

in brief from
RAINEY COLLINS
LAWYERS
MAORI ISSUES

Winter 2010

NAU MAI HAERE MAI

To the Winter edition of Rainey Collins In Brief Maori Issues newsletter.

In this edition we focus on Governance of Maori Trusts, Ownership options for property, protecting culturally-inspired branding, Wills and Estates and relationship break-ups and Foreshore and Seabed.

These articles and others are available on our website www.raineycollins.co.nz. You can download them or send them to others.

I trust you find the information of interest and use.

Kia ora
Peter Johnston
Partner



PETER JOHNSTON

Governance of Maori Trusts

Harry had recently returned to New Zealand with his wife to raise their young family so that they could be closer to his extended whanau. While living overseas he had established a successful cleaning business and was keen to share his business experience with his extended whanau. He put his name forward as a trustee of the whanau farm Maori land trust which had been experiencing problems for years.

The existing trustees had been on the board for many years and a number of them seldom attended meetings. Others had farming but not business experience. The accounts were not up to date, meetings were not being held and the farming operations were run down. There were ongoing problems with the farm manager who was the son of one of the trustees. No dividends had been paid out in living memory and much of the land had reverted to gorse. To make matters worse the bank was threatening to suspend the farming operation's overdraft facility.

Ten years earlier, the trustees had leased the block out as a solution. Unfortunately they had not done their due diligence on the prospective lessee who could not even afford the rental. He also failed to repair the fences and add fertiliser to the land as agreed. If the trustees had carried out due diligence on the lessee they would have discovered that he had an appalling credit rating and negligible farming experience. Instead they were faced with expensive legal action to have the lessee removed from the land.

Although the whanau were unhappy with the situation, they had put up with it for years as the trustees were related and respected kaumatua of their marae.

Under the trust deed there was no limit to the term of office for each trustee, which effectively made them life members. In the past they had resisted standing down due to their strong attachment to the land and a desire to turn the situation around. Despite their best intentions the trustees could not see that their remaining on the board was endangering the farming operations.

They had exposed themselves, the farming operations and land itself to significant risk, including a mortgagee sale.

Fortunately Harry's experience in business meant that he was able to come up with a plan. He approached the trustees and offered to help them to turn the farming operations around. His plan was drawn up with the assistance of a respected farm consultant, a good accountant and a lawyer experienced in Maori land and governance issues.

The plan set out the steps required and included changes to the Trust deed to ensure that there was an appropriate mix of experience on the board and for the retirement and rotation of trustees. A succession plan ensured that new talent could be brought on to the board. Clear rules on conflict of interest included the hiring of staff. Both the bank and the beneficiaries were delighted by the changes. The trustees were also happy that the fortunes of the farming operations had finally been turned around and they were looking forward to positive future operations.

For more information on governance of Maori Land please contact Bryan Gilling on (04) 473 6850 or at bgilling@raineycollins.co.nz.



BRYAN GILLING

CONTENTS

- 1 Governance of Maori Trusts
- 2 Property Ownership...
Choose The Best Option For You
- 2 Protecting Your Culturally-
inspired Branding
- 3 What's Yours is Mine and
What's Mine is Yours...
Until We Break Up
- 3 Foreshore and Seabed
- 4 Will I or Won't I...
The Importance of Having an
up to Date Will
- 4 Recent News

Property Ownership... Choose The Best Option For You

When Pat and James purchased a property, their lawyer put to them different options for ownership of the property, many of which they hadn't even realised were available. Both had children with previous partners and wanted to ensure those children received part of the property when their respective "parent" passed away. If they chose to own as "joint tenants", the property would pass to the surviving owner automatically, leaving nothing for their respective children. They decided on "tenants in common", where they each own a half share of the property, so they can each leave their half of the property to their children if they choose.

Whether a couple owns a property as "joint tenants" or as "tenants in common" will depend on their personal circumstances and how they intend the property to be dealt with in the event of death.

With "tenants in common" there is also the ability to own property in unequal shares, although any such

unequal ownership may need to be accompanied by a Relationship Property Agreement.

Using a Trust is also a common way to own property. A property that is owned by a Trust can be ring-fenced against creditors, relationship disputes and other claims. It also removes property from a person's Will, so long-term family arrangements may be more easily continued across the generations.

Property can also be owned by a Company, which may result in tax benefits if you are buying a rental property. Proper accounting advice as to a tax and business efficient way to own property should accompany your legal advice.

How you own your property can have significant unintended consequences. Talk to your legal advisor about what is best for you.



SARAH BLANEY

Protecting your culturally-inspired branding

Tamati was in business. He was creative and so set about designing his own brand. After approaching a respected elder from his whanau, he incorporated a traditional Maori design into his branding. He also wanted to give his business a Maori name and so used a Maori word.

Having spent time and money developing his brand Tamati wanted to make sure it was protected. He wanted to protect both the artistic image in his brand and, if possible, the Maori word itself. It would probably not be straight-forward, but there are ways to get it done!

Can you protect, and therefore "own," traditional Maori images?

The short answer is "No", but you can protect and "own" your particular representation of a traditional Maori image. By way of example, take the Air New Zealand logo which utilises the koru. Air New Zealand do not "own" the koru itself, but they do own their particular visual representation of it as it appears in their well-known branding.

How?

Intellectual Property protection for Tamati's image was possible in two main ways – by way of Copyright and Trademark registration.

Generally speaking, Copyright protection is automatic if an image is original (that is, not a copy of something else). So, without taking any formal steps, Tamati's image was Copyright protected from the day it was recorded on paper.

Trademark registration requires application to the Intellectual Property Office of New Zealand (IPONZ) and payment of a small fee. If someone has already registered a similar image registration may not be possible. Further, if the image is offensive registration will not be allowed. A Maori Trademarks Advisory Committee assesses such applications and takes into account matters such as tikanga, tapu and noa.

Depending on the nature of Tamati's image, but as long as it was not offensive, he would likely be successful in registering the visual image associated with his brand.

Can you protect Te Reo?

Common Maori words, like English ones or any other language for that matter, are often unable to be registered. This is because it would be unfair to allow one person to "own" a word like "koru." To allow such ownership would prevent others from using the word without permission. Unlawful use could result in hefty fines or imprisonment. Other types of words that are unregistrable are those which are superlatives, for example, "Super" or "Awesome".

Tamati

Unfortunately for Tamati, the Maori word he chose was not only a commonly used slang word, it was also (when used informally) a superlative (a word describing how good something is). So, by itself, the word may not be able to be registered as a text mark.

Tamati could however, register his logo as a visual image (or "device"), which would include the word. This way, if successful, he would obtain full protection for his brand, and even some limited protection of the text. Alternatively, Tamati could alter the proposed trading name to incorporate a phrase involving the word itself. This would more likely be successful.

Do you have a brand to protect?

If you are in business, you have a brand worth protecting. Contact your professional advisor today to find out whether your brand, which you have invested time and money creating, is safe from being copied or used by others.



KIRSTEN FERGUSON

What's Yours is Mine and What's Mine is Yours... Until we Break Up!

Tania owned a florist business which had been very successful in recent years. She had built up significant savings when she met Rawiri. They decided to buy a house together, borrowing the bulk, but with Tania putting in an extra \$100,000.00 towards the purchase. They shared mortgage repayments but did not make any agreements as to how their property would be split if they were to separate.

After a few years things turned messy in their relationship and they separated and sold the family home. Rawiri claimed half of the home, despite the fact that it was Tania's money put into the relationship home. He is entitled to do this by law, but if Tania and Rawiri had signed a Contracting Out Agreement to agree that Tania's contribution was her own separate property, this would not have happened.

If you're married, in a civil union or you've been living with your partner for three years or more then the presumption under Law is that all assets are split 50/50 if you separate. If you haven't been living together for three years but you have a child together, then the law may also apply to you. There are various factors which are taken into account in deciding whether you are in a de facto relationship, so you may also not realise that a Court would consider your relationship a de facto one.

Property that may be divided under the 50/50 division rule includes the family home, furniture, cars, superannuation and potentially all other property you both own at the time that you separate. Do you want to risk losing your precious car, the whanau taonga, your jewellery or your land shares?

Division can also be complicated when one of you has received a gift of money or inheritance from a relative and has put that towards relationship property, for example renovations on the family home or paying off the mortgage. In those situations, the property becomes so intermingled that it loses its status.

To avoid having these laws apply to your situation you can contract out of the legislation by putting in place a Contracting Out Agreement. This Agreement lists the property that you want to retain as your own, if your relationship ends. Both you and your partner can include all your separate property in the Agreement, for example bicycles, CD collections, whanau taonga or land shares, or just the larger assets like houses and your superannuation.

It's often easier to enter into a Contracting Out agreement at the start of the relationship, when things are clear and you both have a good idea of who owns what, and what items you want to keep separate. However, you can enter a Contracting Out Agreement at any time during a relationship, as long as your partner agrees. If you both owned property at the start of the relationship then it's a good way to protect both of your interests. Alternatively, if you do own more property than your partner but they aren't planning on claiming half then they won't mind signing something to clarify that, or vice versa.

If you do end up separating then a Contracting Out Agreement should also make the division of property easier and cheaper, because you'll both know where you stand in relation to the specified property.

For a Contracting Out Agreement to be legally binding both you and your partner must receive independent legal advice on it and each of your signatures on the Agreement needs to be witnessed by independent lawyers.

Contracting Out Agreements are more common than people realise.

It pays to protect yourself as much as possible and ensure that there is a clear understanding of what would happen in the event of a break up and hopefully avoid unnecessary and messy disputes.



ALAN KNOWSLEY

Foreshore & Seabed

The Government and the Maori Party have reached an agreement in relation to the foreshore and seabed. The key points to the agreement reached are as follows:

- Repeal of the Foreshore and Seabed Act 2004.
- Existing private titles will continue unaffected.
- Public access and existing navigation and fishing rights will continue unaffected.

- The foreshore and seabed which are currently vested in the Crown will become public space.
- Maori will be able to seek customary rights and customary title through negotiation with the Government or through the High Court.

For more information regarding the foreshore and seabed agreement and customary title please contact Campbell Duncan at cduncan@raineycollins.co.nz or on 04 4736850

Did You Know?

We have further articles on Maori land and Treaty of Waitangi issues.

You can review these on our website www.raineycollins.co.nz.

Will I or won't I...? The importance of having an up to date Will

The consequences of not having an up to date Will can be huge. Not having a Will means that the process for administering your Estate is far more complicated and can mean that your spouse or whanau has to make a claim on your Estate to get their share, or at worst, your assets end up with the Government.

Hemi was a shareholder and director of a company which ran a cleaning business, along with three of his extended family members as fellow directors and shareholders. He died suddenly, devastating his whanau and friends. It became apparent after some investigations by his wife that Hemi in fact did not have a Will.

His wife had to go through the longwinded process of being appointed administrator, only to receive part of the estate, with the rest going to their children.

As part of her share of the Estate, his wife acquired Hemi's shares in the company. His wife was not business minded at all and Hemi had always taken care of all the finances. His co-directors and shareholders were left in an awkward position of having his wife as shareholder and having to be part of decisions, which ultimately did not help the business.

The shareholders and directors had had discussions about having a shareholders' agreement drafted earlier that year but had done nothing about it. During those discussions, Hemi had indicated that he would not be leaving his shares to his wife as he and his co-owners had built the business from scratch. Unfortunately, discussions are not enough to make a wish legally binding.

If you die without a Will, the law governs how your Estate will be divided, without regard to what you or your family might want. If you and your partner have children, then basically everything is divided between your partner and your children in specific shares which are set out by law.

This can cause considerable hardship to the surviving partner because they are cut off from part of the assets, which have to pass to your children, possibly leaving your partner with very little to live off. While your partner can pursue a claim for half the assets under the Property Relationships Act, this is a lengthy and clumsy way of having to pursue entitlements.

In the worst case scenario, if you have no blood relatives, then the whole of your Estate goes to the Government.

The time taken to make a Will would have been insignificant compared to the time and emotion expended by Hemi's wife and the stress that it created in the business, only to be left in a situation which Hemi would never have intended.

So, what exactly is a Will? A Will is a document setting out who is to get your property and possessions when you die. Each person needs to make their own Will; it is not possible for you and your spouse to have a "joint" Will.

In your Will you need to appoint somebody as executor of your Estate. Your executor is someone you appoint to carry out the terms of the Will. That person is required to obtain Probate for the Will, which is authorisation from the High Court to begin dealing with the Estate. The executor's role is then to make a list of all the assets and gather those assets in. They also pay funeral expenses and other debts from the Estate, pay out any gifts in the Will and distribute the remainder of your Estate to the person, people or charities you nominate. This is done with the assistance of a lawyer. In your Will you can also appoint guardians for your children and give directions about your funeral and where you wish to be buried.

Wills are only valid if they are properly witnessed, so even if you have written something down and signed it, it will not be legally binding if it doesn't comply with the Law. Also bear in mind that a Will is invalidated when you marry, unless that Will was made in contemplation of that marriage. If you have divorced, the provisions in the Will relating to your ex-partner are treated as invalid, but not if you have merely separated.

The importance of having a Will cannot be emphasised enough. If you don't have a Will, the process of administering your Estate is much more complicated, can take considerably longer, and is likely to cost more in legal and other fees. Talk to your lawyer about updating your current Will if you do have one, or making a Will if you don't have one, to ensure you have your affairs in order. It's a very modest investment in a lot of peace of mind!



CLAIRE COE

Recent News

The Waitangi Tribunal has recently commenced hearings of the Te Paparahi o Te Raki (Northland Tribunal Inquiry). The initial hearing will focus on the 1835 Declaration of Independence and the 1840 Treaty of Waitangi.

For more information on the Waitangi Tribunal Northland Inquiry, please contact Bryan Gilling on 0800 729 529 or at bgilling@raineycollins.co.nz.



BRYAN GILLING

RAINEY COLLINS LAWYERS

Tel (04) 473 6850 | Level 23 Vodafone on the Quay
Fax (04) 473 9304 | 157 Lambton Quay
DX SP20010 | PO Box 689
www.raineycollins.co.nz | Wellington 6140

To receive future editions of In Brief
If you are not on our mailing list and would like to receive future editions of In Brief, phone Maureen on 04 473 6850 or email mharris@raineycollins.co.nz
You can unsubscribe in the same way if you do not want to receive future copies.

© Copyright. 2010. Rainey Collins Lawyers. All Rights Reserved.