

In brief from
RAINEY COLLINS
LAWYERS

Autumn 2010

WELCOME

To the Autumn edition of Rainey Collins In Brief newsletter.

In this edition we focus on how important an Enduring Power of Attorney is, expectations in 2010, losing half your property if your relationship ends, legal health, and 5 golden rules for purchasing property. A bonus moving house checklist is also included.

I trust you find the information of interest and use.



JAMES JOHNSTON

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Bonus

Buying/Moving House Checklist.

Why Not Having an Enduring Power of Attorney Can Cause You Grief and Unnecessary Expense

Natalie was very excited to have signed a contract for the purchase of her first home. She had saved a good deposit and had organised to borrow what she needed to complete the purchase.

Travelling home from work one night, a week before settlement, she was hit by an out-of-control car, and injured badly enough to be hospitalized for 2 months.

All the usual pre-settlement tasks were beyond Natalie ... signing her mortgage, arranging insurance, and arranging for the transfer of her remaining funds to her lawyers for the settlement.

Eventually alternative arrangements were made, at considerable expense, well after the due date for settlement, but not before she had incurred heavy default interest under the purchase contract for settling late ... and a lot of grief.

Continued on Page 2.

Expectations 2010

After a quick review of the media, everything we are hearing about 2010 is much more positive than it has been for the last few years. Here are a few predictions together with actions you may need to take:

Inflation:

- Should you be looking to fix your mortgage rate in the next 6 months?
- If your assets are likely to appreciate with inflation, should you look to move them into another entity now, before you need to gift or accrue inter-entity debt at a higher value?

Employment:

- 80% of employees do not have written employment contracts as required by law. (NBR 2009)
- If you are an employer, are your employment contracts in order?
- Employer or new employee – do you understand your rights relating to trial periods?

- Employee – is your current or new employment agreement adequate?

Likely changes to the tax laws:

- There will likely be changes to the tax laws which may impact on business owners and property investors.
- Is your business model sufficiently robust to deal with any changes?
- Property investors, is it time to consider off-loading some properties and looking at a more diverse investment strategy?
- GST – indications are that this will rise to 15%.

We don't have a crystal ball and we can't provide any promises about the future, but we do know that the predictions are more positive than we've seen in the last few years and that there's no time like the present to take action.



RONETTE DRUSKOVICH

Why Not Having an Enduring Power of Attorney Can Cause You Grief and Unnecessary Expense - *Continued from Page 1.*

The simple step of putting in place an Enduring Power of Attorney would have avoided all the problems, and would cover a situation where she was incapacitated or unavailable, e.g. while travelling overseas.

An Enduring Power of Attorney (EPOA) is a document which allows a person to nominate who can make decisions about their property and/or their personal welfare if they become mentally incapable, or in some cases also when they are capable, but are unable to act. For example, if a person has a stroke, their attorney can assist with choices regarding health care and also can sign cheques, pay bills and if necessary buy and sell property on behalf of that person.

Recently there have been changes to the law relating to EPOAs, in response to many complaints involving the abuse of EPOAs. There have been several cases where an attorney has taken the person's assets and left them with nothing, with no reference to the person or the rest of the family.

These changes have been made to protect clients when an Attorney takes over their affairs. Clients can now be far more specific about what they want in their EPOA.

There are two types of EPOAs. One relates to property (land, investments, and bank accounts) and the other relates to personal welfare (medical decisions, rest home choices, etc). A person can have more than one Attorney acting for them on their property affairs but only one Attorney can act on personal welfare matters. They need not be the same person.

Property EPOAs

A person (the Donor) can choose:

1. Whether a Property EPOA will be used when they are mentally incapable or capable.
2. Whether to appoint one or two (or more attorneys) and whether they can act alone, or whether they must make joint decisions.
3. Whether to limit the property the Attorney can deal with (e.g. only real estate).
4. Whether to put in any conditions.
5. Whether the Attorney must consult a particular person before they do anything.
6. Whether the Attorney must provide information to anyone in particular.
7. Whether the Attorney can make a new Will for the Donor.
8. Whether to place restrictions on the Attorney.

9. Whether the Attorney can benefit themselves (payments, gifts).

Personal Care and Welfare EPOA

This EPOA only operates if a person is "mentally incapable". Many of the same options which are in the Property EPOA are also in the Personal Care and Welfare EPOA.

What is the Attorney's Role?

The Attorney must act in a way which is in the best overall interests (not just financial) of the Donor, and must encourage the Donor to develop competence to manage their own affairs. The Property Attorney must also assist the Personal Care Attorney in terms of financial requirements. Records of all financial dealings must be retained and provided to any person specified as entitled to that information in the EPOA.

What does "mentally incapable" mean?

The new legislation assumes a person is competent until proven otherwise. For the purposes of the Property EPOA "mental incapacity" is when a person is "not wholly competent to manage their own affairs in relation to their property".

In relation to Personal Care and Welfare EPOAs, this is when a person lacks capacity to make decisions about their welfare, or understand the nature of those decisions, can not foresee the consequences of these decisions, (or failure to make decisions), or lacks the capacity to communicate those decisions. A GP or a doctor, whose practice includes assessment of a person's mental capacity, can make this assessment. Some people specify which doctor, or how many doctors are required.

Who Should be the Attorney?

The Attorney must be over 20 years old, not bankrupt, and must be mentally capable. It is extremely important that the Attorney has the skill to make decisions and exercise good judgment. There are obligations on Attorneys which if neglected can result in a fine.

If you need an EPOA but do not have one, the alternative will be for your next of kin to make an application to the Family Court to have someone appointed to act on your behalf.

The downside of this is the time and cost of going to Court, and also the fact that the person appointed to be your attorney may be someone who you would not have chosen yourself.



CLAIRE COE

Free Seminars

Free Seminars are held regularly on a range of legal issues: First home buyers, employment, family, asset protection, business succession, contracting, intellectual property, Wills, commercial leases and buying and selling businesses. See our website www.raineycollins.co.nz in the 'Your Resources' section or call us on 0800 733 424 for details.

Don't Lose Half Your Property If Your Relationship Ends

Under the Property (Relationships) Act, if you're married, in a civil union or you've been living with your partner for three years or more then the presumption 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.

Property that may be divided includes the family home and furniture, cars, superannuation and potentially all other property you both own at the time that you separate. Do you want to risk losing your sports cars, the art collection, your jewelry or your share portfolio?

To avoid having the above law apply to your situation you can contract out of the law 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 of your separate property in the Agreement or just the big items like houses and superannuation.

It's often easier to enter into a Contracting Out Agreement at the start of the relationship, when things are clear and both

have a good idea of who owns what and what items you want to keep separate.

You can also enter a Contracting Out Agreement at any time during a relationship, so 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 or alternatively if your partner isn't planning on claiming half then they won't mind signing something to clarify that.

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 your signatures on the Agreement need to be witnessed by your lawyer.

If you have any questions, or would like to arrange a Contracting Out Agreement, contact Fiona on (04) 473 6850.



FIONA MCGEORGE

Legal Health Checklist

The new financial year is a good time to review, update or check that your legal affairs are in order. Indeed more and more New Zealanders are reaping the benefits of a healthy lifestyle. This includes keeping fit and being healthy. We at Rainey Collins are of the view that your legal health is important, particularly if you have loved ones, assets or are in business.

1. Business

Do you own a business? If so, have you recently reviewed your business plan? What are your goals for the next year/ financial period and the steps you will be taking to achieve those goals?

Have you considered:

- A review of employment agreements? Research indicates that up to 80% of small businesses do not have employment agreements in place as required by law.
- Are your company's shares held in the best entity? Should shares be held by you personally or in a trust?
- Do you have appropriate and up-to-date agreements with your business partners?
- Have you reviewed your terms of trade recently? Do you need to prepare them for an upturn in the economy?
- Are your trademarks or intellectual property rights adequately protected?
- Is your lease coming up for renewal or rent review?
- Are there any personal guarantees or financing arrangements you should consider reviewing?

2. Succession Planning

Do you have a succession plan in place?

If not, do you need one? If so, does your existing plan need to be reviewed?

3. Family Trust

Do you have one? If not, do you need one? A family trust can be an effective way of protecting your assets from business failure, being sued, relationship breakdowns and wasteful children.

If you do have a family trust, are you maintaining it properly? This includes keeping a separate bank account, appropriate resolutions and minutes of major decisions and ensuring that your trust is achieving what it was designed or set up to do.

4. Wills

Do you have a Will? If so, have your circumstances changed so that it needs to be updated? If not, should you have one?

5. Powers of Attorney

Do you have a Power of Attorney including an Enduring Power of Attorney? (Refer article also in this edition). We can assist with ensuring you have appropriate Powers of Attorney established for your circumstances, including in relation to property or your personal care and welfare.

6. Insurance

Now is a good time to review your insurance policies to ensure that they are up-to-date. Remember that any inaccuracies, significant changes or non-compliance may invalidate your policy should a claim arise.

If we can help, please let us know.



FINTAN DEVINE

5 Golden Rules for Purchasing Property

Buying a property is probably the biggest financial transaction that most people will ever enter into. But how do you ensure that the property is safe to buy? A recent example shows what not to do.

Sarah and Andrew had been going to open homes for months. Finally they found a property which they instantly fell in love with. They had been looking for so long, and were worried that someone else would buy it, so they put in an unconditional offer on the spot. Unfortunately the property had been renovated by a prior owner who had not obtained the required building consent for the addition of an en suite to the master bedroom. This work involved plumbing, electrical work for the fan and heater and construction of the en-suite itself.

If only Sarah and Andrew had been more careful and had the property thoroughly checked out before signing an unconditional agreement they would likely have discovered the missing building consent. That way they may have been able to make their offer conditional on the Seller taking the necessary steps to remedy the situation before being bound to settle.

Because they didn't sign a conditional agreement, Sarah and Andrew's options to require the Seller to fix things up were limited and they are now incurring that expense themselves.

There are many ways you can check a property before you are locked into a purchase. The following are "5 golden rules" for checking a property prior to signing the agreement.

Where appropriate you should seriously consider including these as conditions in your Agreement for Sale and Purchase to ensure you are

not bound to purchase until you are completely satisfied with the property:

1. Builders Report

These come in all varieties, but most commonly involve a suitably qualified builder going through the property to check its structural integrity and the quality of construction.

These reports can also cover wiring, internal moisture levels (i.e. is it leaky?), plumbing and roofing.

5 Golden Rules:

1. Get a Builders Report.
2. Get a LIM.
3. Have your lawyer search the Title.
4. Get a valuation.
5. Arrange Finance.

2. Obtain a Land Information Memorandum (LIM) Report from the Council

You can order a LIM report from your local council. A LIM is a report for the property from the Council compiled from the Council records.

This will tell you whether consents have been granted for any building work and also whether that work was signed off with final compliance.

It will also provide useful information as to where the underground services are located, an aerial photograph of

the property and details as to any historical hazards that may have affected the property in the past i.e. flooding or subsidence.

3. Have Your Lawyer Search the Title to the Property

The lawyer acting for you will search the title and advise on any matters that you need to know about. What they are looking for are things like restrictions and other impediments (called encumbrances) on the title. Of particular importance are the contents of rights called easements where there are shared services and rights of way for access.

4. Obtain a Valuation

You may wish to make your purchase conditional on receiving a satisfactory market valuation report. It is better to know the value of what you intend to buy before being contractually bound. These are carried out by a registered valuer and use comparative values of surrounding properties to find the market value. If you are borrowing funds for the purchase, the lender will often require this report as a condition of approving finance.

5. Make Sure You Have Arranged Finance to Buy the Property

No matter how perfect the property is, in most situations you will most likely not be able to follow through with the purchase without some borrowing. You can shop around and find the lender that best suits your needs, or get a mortgage broker to do this for you.

Following these golden rules will help prevent nasty surprises before you are contractually bound to purchase.



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