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Why should I look at my will?

Review at life's milestones

You should review and update your will regularly. It is not something that, once done, you should just stick in a drawer and forget about. There are many significant milestones in life when you should think about whether your will is still appropriate for your unique circumstances.

If you don't often review your will, particularly after important life milestones, you may discover (or worse, your family may discover after your death) that your will does not leave everything the way you intended. This means that certain people or causes may miss out on an inheritance or a gift in your will. Also, out-of-date wills can cause significant complications for the people involved in the management and distribution of your estate.

With the summer holidays coming up and some time away from the treadmill of daily life, this is an ideal time to review your will.

Buying a home is a milestone

Many people make a will when buying their first home. Although there is no reason why you cannot make a will before then, this is often the trigger when it feels like you have something significant to leave in your will. If you buy your home with someone else, usually you will want to leave the house to that person when you die. However, this is not always the case, particularly if you are not in a romantic relationship with that person.

If you have children from a previous relationship, you may want to ensure your partner can continue living in the house when you die but, ultimately, you want your children to inherit your share of the house. You may have borrowed money from other family members to help with the purchase that you need to repay first. Your will should be carefully drafted to make sure it truly reflects your intentions.

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Joint ownership vs tenants in common: The ownership structure of your home, or any asset for that matter, is also very important to understand. 'Jointly owned' assets pass to the surviving owner/s when one owner dies. Assets which are owned as 'tenants in common' remain part of a person's estate when they die and will be distributed under that person's will.

Many people are not sure, or forget what type of ownership they have, especially if their house was bought many years ago. If you are unsure, or the ownership structure of your asset/s changes, you should review your will to make sure that everything will still be distributed as you want after your death. You should also review the ownership structure at the same time.

Marriage, separation and divorce

Getting married, separated or divorced are all events that have a significant effect on how your will might operate when you die.

If you have a will and subsequently get married or enter into a civil union, your will is automatically revoked, unless your will is specifically worded as being in contemplation of that marriage or civil union. If it is not, you could effectively be left without a valid will, even though you have made one in the past.

In the case of a separation order or divorce, your existing will is not revoked but the law states that your spouse or partner is treated as having died immediately before you. This means any gifts to them will be void and, instead, any backup provisions in your will would come into effect. You should update your will after a separation or divorce to ensure that it will operate as you intend.

It is also important to know that the simple act of 'breaking up' with someone is not enough to have gifts to that person automatically voided. You should take the additional steps of obtaining a formal separation order or an order dissolving the marriage, and reviewing your will. If not, you could be left in the awkward situation of leaving everything in your will to your ex-spouse or partner – which may be a very unpalatable idea for some!

Birth or adoption of children

There's a lot to think about when welcoming a child into your family and a review of your will may not be high up on the to do list. Your will should, however, assign guardianship of your children and account for their future needs, particularly if your child has special needs requiring a higher level of assistance.

If there is a significant age gap between your children or you have children from different relationships, your will may need to be tailored to account for this.

Death of an executor, beneficiary or guardian

Executors are the people you name in your will to manage and distribute your estate when you die. A will-maker will often appoint a family member or someone to whom they are very close to carry out this role. It is important to have an executor who you trust who will do a good job.

The death of an executor, beneficiary or a guardian of your young children means your will may not work as intended or could create confusion. Do review your will if this happens or should your executor's circumstances or health change.

Significant changes in financial position

Receiving a large inheritance or a significant capital gain on, say, property or business assets (or perhaps winning Lotto!) can significantly alter how you want your estate to be distributed when you die. You may decide to include additional beneficiaries – perhaps more distant family members or friends, or leave a gift to a charity that you care passionately about.

Although it's not always the case, estates of relatively higher value are often more complex and require greater planning to ensure that everything runs smoothly when you die.

What if I don't have a will?

If you die without a will (called an 'intestacy'), your assets will be distributed according to the default rules established by law. Depending on your circumstances and who survives you, your assets would usually go to some combination of your spouse or de facto partner, children, parents and siblings.

Even if some family members are estranged from you, they could still receive something from your estate under the default rules.

Other milestones

The milestones we have noted above for reviewing your will are not exhaustive. Starting a business, having a KiwiSaver account, moving countries, changes in your health and amendments to the law are all good reasons to look at updating your will.

If it's been a while since you've looked at your will, we hope this article gives you the impetus to pull it out of that drawer and dust it off. Better yet, talk with us about it so you can have peace of mind knowing that, when you die, your loved ones will be taken care of as you wish. +

Hiring casual employees

Employers have significant legal responsibilities

With summer shortly upon us, the up take in casual work is synonymous with school and university holidays. Despite the short-term nature of these roles, whether it's seasonal fruit-picking, a retail Christmas-casual or a restaurant needing extra cover for busy nights, if you hire staff on a casual basis you still have significant legal responsibilities.

Hiring casual employees can provide beneficial working arrangements for both parties, with employers able to offer work on an 'as needed' basis and employees having the flexibility to decide when they wish to work and which shifts they would like to perform.

However, as an employer you must remember that during 'agreed periods of work,' casual employees are entitled to similar protections to those to which permanent employees are entitled.

This is highlighted in a recent case before the Employment Relations Authority (ERA).[1]

Background

Mr Ford was employed by Haven Falls Funeral Home as a casual employee. It was agreed he would complete an initial eight-week training period.

Mr Ford completed about three weeks of this training in Northland before incidents occurred that led to him returning home to Whanganui. As a result, Haven Falls decided not to offer Mr Ford any future work and notified him via a phone call and a letter soon after. Haven Falls believed that because Mr Ford was a casual employee, he had no expectation of ongoing work and they could simply inform him he was no longer required.

Mr Ford filed an application in the ERA claiming he was a permanent employee and had been unjustifiably dismissed. The ERA upheld Mr Ford's casual employee status and disagreed that he was a permanent employee. Nevertheless, his dismissal was still deemed to be unjustified.

The ERA held that Mr Ford was dismissed by Haven Falls during a period of employment. This meant that despite being employed on a casual basis, whilst Mr Ford was engaged for his eight-week training programme, he was entitled to the same entitlements a permanent employee is owed – including a fair process of dismissal. (Haven Falls informed Mr Ford of his dismissal via a phone call and a follow up letter.) Haven Falls did not carry out an investigation of the incidents, nor was there consultation with Mr Ford before the company decided to dismiss him. Haven Falls also failed to give Mr Ford a reasonable opportunity to respond.

Due to Haven Falls' failure to follow the fair process owed to an employee engaged for a period of work, it was ordered to pay the following amounts to Mr Ford:

+ Lost wages of four weeks' pay for the remainder of the agreed training period
+ Eight per cent holiday pay on top of the lost wages
+ Interest on the lost wages from 11 March 2020, until payment was made, and
+ $20,000 compensation[2] for humiliation, loss of dignity and injury to feelings.

Employers' obligations

Previous cases have also stated that there are responsibilities to casual employees during periods of engagement. This case confirms that obligations are owed to a casual (or fixed term) employee during agreed periods of work. The high price for failing to meet these obligations is also shown in this case with, amongst other remedies being awarded to Mr Ford, an additional $20,000 compensation on top of the lost wages award.

The key outcome in this case is that when hiring casual workers or if you are signing up to a casual role this summer, be sure to keep these obligations and rights in mind. If you have any hesitation at all or if you are involved in a similar situation, please contact us. +

1 *Ford v Haven Falls Funeral Home* [2024] NZERA 224.

2 Section 123 (1)(c)(i) Health & Safety at Work Act 2015.

Eligible investor exemption

In light of the Du Val insolvency

The recent interim receivership and subsequent statutory management of the Du Val Group has brought the use of, and reliance on, 'eligible investor' certifications under the Financial Markets Conduct Act 2013 (FMCA) back into the public spotlight. In this article we discuss this exemption and provide insights to market participants on best practice.

The FMCA

The FMCA is the legislative mechanism for the regulation of New Zealand's financial markets. It prescribes a comprehensive disclosure regime in relation to offers of financial products. Financial products include, but are not limited to, debt and equity securities, and managed investment products.

Wholesale investors

An investor may be classified as a retail investor or a wholesale investor. While there is an extensive list within the wholesale investor exemptions, relevant examples include:

+ Participants who invest a minimum of $750,000 into a single investment
+ Those who are considered 'large', as in they hold net assets or have consolidated turnover of at least $5 million
+ Government agencies, and
+ Investors who meet certain investment activity criteria, for example, they own a financial products portfolio of at least $1 million in value.

Wholesale investors have access to a broader range of investment opportunities than those available to the general public. Public offers are subject to significant disclosure requirements, statutory oversight and compliance costs.

To counter this, fewer consumer protections exist for wholesale investors.

The 'eligible investor' exemption

Under the umbrella of wholesale investors is the 'eligible investor' subset; this allows experienced investors who possess the skill and judgement necessary to assess the merits of a transaction, without full statutory disclosure, to be deemed a wholesale investor.

This rationale is reflected in the criteria used to determine who qualifies as an eligible investor. An investor may be eligible where their prior experience allows them to assess a transaction's merits, their own information needs and the adequacy of any information provided.

If an investor has the expertise to assess the criteria, they may self-certify that they are an eligible investor. As part of this process, an appropriately qualified financial adviser, accountant or lawyer must confirm the investor has been adequately advised of the consequences of certification. The relevant professional must confirm they have no cause to doubt the certification.

The Du Val Group situation

In October 2022, the Financial Markets Authority (FMA) warned two entities within the Du Val Group that certain investor certificates it was relying upon were incomplete. The FMA cautioned that, within the certificates, the relevant grounds investors were giving 'did not refer to any previous experience in acquiring or disposing of financial products and so are not capable of supporting the certification and should be disregarded.'

In addition to those 2022 findings, recent media reports have suggested that the Du Val Group continued to market their financial products to retail investors and encouraged them to use the eligible investor category. The report suggested they were not sufficiently experienced or high-net worth individuals for whom the exemption is intended. At the time of writing, it appears these investors are unlikely to receive their investments back in full.

Who should exercise caution?

The Du Val insolvency process is a reminder of the risks involved with financial markets and financial products. Market participants should be fully aware of the risks associated with using the eligible investor exemption:

+ Investors must understand fewer regulatory protections are afforded to them within this class. It is, therefore, particularly important that eligible investors are appropriately experienced to allow them to properly assess investment opportunities and associated risks
+ Financial advisers, accountants and lawyers must exercise caution when giving certifications, particularly for investors with whom they have had no previous dealings. The assessment as to whether an investor is sufficiently equipped to transact without the default protections of the FMCA is not an exercise that should be taken lightly, and
+ Issuers and offerors relying on eligible investors to raise capital must be careful to correctly classify investors. Encouraging inexperienced investors to proceed as eligible investors does not support an informed or balanced decision and may result in significant penalties.

For more advice on eligible investor status, please don't hesitate to contact us. +

Modernising the Companies Act

In August 2024, the government announced that it would progress a package of reforms to the Companies Act 1993 and related legislation.

The reforms are designed to address several issues that are regularly encountered in practice, to make New Zealand an easier and safer place to do business and to increase uptake of the New Zealand Business Number (NZBN).

The reforms will be carried out in two phases:

+ Phase 1 will focus on modernising the Act, simplifying compliance, deterring poor and illegal business practices and making improvements to insolvency law to make outcomes fairer for creditors. The bill introducing these reforms is expected in early 2025, and
+ Phase 2 will take place after a Law Commission review of directors' duties and liability issues, which is also due to begin in early 2025.

Phase 1

The first phase includes reforms that will address several practical issues. The key changes that have been suggested for Phase 1 include:

+ Introducing a simpler process for a company to reduce its share capital, modelled on Australian legislation
+ Amending the definition of 'major transaction' by excluding transactions relating solely to the capital structure of a company (for example: issuing shares, share buy-backs, dividends and redemptions) and by clarifying that a series of related transactions does constitute one 'major transaction'
+ Extending the shareholder unanimous consent process in section 107 of the Act to cover issuing options or convertible securities, crediting unpaid share capital and acquiring shares to be held as treasury stock
+ Providing a process for dealing with unclaimed dividends
+ Providing for certain actions such as share buybacks and a company holding its own shares to be available by default (currently these actions are only allowed if expressly permitted by the company's constitution)
+ Simplifying processes to reserve company names, restore companies to the register and correct mistakes on the register
+ Allowing companies to put certain shareholder and creditor information on a webpage rather than having to physically send out copies to each person
+ Introducing unique identifier numbers for directors and changing address requirements so directors' residential addresses don't have to be disclosed on the public register
+ Improving insolvency laws by extending the claw back period for related party transactions, and
+ Introducing various measures to improve the uptake of the NZBN.

The bill containing the reforms will be introduced in early 2025, and the public will be able to make submissions on the legislation as it progresses through the select committee stage.

Phase 2

The second phase is expected to begin in parallel with Phase 1, starting with a Law Commission review of directors' duties and liabilities. This is expected to address several concerns, including that the law related to reckless trading and incurring obligations is unclear and difficult to apply. +

Postscript

Feedback about NZ Post's service obligations

No doubt you have heard that the Ministry of Business, Innovation & Employment (MBIE) is seeking feedback from the public on how changes to NZ Post's minimum service obligations could impact New Zealanders who still need to be able to send and receive mail. NZ Post's obligations are set out in a Deed of Understanding, last updated in 2013.

With mail volumes continuing to decline significantly (one billion mail items were sent in 2014 and around 220 million sent in 2023-24), NZ Post estimates volumes will continue to decrease to about 120 million items by 2028. It is seeking a more financially sustainable mail service model.

Proposed changes include reducing minimum delivery frequency, reducing the minimum number of postal outlets and proposing mail items are delivered to clusters rather than individual mail boxes.

If you want to give feedback, submissions are open until 5pm on Tuesday, 10 December. To make a submission, go to **www.mbie.govt.nz** and click on 'Have your say.' +

Beware of scammers in the coming Christmas season

With the hustle and bustle of Christmas coming up and the demands of the end of year activities, it is easy to let our vigilance slip in terms of scams – whether they be through emails, phone calls or text messages.

In *Fineprint's* Winter 2024 edition (page 5) we offered some tips to help protect yourself and your money this holiday season. +

Merry Christmas and a happy New Year

As this edition of *Fineprint* is the final issue for 2024, we wish you all a very Merry Christmas and a happy, safe and healthy 2025.

Meri Kirihimete me te Hape Nū Ia. +

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