

UPPER HUTT CITY COUNCIL

SENIORS PUBLIC FORUM

1 April 2009

Legal Information about Estate and
Financial Planning

Presentation by John Gwilliam

ABOUT THE SPEAKER

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John is a Barrister and Solicitor who has been in private practice in Upper Hutt for over 20 years.

John has extensive experience in advising families and retired persons regarding their financial and legal affairs particularly in regard to asset planning. With particular expertise in litigation, he has an intimate knowledge of the adverse and unintended consequences that families and individuals can face when people do not properly structure their affairs.

TOPICS FOR DISCUSSION

1. Enduring Powers of Attorney
2. Wills
3. Reverse Equity Mortgages
4. Rest Home Subsidies
5. Family Trusts

ENDURING POWERS OF ATTORNEY

- Authorising another person (the Attorney) to deal with your affairs and property should you (the donor) be unable to do so because of physical or mental incapacity.
- Extension of an ordinary power of attorney
- Two types:
 - Personal Care and Welfare
 - Property

PERSONAL CARE AND WELFARE

- Can only be used where the donor is under a mental incapacity
- Only one person at a time can be appointed as attorney
- But can have successive attorneys
- Authorises the attorney to make decisions about personal care and welfare matters
- E.g. - where you are to reside
 - Consent to medical treatment
- Can limit the power of attorney to certain aspects of the donor's care and welfare
- Can place conditions on how the power of attorney is to be exercised.

PROPERTY

- Can authorise attorney to act whether or not the donor is mentally incapable (called an open power of attorney)
- Can limit the power of attorney so that it can only be used if the donor becomes mentally incapable (called a closed power of attorney)
- Authorises the attorney to deal with the donor's property
- E.g. Authorises the attorney to operate the donor's bank accounts or to sign legal documentation on behalf of the donor in relation to the donor's property
- Can limit the power of attorney to particular property
- Can place conditions on how the power of attorney is to be exercised

SOME MATTERS FOR WHICH YOU CAN'T USE AN ENDURING POWER OF ATTORNEY

- To make a will (unless authorised by the Court)
- To consent to marriage
- To consent to medical experimentation
- To euthanise the donor
 - e.g. to refuse consent to medical treatment
- To consent to the adoption of a child

RECENT CHANGES IN THE LAW RELATING TO ENDURING POWERS OF ATTORNEY

- Donor must now be independently advised as to the effect and implications of the enduring power of attorney before it is signed
 - i.e. the donor's execution of the power of attorney can not be witnessed by the lawyer representing the attorney
- This has created additional costs, particularly where a husband and wife appoint each other as their attorney
- Can now require the attorney to consult with other person (e.g. family members) before using the power of attorney
- Can state what personal benefit, if any, an attorney is entitled to when exercising the power of attorney
- Can state which or what type of medical practitioner is to certify as to the donor's mental incapacity before the power of attorney can be used

WILLS

- Probably the most important legal document anyone will sign during their life
- Not just about who you want to leave your property to:
 - Directions as to funeral service, cremation or burial
 - Testamentary Guardianship
 - Operation of any family trust
 - Payment of your debts

WILLS (Cont.)

- Only becomes legally effective on your death
- Only relates to the property you own at your death
- Can be changed at any time (provided you have mental capacity)
- Should be kept constantly under review
- Mutual Wills
- Agreements not to revoke Wills

REVERSE EQUITY MORTGAGES

- Of benefit to those who are asset rich but cash poor
- Enables those over a certain age (usually 55 years of age) to access the equity in their home to fund their lifestyle
- There are no repayments during the property owner's lifetime
- Loan plus interest does not have to be repaid until the property owner's death and is paid out of the sale proceeds of the property
- If there is a shortfall between the sale price of the property and the amount owing on the mortgage this is written off by the mortgagee

REVERSE EQUITY MORTGAGES

- WARNINGS

- Should be discussed with your family
 - effectively you are spending the children's inheritance
- Expensive way to borrow money
 - upfront fees and charges
 - high interest rate
- Usually can borrow only up to about 45% of the equity
- Not advisable if house still has a mortgage
- Could be required to pay back the loan before your death
 - e.g. if you sell your home and move into a retirement village
 - if you require full time rest home care
 - fail to adequately insure the property or otherwise fail to comply with the other conditions of the mortgage
- Difficulties where a surviving spouse remarries
- Criteria have been made more restrictive given the current economic environment with diminishing property values

REST HOME SUBSIDIES

- Administered by WINZ
- Asset tested
- Government will meet part of your rest home fees provided you meet the asset test requirements
- Asset test :
 - if single, no more than \$180,000.00
 - if a couple (and one partner doesn't require rest home care) then the family home plus \$85,000.00
 - If both partners require rest home care then no more than \$180,000.00
- Subsidy takes into account all other income earned and enables you to keep a small allowance from your superannuation (balance is paid directly to the rest home)
- Need to have been assessed for rest home care first usually by organisations such as Nurse Maude
- Age criteria – 65 years and over

FAMILY TRUSTS

- What are they?
- Why have a trust?
- Are they for me?

WHAT IS A TRUST?

- A trust is simply an acknowledgement by one person (the trustee) that he or she holds property for the benefit of another person (the beneficiary)
- Trusts arise in two ways:
 - The legal owner of the property in question declaring that hence forth he or she holds that property for the benefit of another
 - A formal agreement (**the Trust Deed**) is drawn up between the person wishing to create the trust (**the Settlor**) and the other person or persons (**the trustees**) stating that the settlor will transfer or gift property to those persons on condition that they acknowledge that such property (**the trust assets**) will be held in trust for certain persons or a certain class of persons (**the beneficiaries**)

FEATURES OF A DISCRETIONARY FAMILY TRUST

- Who benefits from The Trust is at the discretion of the Trustees
- **SETTLOR HAS MAXIMUM CONTROL :**
 - Settlor a trustee
 - Power to appoint and remove trustees
 - “Protector” role
 - Memorandum of Wishes
- **MAXIMUM FLEXIBILITY :**
 - life of trust
 - beneficiaries
 - dealing with trust assets

WHY FORM A TRUST?

- Asset protection
- Tax planning
- Providing for family/friends/charities
- Maximising eligibility for state assistance
- Estate planning
- Confidentiality

TRUSTS – ARE THEY FOR ME?

- Trusts are not for everyone :
 - cost
 - complexity
 - small size of estate
 - low risk of creditor exposure
 - age of settlor
 - can be lengthy timeframe before benefits of trust take effect

TRUSTS - WARNINGS

- Transactions entered into for the purpose of defrauding existing creditors can be set aside
- Evading tax is illegal and arrangements entered into for the principal purpose of tax avoidance can be set aside by IRD
- Arrangements entered into for the principal purpose of deriving a Social Welfare benefit can also be disregarded when considering eligibility for a benefit or other state assistance – e.g. Rest home subsidies
- Need for gifting programme :
 - \$27,000.00 per year to be exempt from gift duty
 - \$5,000.00 per year to meet eligibility for rest home subsidy

- Any questions
- Discussion

For further information, please note that John's firm, John Gwilliam & Co, runs a free legal advice service at their offices each Thursday 12.30 p.m. to 2.00 pm. No appointment is necessary.

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