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NEWSLETTER

Inside this edition

Dealing with a Deceased Person's Estate.....	1
Employment Issues – The Bill and John Case Study Continued	2
Shareholders' Agreement ..	3
Update on Personal Property Securities Act 1999	3
Legal Definitions (Wills and Estates)	4



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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.

Once probate has been granted, the executor can proceed to administer the estate. The executor's duties include:

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

Shareholders' Agreement

A shareholders' agreement is one made between the shareholders of a company which deals with issues arising out of ownership and management of the company. The absence of such an agreement can lead to serious problems and may result in the company's failure.

Strictly speaking, a company's written constitution regulates the relationship between the shareholders and between the shareholders and the company. However, a constitution is a document which is available for public inspection, whereas a shareholders' agreement is normally confidential.

Consideration should be given to having a shareholders' agreement in the case of any company where there is more than one shareholder. This is especially so where the shareholders are family members and the potential for disagreement can sometimes be greater. The purpose of the agreement is to ensure that decisions are taken by consensus and discussion.

Issues covered in a Shareholders' Agreement

The most important benefit of the agreement is that it provides a mechanism for resolving disputes between shareholders, whether by mediation, arbitration or some other dispute resolution processes.

Matters covered in a shareholders' agreement may also include the following:

- Dividend payment policy.
- Management and control of the company.
- Allocation of key roles and responsibility between the shareholders.
- Nature and amount of initial financial contributions to the company.

- A procedure for dealing with the breakdown of the relationship between the shareholders.
- The circumstances in which shareholders can exit the company.

Shareholder "deadlocks"

A shareholders' agreement is particularly useful when dealing with a "deadlock" situation with shareholders. Where the shares are owned in equal proportions by the shareholders, a disagreement will create a "deadlock" which means the company is effectively prevented from making decisions. A shareholders' agreement can include a mechanism to ensure this situation does not occur.

A shareholders' agreement can also deal with the situation when a shareholder dies or become mentally or physically incapacitated. This may mean the remaining shareholders will have to work with a family member of that shareholder and who may have little or no knowledge of the company and its business. A shareholders' agreement can deal with this by allowing the shares to be sold at a fair price to the remaining shareholders by the family member so that the company can continue to trade without disruption.

Summary

If you do not carefully consider and provide for situations which may arise between the shareholders, then you could be risking serious disruption and even the ultimate demise of the company. A shareholders' agreement can avoid this and your solicitor will be able to advise you on the terms of one which best suits your particular requirements.

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.

If you have any questions about the newsletter items, please contact us, we're here to help

