(c) If you do nothing, then the surviving partner or spouse is presumed to have accepted option (b)

(See S68 of the Act).

(d) If you elect option (a), then you waive any entitlement you may be due pursuant to the deceased's Will. Say for example you were left a family heirloom or a motor vehicle, then you waive your right to receive that item, even though it is a gift in the Will. You either make your claim under the Act, and if you do so, you take nothing under the Will

(See S76 of the Act.

(e) In the eventuality that you elect option (a), then any agreement you reach with the executors of the estate (i.e. S21 Agreement) or order of the Family Court will take priority over the contents of the Will. As S15 *(economic disparity)* allows the Court to award one party in excess of 50% of *"relationship property"*, this means that in excess of 50% of the deceased's estate will be taken away from the recipients set out in the deceased's Will.

Q. Then why does this cause problems?

A. (a) Firstly the deceased's wishes *(keeping in mind it is the deceased who owns these assets)* are completely over-ridden by legislation. Therefore, the notion that you can leave your assets to whom you wish in your Will is slowly being eroded and is becoming a thing of the past. Property claims which have been granted pursuant to the above mentioned legislation simply take priority over your wishes;

(b) One might say that this is not a problem, especially where there has been a long term marriage or relationship. However, where problems will come is where there has been a short term marriage or relationship and adult children. It may be that the bulk of the assets have been accumulated during a long marriage. One of those persons dies and then the survivor enters into a de facto relationship which lasts only a short period of time. Provided that relationship lasts for a period of three years, then that person can enjoy a minimum of 50% of the fruits of the preceding marriage at the expense of adult children from the first marriage;

(c) Another area which is causing problems for lawyers is the situation of multiple relationship. Upon the breakdown of a marriage or de facto relationship, it is normal that parties meet or have already met a new partner. It is not uncommon that property division from the first relationship takes a long period of time to resolve,

especially if Family Court proceedings have been instituted by one of the parties. Meanwhile one of the parties has entered into a de facto relationship and is living in the family home from the first marriage or relationship. Once the second relationship lasts three years, then you then have two parties claiming an interest in the family home and family chattels etc.

Q. What if I separate and enter into a Property Division Agreement with my former spouse or partner and then I subsequently die?

A. Unless you want your former partner or wife to take the property you have retained pursuant to the Property Agreement, then it is essential that you make a new Will. Just because you separate, does not nullify any Will that is in existence. If you were to pass away as a result of an accident then, of course, the share of property you took under the Act pursuant to the agreement would then go back to your first spouse or partner which may not be your intention. We recommend anyone who separates to urgently make a new Will as a matter of priority.

Q. What if there is no Will in place and I have completed a Property Agreement with my former spouse or partner?

A. Then that former wife or partner would still take under The Administration Act until such time as your marriage is dissolved. So it is again essential that you make a new Will, even if you have some doubts about whom the beneficiaries should be.

6.3 So you can see with the breakdown of the family unit and people accumulating assets throughout their lifetime and enter into subsequent relationships that there are pitfalls in respect of multiple claims from various members of your family whom you have a relationship with along the way. What you do need to know is that:

(a) An action pursuant to the Family Protection Act 1955 cannot be made against assets owned by a family trust; and

(b) Although the Family Court has powers to deal with assets transferred to a trust during a marriage or relationship, the Court has no power to make an order against the capital of the trust *(but it can do against income)* pursuant to the Act. If you do enter into a second relationship and wish to protect the capital base for your children or you feel your children have sufficient and you wish to look after your new partner, then only a transfer of assets to the family trust will give you peace of mind against the legislative claims available to other family members.

Q. How about the situation where there are children from a first marriage or relationship, then that party enters into a new de facto relationship and ends up owning the family home and family chattels

jointly with a new partner?

A. As you know, any assets owned by way of a *"joint tenancy"* automatically goes to the survivor and are, therefore, not distributed pursuant to any Will. This means that the new partner takes all by survivorship because the family home was owned as a *"joint tenancy"* and the children miss out. Taking into account this may have even been the intention of the deceased because he wanted to provide for his new partner. Are there any remedies available to the children?:

(a) The recent Court of Appeal decision in *The Public Trustee v Whyman* is authority for:

(i) That the children in such a situation can have the new partner removed as an executor in the estate and replaced with The Public Trustee (The Administration Act);

(ii) The estate can then make a claim under The Property (Relationships) Act 1976 against the surviving partner;

(iii) This then has the consequence of bringing 50% of the assets retained by the surviving partner by survivorship back into the deceased's estate;

(iv) The children can then make a claim pursuant to the Family Protection Act 1955.

Although the above mentioned process will be costly if litigation needs to be undertaken in order to enforce the above, but because of the Court of Appeal decision the likelihood of such a claim succeeding is good *(depending on certain circumstances)*. One should also keep in mind that statistics show over a ten year period that 90% of the claims made under The Family Protection Act 1955 in New Zealand are successful. Of course, there is no recording of such claims that are settled out of Court.

7.0 Power of Attorney

7.1 When making a Will it is also prudent that you appoint someone to be your attorney pursuant to the Protection of Personal & Property Rights Act 1988 ("the Act"). This is known as an Enduring Power of Attorney.

7.2 There are two types of Enduring Power of Attorney:

(a) For Property.

(b) For Personal Care & Welfare.

7.3 A Property Power of Attorney allows the person appointed to execute any legal documentation on your behalf. The attorney for Personal Care & Welfare allows the appointed person to make decisions in respect of your personal care and welfare.

7.4 Although the attorney may not ever be used it is particularly useful in the eventuality that you loose your legal capacity as a result of an accident or the ageing process.

7.5 Say for example you have an accident or develop Alzheimer's with the ageing process then obviously you are not in a position to make decisions in respect of the ongoing management of your assets and also to attend basic things like payment of day to day bills etc. If no Power of Attorney is in place then usually a family member would need to make application to the Family Court to be appointed as a Property Manager as a result of your incapacity. The court only grants such an order as an absolute necessity. The overriding principle of the Act is to protect each individuals property rights from interference from third parties. The family court would need to be convinced that you are totally incapable of dealing with your own affairs. This would mean producing medical evidence and attending a formal hearing.

7.6 That then incurs expensive legal costs. A simple means of avoiding this expense and inconvenience is to have an Enduring Power of Attorney in the eventuality that you lose your legal capacity.

8.0 Family Trusts - What Happens on Death?

8.1 One important consequence of having your assets transferred into a standard discretionary family trust in your lifetime is that the family trust does not go to the grave with you. As far as the law is concerned the family trust is a separate legal entity and any assets owned by the trust cannot be passed to your beneficiaries through your Will.

8.2 How can you ensure therefore that the assets you acquire during your lifetime if owned by a family trust will end up in the hands of your family and friends in accordance with your wishes:

(a) Firstly it is normal when setting up a family trust to complete a document known as a Memorandum of Wishes. This is a non binding direction to your trustees to distribute the capital and/or income belonging to the trust to the beneficiaries and in the proportions as nominated by you.

(b) It is important to note that this is a non binding direction.

(c) In order to ensure that your Memorandum of Wishes is followed it may be prudent to have more than one executor appointed in your Will. Keeping in mind that in a standard discretionary family trust it is the executors in your Will (subject to individual drafting) who normally hold the ability to

hire and fire trustees. As the trustees make all decisions in respect of distribution then it would be prudent to ensure that the executors appointed in your Will are persons who you have absolute confidence in to follow your wishes. If there is more than one and as decisions have to be unanimous then this further entrenches the position.

8.3 There is a definite advantage of leaving your assets via a family trust in that it will protect your estate from claims made by your children's partners in the eventuality their relationship breaks down. Pursuant to the Property Relationships Act 1976 ("the Act") your children run the risk of losing half their estate to their future partners even though they have not even met them. In plain English your hard earned dollars may at some point in time pass to your children's partners as a result of their relationship breaking down. The Act now applies to de facto relationships as well as married couples.

8.4 We therefore recommend that when completing your Memorandum of Wishes that you leave a direction that your children receive an interest free loan from the trust as opposed to receiving a distribution. If the capital is distributed and it is used to acquire for example a family home and the relationship comes to an end then 50% of your child's inheritance is passed on to their future partner. However if the trust simply made an interest free loan to allow your child to purchase a family home then of course that will be a debt just like a mortgage debt that would need to be paid back in the eventuality of a relationship breakdown.

8.5 Once the dust settles then that amount could be readvanced to that particular child. In effect your children still have the same benefit and use of the capital as they would normally receive if their inheritance was distributed pursuant to a Will except that its classification would be a debt as opposed to an asset and of course is repayable upon demand.

8.6 Finally if you are in the middle of a gifting programme then it is normal that you place a forgiveness of debt clause in your Will. There is no gift duty payable on death and if the trust still owes you moneys at the time of your death then that is automatically forgiven. Otherwise the amount of debt outstanding by the trust would pass to whoever you name as beneficiary in your Will. That person would then need to readvance it to their own trust (normally your spouse) and that means they would have to complete a gifting programme (maximum $27,000.00 per annum).

9.0 Options to Purchase

9.1 You may wish to grant to a person or persons the option to purchase property which forms part of your estate.

9.2 For example you may own shares in a private company and may wish to give a particular family member the right to purchase those shares from the estate

ahead of anyone else. Before including such a clause in your Will you will need to give consideration to the constitution of the company (if in fact it does have one) and what that constitution says about selling shares. Many company constitutions require that if a shareholder wishes to sell its shares they must first offer them for sale to remaining shareholders.

9.3 You may also wish to grant the first right to purchase property other than shares in a private company. For example you may wish to have a particular family member given the opportunity to have a first right to purchase a home or beach house or in fact any other item of property which would form part of your estate.

9.4 In respect of the above options you should also give consideration to how the shares or property is valued if the option to purchase is taken up.

DISCLAIMER

Please note that the enclosed booklet is for information purposes only and is not to be relied upon. Before relying on any of the information set out herein, it is important you consult a solicitor first.