sydney. A family home in Victoria still contains some of Napoleon's furniture. Jeanie loves to travel and her last escapade included seeing Phil Collins live in concert with Genesis at the Olympic Stadium in Munich. Jeanie says of all the places she's been to she would definitely go back to Santorini; and not just because it's where she was proposed to!

### 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:

*The Strategy Pathfinder – A toolkit for plotting corporate success – Paul Franklin*  
*Environmental Law 2007 – Lauren Wallace*  
*Litigation Skills – Lucin Fraser, Lauren Wallace and Catherine Chetwin*  
*Creditors Remedies – Andrew Laurenson*  
*Local Government Legal Forum 2007 – Lauren Wallace*  
*Climate Change – Lauren Wallace*  
*Franchising – Ethelred Chey and Rich Flitcroft*  
*Strategic Law Firm Management – Lauren Wallace*  
*Taxation of Offshore Businesses and Investments – Paul Franklin*

## Govett Brewster Art Gallery

### **ACTIVATING KOREA: TIDES OF COLLECTIVE ACTION**

15 SEPTEMBER – 25 NOVEMBER 2007

Bae Young whan, CDC, flyingGity, JNP Production, Kim Gisoo, Sang-Don Kim, Ko Hyun Joo, Minouk Lim, mixrice,, Heinkuhn Oh and Park chan-kyong with exhibition design by Choi Jeong-hwa.

This major exhibition explores the complex and contradictory meanings of collectivism within Korean contemporary art in a society where traditional values and today's multifaceted changes coexist. The works in this exhibition represent a shift from the political representations of Korea's military dictatorship, the Cold War, and national division, heralded by 1980s Minjung art. Many artists today aim to raise awareness and bring about change around issues such as urban development, immigration and national identity. Featuring a range of media, the exhibition challenges the fast-paced cultural, economic and political changes in the contemporary Korean society. *Activating Korea* is co-curated by Mercedes Vicente and Beck Jee-sook in conjunction with Insa Art Space of the Arts Council Korea

### **DATE LINE – CONTEMPORARY ART FROM THE PACIFIC**

7 SEPTEMBER – 21 OCTOBER 2007

Neuer Berliner Kunstverein (NBK) Berlin and German Tour, 2007-08

Curated by Alexander Tolnay and Rhana Devenport, in a partnership between NBK and the Govett Brewster Art Gallery.

Date Line – Contemporary Art from the Pacific is a major international touring exhibition exploring the contemporary art of the Pacific

'International Dateline' it investigates how contemporary artists in the region respond to the complex contradictions across customary practice, postmodernity and globalisation. The exhibition will articulate a range of narratives concerning spirituality, colonial rupture and change, migration and displacement, diasporic and 'travelling communities', environmental pressures, the challenges of representation and the complex dynamics of multiple, evolving identities. Artists are John Pule, Filipe Tohi, Michel Tuffery, Ani O'Neill, Lonnie Hutchinson, Andy Leleisi'uao, Edith Amituanai, Shane Cotton, Michael Parekowhai, Peter Robinson, Lisa Reihana, Reuben Paterson, Fiona Pardington and Rachael Rakena plus a video programme.

### **LISA REIHANA: DIGITAL MARAE**

6 OCTOBER – 2 DECEMBER 2007

Lisa Reihana has contributed in powerful ways to multimedia and screen culture in Aotearoa. Her major ongoing project *Digital marae*, from 2001, explores haunting images that represent Maori ancestral figures within a wider consideration of the whareniui, the physical structure of the meeting house. The large photographs are a contemporary take on pouwhenua, the wooden carvings found lining Maori marae. Imbued with the lyricism of magic realism, these images seamlessly blend the traditional with the contemporary. This presentation of *Digital marae* embraces a new suite of photographs that reference atua, male, and takatapui or cross-gendered figures, in an expansion of her existing repertoire of arrestingly beautiful female forms.

**For more information on exhibitions and events Phone 06 759 6060 or visit [www.govettbrewster.com](http://www.govettbrewster.com)**

*Please note that all the Govett Quilliam Guides to many interesting legal topics and opportunities are available online on [www.thelawyers.co.nz](http://www.thelawyers.co.nz). Please download them at your leisure.*

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