

A LAWYER'S TALE

(SOME WOULD SAY ITS TALL OTHERS KNOW FROM BITTER EXPERIENCE, ITS NOT!)

A MUST READ IF YOU WANT TO KNOW;

1. **WHY EVEN AT HUNDREDS OF DOLLARS AN HOUR LAWYERS ARE ACTUALLY CHEAP**
2. **WHAT YOU DIDN'T KNOW YOU NEEDED TO KNOW**
3. **HOW TO AVOID PAYING FOR YOUR LAWYER'S HOLIDAY**
4. **A NUMBER OF WAYS TO SCREW UP YOUR LIFE**

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WARNING We've been around since 1883 and so have our jokes!

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Warning – The author has been practicing law now for some twenty five plus years and some would say has become a little cynical and blunt with the passage of time. The content hereof is as such written in a “lively” manner and may cause offence to those of a delicate disposition. Further the author does not pretend to be politically correct and although never wishing to cause offence prefers an unambiguous clear communication style whereby the message is conveyed in as few words as possible. At the same time he enjoys the English language and although he eschews verbosity he is comfortable utilising words of more than one syllable. If any of the foregoing rings discord with you, I would ask that you cease and desist proceeding further, that you place this booklet down carefully and allow somebody with a more robust character to pick it up and hopefully gain a little knowledge that may help them tread the path of life a little more forearmed, than they may otherwise have been.

1. **DISTURBING FACTS ABOUT WILLS**

1. Your marriage revokes your Will but separation does not.
2. If you separate (more of which I comment on hereafter) one of the first things you should do is to see a lawyer to change your Will. In the meantime, don't be the first down the stairs!
3. Have you heard the saying (please excuse the vulgarity) "your arse is mine" well after you're dead, from at least a trustee's perspective that is perfectly true. In particular your trustees and executors (and not you by your Will nor your family) decide what happens to your body. The lesson here is to make sure that your trustees and executors know, and more importantly can be trusted, to follow your wishes concerning what is to happen to your remains. The usual options are cremation or burial, although I did have one old chap tell me to just shove a leg of mutton up his [bottom] and let the dogs drag [him] off into the bushes.
4. The Property Relationships Act overrides your Will, so if you don't leave at least one half of your relationship property to your relationship partner(s) (the "s" here is intentional as at law there is no maximum number of relationship partners that the law can recognise you as having at any one time, all of whom qualify to be able to claim against your estate under this Act), so if instead you want to, for instance, leave more than half of your relationship assets to your children by an earlier marriage, then be aware your surviving relationship partner will have an automatic right of challenge. Note if you are mad enough to have more than one relationship partner on the go at a time, then the Court will prioritise these in order of importance to you and then give half of your relationship property to number one, half of a half to number two, half of a quarter to number three, half of an eighth to number four and so on!
5. Even if surviving relationship partners don't want to challenge your Will, then sometimes Government departments will try and force them to challenge this in an effort to ensure that they get something more than they would otherwise have got under your Will and are thus put into a position to pay their own rest home subsidies.
6. Sometimes elderly parents become the pawns of their children (possibly of an earlier relationship) and understandings are forgotten as money hungry (step)children are suddenly closer than dermatitis to their surviving parent and become "actively engaged" in the management thereof.
7. If you need rest home care and have in excess of \$210,000.00 (as at 2014) in assets you will have to pay your own way until you have spent the excess on your own care. Further even the meagre income mentioned above invested will generate, must all be put by you towards offsetting your care costs and the reality is that your capital will reduce in value over time.
8. If you die without a Will;
 - (a) It will take a lot longer and be more expensive to sort out your estate than it is if you take the time to sort it out now. Further your family could be left without immediate access to money and other assets that are tied up in the administration process. Further even once those are finally made available, your estate will face a larger bill than if you had simply taken the time to sort your affairs whilst living.
 - (b) The law sets down who gets what based on legal relationship as opposed to your wishes. In fact how close you were to the relevant people, when you last saw them or who else may be deserving is irrelevant. Without a Will who gets

what is decided for you based on some antiquated law as opposed to practicalities, true relationship and/or your probable wishes.

Remember here:-

- Good intentions were exactly that – intentions.
- Understandings can be ignored or overridden, especially when you can't predict who will in fact in the future be calling the shots.
- It is a bit late to start planning and organising your affairs when you are standing in front of the Pearly Gates.
- Your family will thank you for a wee bit of planning and expense now, rather than leaving them with an unpleasant, stressful mess later on.

2. **FREE WILLS (ARE THEY REALLY?)**

2.1 Wills are a complex piece of legal documentation with far reaching effects, dealing with the whole of your property and affecting your family long term. When being offered a Will for free, I would always question;

- (a) What sort of job am I going to get?
- (b) What is in it for the draughtsman?

2.2 If you get a free Will or worse still a “do it yourselfer”, be aware that;

- (a) It may literally not be worth the paper it is written on and your estate and family could end up spending tens of thousands of dollars in legal fees arguing what you really intended. Wills are a remarkably easily mucked up and if not properly drafted and then executed they will cause a lot more problems than ever they saved.
- (b) Even if a lawyer has been involved and a robust drafting job has been done, the chances are the draftsman insisted on being a trustee or at least your estate being administered through his or her firm/trustee company. The reason for this is that there is obviously an expectation of being able to recoup the initial investment made in the form of the free Will at the time of the administration of your estate.

Nothing in life is truly free. With Wills, like everything else, you get what you pay for and sooner or later you or your family will be paying.

3. **PLEASE TURN THE LIFE SUPPORT OFF**

3.1 Euthanasia is not legal in New Zealand. You do, however, have the right to refuse medical treatment and can record that wish in a document called a “Living Will” if you wish. These documents typically say that if your doctors declare that you are in a vegetable like state, from which there is no hope of return, or alternatively are mentally alert but trapped inside an entirely unresponsive body (perhaps eye blinking aside) then your wishes are that;

- (a) Your life support machine be turned off.
- (b) If you die, that you not be resuscitated.
- (c) That you refuse any medical treatment designed to prolong your life.

- (d) That you be given medical treatment that keeps you free from pain and discomfort, even if it hastens death.
- (e) If you are being looked after by a doctor which for religious or other reasons is unable to comply with your wishes, then you relieve him or her of your care and ask to be transferred to another doctor who may view their Hippocratic oath in a slightly different manner.

3.2 This is not to say of course that a Living Will will always be followed. It can be overridden by your family, and if they believe there is hope yet, your wishes can be set aside. However equally sometimes your family will need a little guidance and if they are in the awful position of having to make a judgement call as to whether to “pull the plug” or not, then at least they will have something more to rely on than just the flip of a coin!

4. TRUSTS – SOME SHORT AND NASTY REASONS TO HAVE ANOTHER LOOK

4.1 By using an appropriately set up trust you can;

- (a) Protect your assets from creditors.
- (b) Avoid possible future claims by failed relationship partners.

4.2 After suffering a separation and/or bereavement, you can enter into a new relationship without the risk that if that fails that what you kept from your first marriage and/or worked hard for with your dearly departed spouse, is now put at risk to claim by any new failed relationship partner. This is especially relevant if you have children by your first or dearly departed spouse. In the words of a female client of mine “if I die before [her husband] then there is no way some little bitch is going to get a share of our assets ahead of my kids!” When telling me this I don’t know whether or not she had somebody in mind, but either way the point was not lost on the husband.

4.3 If you are in business and we should point out at this juncture that this benefit is purely incidental to the above benefits (because after all we would never advocate setting up a trust purely as a means to avoid income tax would we!), you could use these to restructure things so as to be able to:-

- (a) Re-juggle all private and business lending.
- (b) Income split.

and achieve better tax efficiency. In particular we can often swap non tax deductible borrowing with fully tax deductible borrowing and by splitting incomes, redistribute that so that income falls in a manner whereby it attracts a lower income tax bracket.

4. Control your assets years after you are dead and gone.

5. Partition your assets so that some groups of people get some assets and other groups other assets. This is particularly useful in the modern blended family situation where there is often a desire to preserve certain inheritances and/or other assets for “blood line” children, whilst ensuring newly generated wealth is shared with new children of the relationship and/or with step children.

5. PAST THINKING FOR YOURSELF? – ENDURING POWERS OF ATTORNEY

- 5.1 These are Powers of Attorney (i.e. the authority for somebody else to act in your name) that carry on beyond mental incapacity (which normal powers of attorney don't). Although handy enough if a young person's unlucky enough to suffer temporary or permanent mental incapacity by reason of accident or other eventuality, they are particularly useful when considering the elderly, who often fall victim to diseases affecting capacity. I find the definition of who is and is not middle aged, let alone elderly, a flexible concept, but typically those that are in their 70s should definitely have them and practically it would be a good idea to start thinking about them much earlier.
- 5.2 Enduring Powers of Attorney enable spouses, family members, friends and/or other trusted people to make decisions for those who are not otherwise able. If you don't have an Enduring Power of Attorney and do ever suffer incapacity and something needs to be done requiring your signature and/or consent to some act or omission, such as the investing of funds or the sale of property, then the only alternative you have got is for family members to go to Court.

6. IS HE/SHE LOOKING AT YOU OR YOUR WALLET? – PROPERTY RELATIONSHIP AGREEMENTS

- 6.1 The law says that after you have been in a personal relationship for three years or more then your relationship partner has automatic right to 50% of your relationship assets. This is unaffected by your Will (which it overrides), your age, who brought what to the relationship, whether either party is truly deserving, fairness, and some would say common sense itself.
- 6.2 Further what is and is not a "relationship" is a flexible concept. There is no need for marriage, cohabitation, agreement between the parties as to whether they both think they are in a relationship, a "physical" aspect (who said I couldn't be diplomatic when needed), or if that is occurring a threshold of "encounters" before you are deemed to qualify. In a broad sense if the public view you as a couple, or as in a relationship, then guess what, you are!
- 6.3 Relationship assets are assets acquired during the relationship from, supported by or contributed to from relationship income. As such if you have an investment property that you bought before the relationship, but you are topping up the rental shortfall on a mortgage from your income then that separate property becomes contaminated and loses its separate property classification to one degree or another. This means it suddenly becomes able to be claimed by any failed relationship partner. Similarly if you are living in the investment property it becomes a relationship home and again it loses its separate property protection.
- 6.4 Even if you have your asset in a trust and you allow that to somehow be supported from relationship assets, then you are simply inviting the Family Court to trust bust.
- 6.5 You should also note here that even if you have a Property Relationship Agreement, these are not effective forever and the Family Court is inclined to take the approach that they are out of date and unfair to enforce after approximately ten years.

These issues can, however, be avoided by getting the right advice and structuring things properly from day one and then revisiting them whenever circumstances change (i.e. somebody gives up work or has children) or at least every four to five years thereafter.

Anniversaries should go, the 1st paper, the second is cotton, the third is leather, fourth is fruit or flowers, and the fifth is "please sign here again honey"....

7. A PAINLESS SEPARATION – YEAH RIGHT

- 7.1 OK we can't make these painless (and advocating alcohol would be plain irresponsible), however we can give some sensible advice;
- (a) Lawyers have a duty to advocate reconciliation and can point you in the direction of Counsellor's (free up to a point) to help with this.
 - (b) Almost invariably this is going to cost you. How much, however, is over to you.
 - (c) The law does not care who is at fault and nor should you. Lawyers make far more money out of those determined to prove guilt, to allocate responsibility or to extract vengeance than ever they do from those prepared to put it down to a bad experience and to get on with life. Argue over principles if you want, just remember these don't come for free. I say turn the page and move on.
 - (d) Although you own what is in your name and/or was acquired by you from your income during your relationship, upon the ending of that your ex relationship partner has a claim to half of such part of that as forms relationship property.
 - (e) If there is no turning back;
 - (i) Try to agree between yourselves the "big picture" items;
 - Who has the kids and when.
 - Who gets the dogs.
 - Who gets what assets (including life insurance policies, superannuation schemes etc).
 - Who is responsible for paying what in the short and long term (i.e. the mortgage, rates, kids expenses etc).
 - Who stays in the house.
 - When the arrangement "kicks in".
 - (ii) Consider if your Will is still appropriate and whether or not you should immediately be making changes to that – most times you should.
 - (iii) Consider if your Enduring Power of Attorney is still appropriate.
 - (iv) Split any joint accounts into two separate bank accounts and then freeze the old accounts.
 - (v) Make sure the bank agrees that the old joint mortgage (which practically will stay in place until such time as the house is sold/ transferred to one or other of you and your other affairs are sorted) cannot be used as security for any new borrowing by either partner. Remember here that unless and until such time as new arrangements are made, then you are both responsible for meeting all obligations secured under your mortgage, which will include any facilities either of you have or may open in the future, whether with or without the others consent or even knowledge!
 - (vi) Revisit any guarantees given (i.e. of ex relationship partner's business dealings, leases, banking facilities etc and if necessary give

notice of the cancellation thereof and/or seek indemnities from your ex under your separation agreement.

- (vii) If you are involved in partnerships and/or companies with your ex relationship partner, check that any loans between entities are dealt with and recorded as repaid, shares are fully paid up and transferred, and directorships (which carry their own risk) are resigned from.
 - (viii) Revisit all insurances to check they are put into the right names and they are still relevant to your circumstances.
2. Remember joint assets are just that, joint and they remain so until a settlement is reached and final ownership passes to one or the other of you. Until then neither has any greater right to the use and/or to have the occupation thereof, than the other. I had one situation whereby our clients ex relationship partner moved the new boyfriend into the relationship home and insisted on using our client's, (who was by that stage sleeping in a different bedroom), ensuite each morning!
 3. Oh yeah, and beware the curtain rail. Another of the firm's clients ex relationship partner found it funny to put sardines in the curtain rails before shifting out! Another good one is a cough lozenger in the shower rose head or disinfectant in the septic tank. Hopefully most people will be more mature than this, but it cannot always be guaranteed.
 4. Always, always, always, always, always, and yes always, find out what your legal rights are. Even you are the only one in 50 billion squidillion, famillion (I have no idea at all if these are actual words!) of couples separating that are going to be perfectly civilised about it and you are parting as BFF (my eight year old daughter once told me this means Best Friends Forever), or it was you that shagged the neighbour and you feel like pooh (and I don't mean as in Winnie), you owe it to yourself to find out what your rights are. Whether or not you actually enforce those is over to you, but at least you will have made an informed decision. This is especially true if you are being victimised, dominated or made the subject of an abusive relationship (and here I am speaking as much to guys as to females, as husband bashing is very much alive and well in New Zealand – albeit one that because of male pride, does not get as much attention as it deserves). You owe it to yourself and any children you have to make an informed decision about what your current and future entitlements are.
 5. If one of you has a trust and the other does not then (unless the Trust is open to attack) whatever is in it is excluded from the division process. Bear this in mind when considering the terms of any relationship separation agreement as these will often have a significant effect on what is actually really divisible.
 6. Try and get clarity on all relevant issues and give your solicitors clear instructions so that they can prepare a property relationship agreement recording your separation and the agreement reached. Both of you will need separate advice on the agreement, but at least if you can agree the terms of the “big picture” in advance, then the additional cost incurred in having that thrashed out by your lawyers will be avoided. Do “NOT” try and do this yourself. Agreements entered into without each party having separate legal advice and solicitors certificates to this effect, are completely worthless and open to being revisited by either party at any time. This is a false economy and one that invites major problems (aka expense) later on.

8. A MUST READ IF YOU OWN YOUR OWN BUSINESS – NO REALLY, YOU'RE A SILLY BUGGER IF YOU DON'T.

- 8.1 A Buy Sell Agreement is an agreement between shareholders (separate from and in addition to a Constitution) or partners (separate from a partnership deed) setting out;
1. What happens concerning your interest in the business:
 - (a) If you die, suffer total permanent disability or Trauma, (i.e. how can you turn your interest in the business into money for your family).
 - (b) If your co-shareholder or business partner dies or suffers incapacity, (i.e. will you end up working with somebody who can no longer “pull his or her weight” or with their spouse (as the inheritor under their Will) trying to get involved, or can you force the deceased/incapacitated party to sell out and if so, for how much).
 - (c) If you want to exit the company, (i.e. when you wish to retire, is there an orderly process for this to happen at a fair price or could “obstacles” be put in your way).
 2. What shareholders expectations are concerning each entering into agreements with their spouses/relationship partners sorting out ahead of time what happens to shareholdings in the business if they split up (i.e. specifically we can require shareholders to enter into a property relationship agreement with their spouse whereby they agree that in the eventuality of a separation that the business falls into the share of the person who is active in the business and the spouse is only entitled to claim other assets).
 3. Who holds what insurance over which key personnel and when and to whom in these eventualities, is it paid.
- 8.2 Sooner or later ONE OR MORE OF THESE THINGS WILL HAPPEN to you and although often an orderly arrangement can be arrived at, in other situations what is an already stressful time is turned into a positive nightmare with such events triggering in-fighting, “book cooking” and the total breakdown of what was once a good working relationship, as various party’s suddenly find themselves under pressure to buy or sell what has often been up to that point, their life’s work.
- 8.3 Incidentally you should review at the same time;
- 8.3.1 Your estate planning and whether or not as part of this;
- (a) Can you legally minimise the amount of income tax you are liable to pay, (i.e. by possibly;
 - (i) Restructuring, so as to spread income between yourself, the business, trusts and family so as to maximise marginal income tax brackets.
 - (ii) Swapping non tax deductible borrowing for borrowing that is tax deductible).
 - (b) If a Family Trust is desirable.
 - (c) Your Wills, Living Wills and Enduring Powers of Attorney are up to date.
2. Terms and Conditions of Trade.
 3. Whether or not you have written Employment Agreements.

4. Whether or not you should have a Property Relationship Agreement (or if you have an old one, a review of that).
- 8.4 We would suggest that you;
- 8.4.1 Call us to arrange a short meeting for a flat fee to discuss;
 - 8.4.1.1 How this would work for you.
 - 8.4.1.2 If deciding to proceed, likely cost.
- 8.5 Contact your insurance broker to discuss availability of relevant insurance. We can refer you to brokers if you would like.

If you like what you hear, we can then proceed further, in the unlikely event you don't, then at least you will have addressed the matter and made an informed decision.

9. WHY RISK IT – INSURANCES

1. These need to be in the right names, i.e. if your life insurance is over you and you are the beneficial holder of it then upon your death it will pass to you/your estate making it vulnerable to attack. If it is in your spouse's name, equally it will go to your spouse and if he/she gets into a new relationship that fails, then it could be stripped as to a one half from him/her under a relationship property claim, depriving your spouse and family from the benefit you intended. Or perhaps, as much as you love them, maybe your spouse could not manage his/her way out of a paper bag. If that's the case and you would prefer any decisions to be jointly made with a reliable third person then this can also be addressed.
2. Insurances need to be up to date, still relevant to your changed circumstances and realisable, i.e. is your income protection insurance "own occupation", meaning if you can't as the result of the accident still carry out your job as a brain surgeon, you will actually get paid out without running the risk that the insurance company saying "sorry your policy isn't "own occupation" and given you can still pack supermarket shelves and push a trolley you can therefore still work and as such your claim is denied". Try dropping income from a brain surgeon to a mall packer!
3. If you own a business (see my comments concerning a must read if you do above) you need to be reviewing:-
 - (a) Does the business need to cover key persons?
 - (b) If you or your business partner/co-shareholder die and/or suffer total permanent disability could you buy him/her out, or is it desirable that this risk be covered off by insurance.
4. If you can't earn an income any more, what position are you going to leave your spouse/family? Again this is possibly something you should be actively considering covering with insurance.

10. QUALIFICATIONS

1. The content hereof;
 - 10.1.1 Comprises generalisations. There are invariably exceptions and/or circumstances that alter most situations and often the advice we give.

- 10.1.2 Does NOT constitute the giving of legal advice. It is intended to do nothing more than raise awareness and to alert people to possible situations whereby they should seek legal advice. It should not and cannot be relied upon in whole or part as representing guidance on any issue.
- 10.1.3 Is to the best of the authors knowledge correct at the time of publication and no warranty is given as to the accuracy or even approximation to fact thereafter.
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11. A BIT ABOUT THE AUTHOR



- 11.1 The author is a partner in Weston Ward & Lascelles, a Christchurch Law firm established in 1883.
- 11.2 He was admitted to the partnership in 1991. Operating from a solid foundation of 25+ years legal commercial experience, he specialises in sale and purchase and restructuring of businesses, Buy Sell Agreements and Trust work designed to help avoid/mitigate many of the risks touched on above.
- 11.3 He has over the years served on a number of local and national boards and been Chairman of a couple including of a major alliance of law firms.
4. Married to his wonderful wife Rachael and father of four, keen military historian and war gamer.

12. WHERE TO FROM HERE

- 12.1 I would suggest that you review your position and if concerned that in light of the foregoing there are issues that possibly deserve to be revisited you should contact your lawyer or failing him or her the author at the details provided below with a view to setting up an appointment to discuss some of the issues that this raises for you. Although each lawyer runs his/her practise slightly differently, it is the author's practise to undertake an initial consultation, presupposing that leads to an issue that needs to be addressed, to thereafter provide a planning letter all for a flat fee.
- 12.2 The idea of the planning letter is to lay out our understanding of the history of the matter, to then set out a plan, time line, cost and implications, so that you can in a concise and clear way understand what is intended, what the issues are and what benefit of the course of action will be for you, together with the likely cost of the exercise. Once you receive that you can reflect upon the content of that, discuss it with whomever else you wish to (including if in business usually your accountant) to ensure that it is in fact something that you wish to undertake and that the returns to you will be great enough to justify the expense.
- 12.3 From there you give us instructions to proceed and we will get the ball rolling for you.

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