

**INSIDE THIS EDITION**



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**Christmas & New Year Office Hours**

***Our offices will close for the Christmas break at 4pm Friday 21<sup>st</sup> December 2018.***

***Reopening partially staffed Monday 4<sup>th</sup> January 2019 (fully staffed from the 14<sup>th</sup>)***

***We wish you a very Merry Christmas and a Prosperous New Year.***

***The team at Swayne McDonald***



*All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.*

**First home buyers – The process of buying and what to look out for**

If you have never bought a property before, it can be an intimidating prospect. We have broken down this process below and highlighted some things you may want to keep an eye out for along the way.

The process can be split into about 9 general stages (order may vary slightly).

**1. Finding a house**

You might seek out house through a real estate agency or by using a website such as TradeMe and then dealing with the homeowner (Vendor) yourself.



**2. Get a lawyer**

You will need to have a lawyer or conveyancing practitioner acting for you in order to complete the purchase. They will be able to advise you of each step and aid you with the documents required along the way.

**3. Arranging finance**

You will need to be completely satisfied that you will have sufficient finance available to you prior to making a sale and purchase agreement (“SPA”) unconditional. Ideally, you can do a lot of the ground work for your finance before you even find a house to buy.

If you are getting a loan you will need confirmation from your bank that your loan application has been approved, which you can generally get while you house hunt. You can also complete your initial Kiwisaver forms to start the process of receiving your Kiwisaver first home withdrawal and home start grants before you sign. These forms can be downloaded online.

**4. Receiving the SPA**

Once you have decided on a house and want to make an offer, the SPA is prepared for signing by you. Generally the agent will prepare a SPA if you are dealing with an agent. If not, you should have your lawyer prepare it. Either way, we strongly suggest that prior to signing a SPA you send a copy to your lawyer to review. If you cannot arrange for your lawyer to review it prior to signing, we suggest at least asking your lawyer to provide a suitable clause to include in the SPA to allow your lawyer time to review all aspects of the SPA after you have signed and during the conditional period. This is discussed further in paragraph 5.

Many buyers can feel pressured to sign a SPA straight away to ensure they don't lose out on a purchase. However, we often receive SPAs already signed and discover that without advice, the buyers are locked into terms and conditions that are entirely unfavourable for them.

## 5. Conditional Period

If your SPA has no conditions included when you sign it, then it is unconditional upon signing. Once the SPA is unconditional, it generally cannot be cancelled.

If your Agreement is “conditional” you will have a specified amount of time to arrange your finance and to perform the recorded investigations into the property such as a building report, LIM report, methamphetamine testing.

By the end of the specified time period for each condition, your lawyer will need to advise the vendor’s lawyer (on your behalf) that the relevant condition is or is not satisfied. If you are relying on a bank loan, your bank will need to have given unconditional loan approval for this particular property for you to safely confirm the finance condition satisfied. Once both parties have satisfied all conditions inserted for their benefit, the agreement will be declared unconditional.

## 6. Deposit

You will normally be required to pay a deposit - either upon the agreement being signed or when it is declared unconditional. If you do not pay the deposit, the Vendor can provide three working days’ notice of requiring payment. If it is still unpaid, and sufficient notice has been issued to you by the vendor, the vendor is entitled to cancel the agreement.

## Relationship Property

The division of relationship property is regulated by the Property (Relationship) Act 1976 (“RPA”), the intention of which is to recognise fair division of the relationship property at the end of a relationship.

There is a presumption of equal 50/50 division, unless this can be disputed or there are certain mitigating factors. Factors such as the length of the relationship, any dependent children and economic advantage and disadvantage may be considered.



A relationship is defined as a marriage, civil union, or a de-facto relationship of three or more years, although shorter relationships may also apply.

In these relationships, there can be separate property and relationship property. Relationship property includes both assets and liabilities, and is property obtained throughout the relationship which is intended for the common use or benefit of the relationship. Separate property is property obtained outside of the relationship that is not for the common use and benefit of the relationship.

Any property which either party has introduced into the relationship can become relationship property. If a contribution has been made that increases the value of separate property, it may become relationship property.

The following are some examples of separate property:

- a) Property that is a taonga or heirloom;
- b) Property that was received as a gift or through succession (as long as this has not been classified as a family chattel or home); and
- c) Motor vehicles can also be excluded from relationship property.

When a relationship ends, the distribution of relationship property can occur in three ways under the PRA: Mutual Agreement, Family Dispute Resolution; and Court Proceedings.

1. Mutual Agreement – Commonly parties will split the property 50/50 together. If the parties have previously

## 7. Settlement preparation

Once unconditional, your lawyer will begin preparing the relevant documents for you to sign prior to the settlement date and will liaise with your Kiwisaver (if applicable) and lending parties to prepare for settlement. You will also need to arrange insurance.

## 8. Pre-inspection

Up to one day prior to the settlement date of the property, you are entitled to arrange with the agent or privately, a pre-inspection of the property. If, as a result of your pre-purchase inspection, you identify damage arising since the agreement, your lawyer can, prior to settlement, raise the issues with the Vendor to negotiate to have these issues remedied, the settlement price reduced or both.

## 9. Settlement day

On the settlement day your lawyer will complete the transfer of the property to you once all the funds have been received and paid out to the vendor. The lawyers will then advise the agent or vendor that the house keys can now be released so you can move in.

The key to buying any home is being prepared. Ask for help. Talk to your lawyer early, and ensure you have your required IDs and finance ready to go.

created a relationship property agreement(s) which is not disputed, then that agreement will outline how distribution is to occur.

2. Family Dispute Resolution – This can be provided by the Family Court as another alternative, if agreements cannot be met and the parties are willing to negotiate out of Court.

3. Court Proceedings – The parties may settle a relationship property dispute through the Court, leaving the Judge to decide. The Court will consider whether there should be any variation to a 50/50 split to the division of assets based on each party’s contributions. A contribution basis will apply if a two-limb test is met, the first being ‘extraordinary circumstances’ and the second being ‘unacceptable justice’. This can occur when there has been a contribution to separate property or economic disparity exists between parties.

- Contribution - An example is found in *Martin v Martin*, where a wife gives her husband money to assist in purchasing a farm that was previously owned by the husband and his ex-wife. Based on the wife’s contribution the Family Court disagreed with the husband who claimed the farm was separate property.

- Economic disparity – The case of *C v C* recognised the disparity between the parties, the wife had remained in the house paying the mortgage and property outgoings along with caring for their youngest child. Her income compared to her husband’s was substantially lower and the Family Court awarded compensation to the wife.

A prenuptial agreement (also known as a pre-nup, section 21 agreement, or a contracting out agreement) essentially outlines the process by which the parties have previously agreed to divide the property. The subject matter of these agreements includes the identification of separate and relationship property, the calculation of shares of the parties, and how the division would take place.

Certain requirements must be met for a contracting out agreement:

- a) it is to be in writing and signed;
- b) both parties must have obtained independent legal advice;
- c) signing witnessed by lawyers; and

d) lawyers must explain the effects of the agreement, and provide certifications regarding the advice.

The Family Court has the discretion to invalidate a contracting out agreement or, on the other hand, validate a contracting out agreement wholly or partly. Grounds to invalidate an agreement are:

- capacity,
- intention,
- consideration ,
- misrepresentation or mistake,
- offer and acceptance,
- form, and

- undue influence, coercion or duress.

Going to court for these matters can be costly and time consuming. It is \$700 for an application for a Relationship Order alone. If the application proceeds to a hearing there is a \$906 fee each half day the hearing takes, this is excluding solicitors' fees. We recommended that if you are entering or in a relationship where there is an imbalance in assets (including forecasted future assets or earnings) that you consider a prenuptial agreement, it may help to minimise disputes and costs arising when relationships and property need to be divided. You should always seek legal advice about the best option available.

## How to give Notice to Your Tenant and What You can do if a Tenant is No Longer Paying Rent

### How to give Notice to Your Tenant

There are two types of tenancy agreements which a landlord and tenant can enter into: periodic tenancy and fixed term tenancy. Periodic tenancy has no fixed end date, while a fixed term tenancy has a specified end date.

To end a periodic tenancy, a landlord must give a minimum of 90 days' notice. The law requires that the notice:

- a) must be in writing;
- b) give the address of the tenancy;
- c) give the date the tenancy is to end; and
- d) be signed by the person who is giving notice.

A landlord can give a tenant on a periodic tenancy, a 42 days' notice period, if the property is:

- e) being sold and the purchasers want vacant possession; or
- f) if the owner or a member of the owner's family is going to be moving into the property; or
- g) if the property is used as employee accommodation and is needed again for this purpose (this would also have to have been stated in the tenancy agreement).

This 42 days' notice must meet all the requirements of a 90 days' notice and also state the reason the notice is being given (this must be one of the reasons above). If the reason is found to be untrue or not followed through, the tenant can challenge the notice in the Tenancy Tribunal.

Notice can be given to your tenant any day of the week and the tenancy end date can be any day of the week.

To end a fixed term tenancy, you are required to wait until the specified end date on the tenancy agreement. When the fixed term ends, the tenancy is then a periodic tenancy. At this point you can give your tenant a 90 days' notice.

### What to do if Your Tenant is No Longer Paying Rent

Unpaid and late payment of rent is a breach of the tenancy agreement and the Residential Tenancies Act 1986 ("the Act").

It is always best to first contact the tenant, and notify them that a rent payment has been missed. The tenant may not be aware that a payment was missed and make the missed payment once notified.



If the tenant is not able to pay the rent owing in one lump sum, you can consider a payment plan that will allow the tenant to pay the rent arrears in smaller amounts on top of their regular rent payment. It is always a good idea to follow up the agreement in writing. You can formalise this agreement through a service provided by the Tenancy Services called FastTrack Resolution. This process is made up of three steps: Reach an agreement; Let the tenant know you are applying for FastTrack; and Submit the FastTrack Agreement.

1. Reach an agreement – The agreement must have the debt amount, details of the repayment plan, the date payments are to be made, and the consequences if payments are missed while the debt is being repaid.
2. Let the tenant know you are applying for FastTrack – Obtain a current phone number for the tenant and let them know that a mediator will be contacting them to confirm the details of the FastTrack Resolution agreement.
3. Submit the FastTrack Agreement online through the FastTrack application – This can be completed through the FastTrack section of the Tenancy Tribunal application. The filing fee is currently \$20.44.

If a repayment plan cannot be agreed upon or the tenant is continuing to miss rent payments, a 14 Day Notice to Remedy can be issued to the tenant. The 14 Day Notice to Remedy is required to:

- a) be in writing;
- b) be addressed to the tenant with the tenancy address;
- c) state how much the rent is in arrears and that this is a breach of the tenancy agreement and the Act;
- d) state how much and when the last rent payment was received;
- e) state an amount and when the amount is required to be paid by (must be at least 14 calendar days);
- f) provide your contact details; and
- g) explain that if the amount requested is not received by the date stated you will apply to the Tenancy Tribunal to end the tenancy and for the tenant to pay all rent owed.

The Tenancy Tribunal is available if you and your tenant are not able to reach an agreement. The referee will make a ruling that is legally binding.

## Wills – What does having a Will mean and what happens when people die without one

A will is a legal document that lets you decide how you want your property, care for you dependants (partner, children etc.) and your body to be dealt with after you die. A will only

comes into effect once you die and is arguably the most important document you will ever sign.

A well drafted will can reduce emotional and financial strain for your loved ones after you pass away and it reduces the likelihood of family members disputing over your estate and challenging your will. Accordingly, we suggest seeking legal advice when creating a will to ensure your intentions are accurately recorded with no room for ambiguity. If your circumstances or wishes change, you can redraft your entire will or create a codicil which is a separate binding document, read together with your will.

Generally, a will includes (among other things):

- Your requested funeral arrangements;
- The appointment of trusted members of your family, close friends or professionals to administer your estate (known as executors of your estate);
- The appointment of guardians for young children;
- Provision for your dependants such as your children, grandchildren or partner (who are also known as your beneficiaries). If your will does not adequately provide for your dependants, they could make a claim against your estate;
- Who you would like to inherit your personal belongings and your general assets such as furniture and appliances;
- Debts owing to be repaid or loans provided by you to be forgiven; and
- Specific gifts to individuals or donations to charities.



Regardless of how much property you have, you should have a will. For example, you may have an item of jewellery that you would like to give to a specific family member due to its sentimental value rather than monetary value.

It is particularly important for those who marry, enter a civil union, or de facto relationship, or have children to create a will. If you get married or enter a civil union, provisions of any will made before that are automatically revoked unless the

will specifically states that it is made in contemplation of marriage/civil union. This is different for de facto relationships. If you enter into a de facto relationship, any will made before that remains valid.

If your relationship ends, you should review your will to ensure that any specific provisions for the benefit of your ex-partner, are removed before any relationship settlements are made. If you get divorced, any provisions made for your ex-partner are automatically revoked. The provisions are not revoked if you have merely separated.

Dying without a will is also known as dying 'intestate'. This means that the Administration Act 1969 determines how your property is distributed (provided that the value of your estate is above \$15,000) which may not align with your wishes and may result in disputes over your estate. Generally, the property is distributed to a surviving spouse and family members in specified proportions. This process can be more time consuming, costly and complicated than having a valid will.

A will allows you to appoint trusted personal representatives to administer your estate as executors. Where there is no will, the court appoints your personal representatives such as your family member or lawyer. They are described as administrators of your estate. The person who benefits most from the estate is entitled to apply to be administrator. However, if that person does not wish to be the administrator, others can be appointed by the High Court. Your administrators can still administer your estate if you die intestate, but they will be restricted by the Administration Act 1969. If there are no family members to distribute the estate to, it then goes to the Government.

Everybody should draft a will at some stage during their lifetime to protect their loved ones and ensure that property is dealt with in accordance with their wishes. Accordingly, we strongly recommend seeking legal advice and creating a will, sooner rather than later, and ensure that if your circumstances have changed, you review your will.

## Snippets

### Unpaid Rates lead to Sale of Property

Whether you are purchasing your first home, family home, rental property, commercial property, retirement home, or simply refinancing your property, you may not remember as time goes by, the consequences of not keeping your rates paid and up to date with your local Councils.

When signing that all important mortgage enabling your loan funds to be available on your settlement or refinance date, you have agreed to keep the rates on your property paid up to date at all times.

Consequences of falling behind in your payments may lead to the Council informing your Bank under Section 62 Rating Powers Act 2002. Council can accept payment of the rates and arrears directly from your Bank. This payment will then be treated as an addition to your mortgage until the unpaid rates have been paid. For serious arrears, the consequence can be a Rating or Mortgagee sale of your property.

*If you have any questions about the newsletter items, please contact us, we are here to help.*

### When You may have to Pay Tax selling a Property

When the bright-line test commenced, it affected residential land bought and sold from 1 October 2015. If you sold the property within a two-year period, then depending upon your circumstances residential land tax may have applied.

From 29 March 2018, the two-year period has increased to five years.

Tax may become payable if you have bought property with the intention to re-sell it and the tax paid would be based on any profit you make when it is sold.

Although the bright-line test may not apply when selling the property after the five year period has lapsed, tax may still be payable if the intention test is applied.

Residential land withholding tax will apply to the sale of your property if it is residential land, sold within five years from 29 March 2018, or you are an person buying from offshore. For more details refer to:

<https://www.ird.govt.nz/property/brightline-ga.html>



Swayne McDonald  
Lawyers

Manurewa Office 09 267 2700

Botany Junction Office 09 265 2700

Postal: P O Box 75 442 Manurewa, Auckland 2243

[advice@smlaw.co.nz](mailto:advice@smlaw.co.nz)

[www.smlaw.co.nz](http://www.smlaw.co.nz)