A GUIDE TO FUTURE PLANNING

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OUR SERVICE

KTLaw Limited provide a caring and comprehensive legal service for the elderly and for those who wish to plan for the future. This involves a personal approach which will often entail visiting the person in their own home, rest home or hospital as the case may be. We are dedicated to being open and friendly and available for a whole range of needs naturally focused from the legal perspective. Whilst our primary purpose is to help with legal matters, we have extensive contacts in the wider community. We can help clients and family and friends by putting them in contact with the appropriate services where necessary. We can offer guidance on Rest Homes, application for Rest Home Subsidies, Estate planning and management, and really the whole range of issues which affect the older person. The people principally providing the service are Steve Bray and Brent Selwyn but the office as a whole is committed to its success and support it wholeheartedly.

The intention of this booklet is to present a snapshot of the many issues which confront the older person. It is not intended to cover everything in detail but to inform in a general way.

Please note: The contents of this booklet are based on information available as at the time of publication being July 2024 so may be subject to change in the future. Nothing in this booklet is intended to provide specific legal advice and should not be taken as such. Each person's situation is unique and so are the solutions and professional advice should be sought before taking any action.

WILLS

Most people know about Wills. This is a document which essentially records what you would like to have happen to your assets when you die. It can include the appointment of guardians for any children who are infants. Generally, however, it disposes of a person's estate which is the sum of all the assets owned by that person at the time of their death.

It is important in a Will to appoint a person or persons who have the role of executors and trustees. Often they wear both hats. An executor is someone who is obliged to "execute" the directions contained in the Will, which most commonly is to gather in the assets, pay all the debts and then distribute to the named beneficiaries in the Will. A trustee's role involves holding assets for a future event such as when a child or children reach a certain age.

There are certain legal formalities to have a valid Will so it is best done with guidance. This is probably one of the more common jobs undertaken by a solicitor. It is important to make decisions about all of the assets including the contingency where a person or people who are left assets do not survive the Will maker. It is also important to make provision for children where appropriate. While not obligatory, many people make a decision which is stipulated in the Will as to whether they wish to be cremated or buried. Most Wills are fairly simple but some can be extremely complicated.

LIFE INTEREST WILLS

This is a special type of Will which is commonly used by people who do not wish to leave an asset or part of an asset to a surviving person, mainly a spouse or partner. This has become more frequent with people living longer and having had a number of relationships, particularly with children from previous relationships.

A common example is where couples get together, both having had children from previous relationships and they own a property, as to a half a share each. When one of them dies, they would not want their half share to automatically go to the survivor for the reason that it could disinherit their own children. In order to protect against this, a life interest Will leaves the survivor with the right to use the half share of the dying person's property until the survivor dies or remarries or enters into another relationship (one can choose what qualification one puts here). Whatever the trigger point, when it occurs, the person making the Will can then stipulate that their share is then divided amongst their own children or in the manner that they state.

Life Interest Wills also have an important estate planning relevance. As an alternative to setting up a Trust which puts ownership out of the hands of the owners of the property, many people could simply transfer their home to themselves as (to use the legal expression) tenants in common in equal shares. The most common form of ownership for a couple is joint ownership but, there is a catch in that, if one person dies then the survivor automatically gets to own the whole of the property. This may not be what is wanted. It may be considered desirable that this principle not apply automatically. A most obvious example would be in a rest home subsidy context where one person has died. If there was a house worth $400,000.00, then in this situation the survivor would end up with $400,000.00 worth of assets and would not be eligible for a rest home subsidy until the assets were reduced to around $230,000.00. If the parties had owned the property as tenants in common in equal shares and had life interest Wills, then the survivor would only own $200,000.00 as the other $200,000.00 (i.e. the other half of the house) would be the property of the estate of the person who has died first. Therefore the survivor would be entitled to a rest home subsidy immediately if they were assessed as requiring Rest Home care. However as with anything like this, the rules could be changed at any time and nothing can be regarded as certain in the area of eligibility for a rest home subsidy.

LIVING WILL

A Living Will is effectively a document which stipulates what we would like to see happen in the event of certain health issues. This covers some fairly obvious cases, such as, not being resuscitated if on life support, not receiving blood transfusions and such like.

Following some high-profile overseas cases, Living Wills are now much more common in New Zealand, although, there is no special legislation covering such documents. They are very common overseas, especially in the United States.

With life expectancy increasing, a greater number of people are choosing to set their wishes in relation to medical treatment down in writing. This flows through also from there being a greater public awareness about this as a possibility. To be valid, such directives need to be made by people who are competent to do so and not under any pressure. It may also be relevant to know whether the person making the directive was acquainted with all of the information which might reasonably be required to make an informed decision.

The medical profession does take notice of such documents.

ENDURING POWERS OF ATTORNEY

Enduring Powers of Attorney are a very useful tool for the management of a person's affairs, especially as they get older. There is one type for property which includes all assets that a person may own, and the other type is for personal care and welfare. This latter form covers decisions about a person's health and wellbeing.

As the Power of Attorney imposes considerable responsibility on the person or people appointed, there have been a number of recent changes in the law to provide a greater degree of protection for the people appointing Attorneys. It is like any situation where a person is put in a position of power over somebody else's assets or indeed personal welfare, then there is a potential for abuse.

Enduring Powers of Attorney have a standard format, designed by government statute, although there is some flexibility to elect options to suit each individual case. Such options include the requirement to report to others, ensuring that all interested family members are kept in the picture. It is now obligatory to consult with a fellow attorney or attorneys where more than one is appointed.

An Enduring Power of Attorney for property is operative from the date of signing, as and when it may be needed; or can be qualified to become operative only when the person granting the power loses mental capacity. However a personal care and welfare appointment does require a person to have lost capacity before becoming operative.

The Enduring Power of Attorney does not work where a person is a trustee of a Trust but there is a special but limited alternative form of authority available for such appointments as set out in the Trusts Act 2019.

People wishing to have Powers of Attorney, (and like a Will this is one of those legal documents which is highly recommended), should consult with their legal advisor as this is a relatively simple document to implement. Failure to do so can have expensive and frustrating consequences. There is often a time lag in making decisions; or alternatively an expensive application to the Court for the appointment of a manager, which could have more simply been achieved by appointment of an Attorney when the person had the mental capacity.

TRUSTS

While Trusts have existed in the English legal system for hundreds of years, they have only really become popular in New Zealand over the last 30 years. Before the 1990's the people who mainly set up Trusts were large asset owners like farmers who wanted to minimise the effect of estate duties and wealthy business owners who wanted some personal protection in the event of business failure.

The first of the historic reasons for setting up a Trust has been resolved by the removal of estate duties (actually the statutory section has not been repealed so much as the rate which was previously 45 cents in the dollar was reduced to 0, so in theory although unlikely, it could be reintroduced very simply).

Perhaps following the liberalisation and deregulation brought in by the Labour governments of the late 1980's the financial markets were opened up considerably and financial planners as a profession were born. With them came a raised consciousness of the validity of Trusts and many people who had never thought of setting up a Trust were now creating a Trust for a variety of reasons.

Perhaps the most common reason was to ring fence the family home into a form of ownership which would remove the home as a personal asset and therefore it would be available for the children of the people creating the Trust in certain circumstances. One of those circumstances was eligibility for a rest home subsidy which for a long time only kicked in when a person's assets were less than $15,000.00. While it is not appropriate to set up a Trust solely for the reason of qualifying for a benefit, it is an incidental benefit which was attractive to many people.

Another common reason for setting up a Trust was the historic perennial protection from creditors in the event of business failure. Thus if a person went bankrupt but had the family home and other assets in a Family Trust then those assets would be preserved wit. family control. There are exceptions to this under our Property Relationship and Insolvency Laws designed to ensure a fair balance between legitimate estate planning and protection of claimants.

Other reasons included income tax saving. The tax rate for income earned by a Trust is currently a flat 33 cents in the dollar, whereas if any of this income is diverted to family members who are paying less than that on their income, then sometimes considerable tax savings can be achieved. For example, if a person was on the top tax rate and transferred income producing assets to a Trust, the income then could be distributed amongst people paying a lower tax rate. In this case there would obviously be a tax saving.

Some people find comfort in the fact that assets owned by a Trust can be used for the benefit of children without necessarily being paid to the children directly. This is especially so in a relationship context where if a child receives the benefit of a sum of money directly this may well become relationship property and would then need to be divided in half and paid to a spouse/partner in the event of a relationship breakdown.

A trust can be created in a Will and operative when the will maker dies but most trusts are created “inter vivos”. An “inter vivos" trust is created during the lifetime of the settlor (the creator of the trust). Also known as a living trust**,** this trust has a duration that is determined at the trust's creation and can entail the distribution of assets to the beneficiaries during or after the settlor’s lifetime. Under the Trusts Act 2019 the maximum term for a trust is now 125 years.

GIFTING

In the modern era gifting has become a fairly relevant topic for many people.

The common notion of gift is well entrenched in our culture. People have made gifts throughout history and until recently these were subject to a special tax called gift duty. Gift duty has now been abolished but there are some constraints and rules which do limit what gifts can be made. These are largely designed to stop a person from divesting themselves of assets in circumstances where they may be eligible for government financial assistance (for example). Some common examples of gift situations follow:

a. In the Rest Home Subsidy context WINZ/MSD will accept that it is appropriate to gift $6,500.00 per annum in the five years preceding the application for a subsidy. There is no law which says it must be five years but that period is really entrenched as policy probably from the practical perspective that beyond a certain time frame it would become difficult to prove that gifting was done deliberately to qualify for financial assistance. Under the Social Security Act if it can be shown that gifting has deliberately taken place for the purposes of qualifying for a benefit then the benefit can be disallowed. Practically, the issue of how to administer such legislation was solved by the "five year" rule.

b. If two people apply at the same time the amount of allowable gifting will double to $13,000 per annum or $65,000 in total over the relevant five year period.

c. Gifts of up to $27,000.00 per individual or couple can be made in any twelve-month period outside of the five years leading up to a rest home subsidy application. Individual gifts on top of the $27,000 can be made for various presents such as Christmas and birthday anniversaries but obviously these rather bitty gifts are going to be fairly difficult to police in practice and in fact are not really policed at all. In addition any payments towards providing a high level of care will not be counted.

d. Forgiveness of Debt. A common form of gift is in an estate planning situation where assets have been transferred to a family trust. As the family trust does not start with any money to acquire these assets what normally happens is that there is a debt owing to the person or persons

transferring the assets. That debt is in fact an asset in the name of the person who made the transfer so it is important from the overall objective of removing assets from an individual's name to ensure that what is called a gifting programme takes place. Forgiving the whole debt which is possible now whatever the amount would lead to a problem under the example given in c. above so what often happens here is that every twelve months a person or couples forgives part of the debt at the rate of $27,000.00 per annum (for couples, gifting is $27,000 in total, not per person). This is done by a document called a Deed of Forgiveness of Debt. This is a fairly straight forward process with no consequences to speak of given the commonality of the process.

FUNERAL TRUSTS

In the context of Rest Home Subsidies, the Funeral Trust has acquired a popular following. As is mentioned elsewhere, the threshold for qualifying for a Rest Home Subsidy is dependent on the amount of assets in the person's name noting there are two basic tests to determine eligibility. In either case if the assets can be legitimately reduced then it may mean an application can be made earlier than what might otherwise have been the case. WINZ have determined that a Funeral Trust or prepaid funeral expenses of up to $10,000 per person is a legitimate provision and when such a trust is created with $10,000 placed in it then it falls outside of the personal assets of the person setting up the trust. This should only be set up at the time of applying for the subsidy as if put in place before then any interest earned by it is counted as a personal asset to the extent it exceeds $10,000.

Essentially what happens is that when a person dies the trust fund or prepaid funeral is available for the funeral account and provision is made in the trust document that anything left over will be paid out to nominated beneficiaries in that person's Will.

FORMS OF PROPERTY OWNERSHIP

There are two main types of property ownership affecting couples.

The first is **joint ownership** such as where a property is owned by John and Mary Smith jointly. In this case, when one of the couple dies, a principle called "survivorship" applies where the survivor inherits the whole of the property and none of the property forms any part of the estate of the person who has passed away first.

The other type of property ownership is where there are **tenants in common** in specific shares. Often these are equal shares, but it is not necessary that this be the case and can depend on the respective contributions of the parties to the property. The difference from joint ownership is that when one of the property owners dies, then the half share belonging to them does not automatically go to the survivor but will go according to the terms of that person's Will. In this instance, it is very important that appropriate forms of Wills called Life Interest Wills be employed and these wills are dealt with under another article heading at page 6.

Some couples transfer their family home to a **Trust**. This covers the situation where it is considered desirable for one or more of a variety of reasons to have the property owned by Trustees and therefore not form part of the assets of the couple. Some people are a little nervous about this considering they will lose control but it is not as bad as it sounds. Most trusts are designed in a manner which leaves significant control in the hands of the original owners including the ability to re-transfer the property back to them or one of them in the future.

One thing that is most important about a trust is to ensure that it is administered in a way which is quite independent of the individuals who set it up. This could involve separate bank accounts and the avoidance of intermingling of funds so that, "like a company" it exists independently.

While trusts are a well established part of the legal and social fabric of our society their operation and the responsibility of trustees is strictly governed now by the Trusts Act 2019 which imposes obligations on the trustees of any trust to disclose information to beneficiaries as directed by the act.

WINZ REST HOME SUBSIDIES

This is a complex and specialist area covering the circumstances in which individuals can qualify for assistance from the government to pay for the not inconsiderable rest home fees that can be involved where a person is living in a rest home or indeed receiving constant hospital care in the hospital wing of a rest home.

While there are existing policies which determine eligibility, one has to have an open mind to the fact that with the ageing population and the increased number of people going into home or hospital care there are going to be financial issues of affordability in the future which have not yet been fully canvassed. Therefore, while this article endeavours to state the government policies, these are only the policies in existence at this point in time and will almost certainly change in the future.

People who:

- Don't have a partner, or
- Have a partner who is in long term residential care.
  - Must have combined total assets valued at $284,636 or less to qualify.

People who:

- Have a partner who is not in care can choose a threshold of:
  - Combined total assets of $155,873 not including the value of their house and car, or
  - Combined total assets of $284,636 which will include the value of their house and car.

  Please note: asset thresholds are adjusted at 1 July each year with the next adjustment due 1 July 2025 and that the house is only exempt from the financial means assessment when it is the principal place of residence of the partner who is not in care or there is a dependent child.

As a person cannot apply until they meet the criteria tests mentioned above, it is important to keep a close eye on the asset total in either category to ensure that an application is made at the correct time and the Funeral Trust established if considered appropriate. If the application is not made soon enough, then the WINZ subsidy cannot be backdated. So, for example, if it was left until the assets in the second case totaled $100,000.00 and even though the threshold was then (say) $200,000, WINZ would only start

paying from the point that the application had been made; they would not make any compensation for the money that had been spent between $200,000.00 and $100,000.00.

WINZ are very well informed about the role of trusts in the lives of many people applying for a rest home subsidy. They will scrutinse very carefully the history of any trust including in particular the reasons for setting up the trust. If they consider the reasons were valid then the trust assets may be excluded from personal assets but WINZ may still look to any income that the trust is earning as a contribution towards rest home payments. This is very important to understand as many people set up trusts because it was then customary to do so and they may not now be the panacea they were initially thought to be in this context.

FINANCIAL PLANNERS

With the then Labour government's deregulation approach of the middle to late 1980's, people's options as far as investment multiplied considerably and their confusion about appropriate options multiplied along with it. Out of this, an industry of financial planners was born, where people offered advice to investors as to a range of options which prior to the 1980's had been relatively simple. People either invested in property, which generally was regarded as the most secure and solid form of investment, or bank deposits, or bonus bonds, or shares. Now of course there are a great many companies offering investments in unit Trusts and related entities where people can invest in the global market according to their inclination and the advice given to them.

Financial planners will not be necessary for everyone, but for the people with sufficient resources it is often a reasonably reliable source of assistance to get help in portfolio management and in placement of investments. We as a firm have a relationship with a number of financial planners in the industry.

REVERSE EQUITY MORTGAGES

Many older people do not often borrow money, mainly because they do not need to or do not want to do so. However, many people are in the situation where they simply cannot afford to borrow money because they do not have the income to make the loan repayments even though they may have a lot of assets. It is rare that an older person has a mortgage paying interest and capital repayments to a bank or other lending institution simply because they don't have the income to support such things in most cases.

A relatively recent phenomenon which has grown enormously over the last decade is "reverse equity mortgages". What this rather grand expression actually means is that people can use the equity of their own home to borrow money but are not required to make any repayments at all during their lifetime and the debt itself would only be repayable on the death of the couple (where both have borrowed) or a single person where they alone own the property. This can be very useful as illustrated recently when a couple wanted to put a heat pump in and generally redecorate to make their home more comfortable. They had a mortgage free home but no savings to speak of and were both in their early eighties. Their children were more than happy to see their parents warm, even if it meant that their parent's home had a mortgage. While not necessarily true in all cases, in this instance the borrowing would clearly have enhanced the value of the home.

There have been many cases where people have been on lengthy hospital waiting lists for operations. By availing themselves of a reverse equity mortgage, they have enjoyed being pain free and mobile a number of years earlier than if they had waited for the public system.

Decisions regarding such a mortgage need to be taken seriously in consultation with family and legal advisors.

ESTATES

At one time or other we will all be confronted with the issue of death. That brings into question the issue of whether or not a person has a Will or whether an application has to be made to the Court for probate or letters of administration.

Probate is where the Will is proved as valid to the satisfaction of the Court who issues a document called probate. This is notice to the world in effect of the validity of the Will and of the entitlement of the executors to administer the estate of the person who has died.

Where there is no Will, as is sometimes the case or if the Will is defective, then letters of administration can be obtained. While this is more complicated than the process for obtaining probate, it serves much the same purpose. Letters of administration constitute an order from the Court authorising certain people (called administrators) to administer the estate of the deceased.

Sometimes there is no requirement for probate or letters of administration. This depends on the amount of assets owned and the type of assets owned by the person at the time of death. Generally, if you have cash or insurance policies, where for example the amounts involved exceed $15,000.00 and are held in a bank account, then the bank or financial institution will require the production of a formal document (Probate of Letters of Administration) before releasing the funds. However, in a number of cases the assets are either easily obtainable, or there is no such formal requirement, or the amounts are so small that the whole of the assets of the estate can be bought together without the need to produce probate or letters of administration.

Where probate or letters of administration is granted, there are certain formal rules which the executors or administrators are bound to follow and there are certain statutory time periods which have relevance.

Generally, any distribution within six months of the date of the grant of probate has an element of risk for the executors and trustees. This is on the basis that should there be any claims within 12 months of the date of the grant of probate then if successful, the executors and trustees could be personally liable. This could be unhappy for them, even if they do have the right to trace any distributions to the beneficiaries as sometimes this is not possible.

Any distribution within six months of the date of the grant of probate or letters of administration puts the executors or administrators at personal risk. The executors or administrators could be personally liable for distributions made within a six-month period if a successful claim is made against the estate. Where there has been no claim or notice of claim during this period, the executors or administrators can make a distribution without the risk of any personal liability to themselves. However, people are entitled to make a claim against an estate at any time up to twelve months from the date of the grant of probate or letters of administration. After twelve months, unless there are exceptional circumstances, they would generally not be able to make a claim and no comeback could be made against either the executors and trustees or the beneficiaries.

CLAIMS AGAINST ESTATES

People can sometimes make claims against the estate of a person who has died. They fall into a number of well-defined categories:

Eligibility Criteria:

1. Family Protection Act – Dependent family members of the person dying can apply to the Court for relief where there has been no provision or inadequate provision for such person where it can be shown that a duty was owed and not met by the way in which the Will was written. Unless there is prior agreement the final decision on this area will often be dependent on the discretion of the judge who will form a view about the matter based on the evidence put before the Court.

2. Testamentary Promises Act – Sometimes in return for services a person, particularly an elderly person, may say that they will provide for somebody in their Will in recognition of the services performed. If the subsequent Will does not make such provision, then the person who has received the promise can make an application to the Court.

3. Property Relationships Act – Claims can be made by previous partners/spouses of a deceased in some cases. Where a spouse/partner is provided for in a Will they can make an election as to whether they accept the terms of the Will or whether they wish to reject the terms of the Will and make an application for an order under the Property Relationships Act.

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