Contracting Out Agreements

Property (Relationships) Act

Couples can make their own rules about ownership of their property. They can decide how their property is to be divided between them, instead of using the rules set out in the Act. The expression "contracting out" is used in the Property (Relationships) Act to describe making an agreement about property ownership.

Married, civil union and de facto couples may make agreements spelling out who owns the property and how the property will be divided if the relationship comes to an end.

The Act provides the couple with remedies if the contract is breached or if one party needs to enforce its terms.

What do you have to do make a valid agreement?

The main requirements for an agreement to be valid are as follows:

The agreement must be in writing and signed;
Each party must separately obtain advice about its meaning from a lawyer; and
Each lawyer must certify that the party understands the effect and implications of the agreement, and must witness the party's signature.

These same formalities were required for agreements between a married couple under the old law. They are now required for a de facto or civil union couple's agreement as well.

What do contracting-out agreements cover?

A couple contracting-out of the Act can make an agreement about all of the couple's property, or just one asset. The agreement can spell out what assets will be shared and in what percentages, what property will not be shared, and how assets are to be valued and divided if the relationship ends.

An agreement can even be made about future property – such as future income or capital acquisitions – provided the relationship is not at an end. By contrast, a contract made at the time of the parties' separation can only deal with property in existence at that date.

A contracting-out agreement can be made to apply:

- During the parties' lifetimes;
- After the death of one or both of them; or
- During their lifetimes and after death.

A couple currently in a stable relationship may want to make an agreement to split assets for estate planning and tax purposes. The couple should also consider how they would want property divided if they separate.

If a couple have separated, it is common for the agreement to specify what maintenance, if any, will be paid to one spouse or partner and for the children, as well as arrangements for the on-going care of the children. The use of the home pending its sale will often feature in the agreement if there are dependent children. However, the Court has the power to vary agreements made about children. This is because the welfare of children and arrangements for their care are considered by the law to be paramount.

Even if spouses or partners become embroiled in Court proceedings about their property, it is still not too late for them to make an agreement settling the dispute.

If a spouse or partner dies, the agreement can be made with the representatives of the deceased's estate.

Are contracting-out agreements water tight?

No, contracting-out agreements are not completely unchallengeable. The new Act gives the Court the power to upset agreements if there is "serious injustice" to one of the parties to the agreement. The use of the word "serious" suggests that there must be grave injustice to one of the parties before the Court will interfere and upset the agreement.

In deciding whether an agreement is seriously unjust, the Court considers a number of factors:

- The actual terms of the agreement (are they unjust?);
- The time elapsed since the agreement was made;
- Whether it was unfair or unreasonable when it was signed;
- Whether it has since become unfair or unreasonable because of certain events (foreseeable or not);
- The fact that the parties wanted to achieve certainty about property; and
- Any other matters.

The reference to "any other matters" is an indication of just how wide-ranging the Court's enquiry into the fairness of the contract will be.

What if one partner wants to contract out but the other party will not sign?

If one partner in a de facto relationship wants to contract out of the Act but the other party refuses to sign an agreement, the first partner could take the drastic step of breaking up the relationship. However, even that will not enable the person to keep all of his or her own property if the relationship has lasted for three years or longer. The approach of the three-year anniversary of any de facto relationship should be a time for reviewing commitment, and both parties should consider the legal and financial implications of continuing the relationship.

Is trust property relationship or separate property?

It is neither. Relationship property or separate property that is transferred to a trust is no longer owned by either spouse or partner and so is no longer in the pool of property to be shared (see next question).

Can I use a trust to keep my property separate?

The Act regulates the rights of married, civil union and de facto couples, except if the couple enter into a valid contracting-out agreement. But no such agreement is water tight – it can be set aside on the grounds of "serious injustice". Therefore, people sometimes transfer their property to trustees, to try to keep the property unavailable to their partner or potential partner.

However, the situation is not quite so simple, the settlor may still have property in the form of:

1. A debt owed to him or her by the trust; or
2. An interest as a beneficiary of the trust.

Debt owed by trust

A debt owed by the trustees of a trust to the spouse or partner is itself property, and could be the subject of a claim under the Act.

Property as a beneficial interest

The beneficial interest of a beneficiary who is a spouse or partner is property.

The law makes the distinction between trust assets which have been transferred to a trust by third parties (ie, other than a couple) and property that is transferred by one spouse or partner. If the property has been transferred by a spouse or partner, the new law seems to classify the equitable interest that either spouse or partner gains as a result of being a beneficiary of the trust as relationship property, and it is available for division. The Court can therefore make orders in respect of this relationship property, and has a power to vary the trust.

What happens to relationship property when one person dies?

As has always been the situation, if the spouse or partner who dies has made a will the surviving spouse or partner can inherit money and property under the will. Under the Act, the surviving partner or spouse has the option of making a claim under the Act for his or her share of the relationship property, instead of inheriting under the will.

If the surviving spouse or partner chooses to make a claim for division of property under the Act, any gift to the survivor made in the will is treated as

revoked. The exception to this is if the will specifically states that the gift to the survivor is to stand, even if the survivor does make a claim.

When does the choice have to be made?

The surviving spouse or partner has some time to weigh up the options. Within six months after the person has died, a written notice must be lodged with the estate administrator or, if there is not yet an administrator, with the High Court, indicating what the survivor has chosen to do. The notice must be accompanied by a lawyer's certificate stating that the lawyer has explained to the survivor the effect and implication of the choice.

Warning

The information contained in this paper is intended to provide general information only and not specific legal advice. We recommend you to contact us immediately if you have any questions about "contracting-out agreements".

For More Information

Visit our website at www.gellertivanson.co.nz or call us on (09) 575 2330.