NEWSLETTER

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Our Hamilton office has moved to 554 Victoria Street.
All other contact details remain the same.

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Selling a business – things to consider

You've worked hard to make your business what it is, but you're now ready to move on. So you list it for sale, accept an offer, receive the funds and hand over possession. Sounds simple, right? Not always.

There are many things you should consider if you want to achieve the best price, minimise your ongoing risk, and ensure your business will have the best opportunity to thrive once sold. As each business is different there is no 'one size fits all' approach. Things to consider include:

- Why are you selling? Probably the most important question, this can affect how the transaction is structured and timing.
- Are you replaceable? Many business owners have unique and integral knowledge and skills that may be difficult for a purchaser to learn or replicate. Remove that key person, and the business suffers. It can be important therefore to devise an exit strategy, perhaps by employing and training a potential new owner for some time (often years) before the business is eventually offered to them. Depending on your business structure, a shareholders' agreement could record that the shares of the business are transferred to your successor in parts over time.
- Are you selling the shares in your company, or just the assets of the business? Selling shares can be simpler, but can include more risk.
- Your business accounts and turnover figures should be up-to-date and accurate. You will usually be asked to provide a warranty that the turnover figures for the last 12 months are accurate.

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- Landlords and tenants on good terms sometimes overlook completing the proper paperwork to renew a lease. It is important to ensure you have signed copies of the lease together with any deeds of assignment, renewal and rent review. A purchaser will typically want to ensure there are several rights of renewal available so they can be confident they won't be forced to relocate shortly after purchasing (especially if there is goodwill tied to the business location).
- Your landlord can usually stop a sale transaction if they are not reasonably satisfied that the new purchaser will be a good tenant. Also, your liability under the lease often extends beyond settlement if the new purchaser turns out to be a bad tenant.
- Do you own everything your business needs to operate? Is any plant or equipment leased or owned by the landlord? If so, these need to be disclosed and you need to ensure that they can be assigned to the purchaser (if they so require).
- What is happening with your employees? Do you have employment agreements in place? Do you expect the new purchaser to take over all existing employees? If not, will you need to make redundancy payments?
- Do you have all the consents, licences, permits, certificates or authorisations required to carry out your business?
- What is your business actually worth? Have you valued the assets? What is the goodwill in the business worth, and how much of that is tied to the business itself, to you as the owner, or to the physical location? With that knowledge, what can you do to ensure you can sell as much goodwill as you can to the new owner?

Finally, when do you need to sell? A common theme here is that there are many things you can do to make your business more attractive (and therefore more valuable and easier to sell), but they can take time. Seek advice early to ensure you are on the right track.

Trusts and relationship property - what does Clayton v Clayton mean for me?

Clayton v Clayton [2015] NZCA 30 ('Clayton') considers whether property owned by a particular Trust is relationship property for the purposes of the Property (Relationship) Act 1976 ('the Act').

Relevant facts

Mr and Mrs Clayton separated in 2006 after 17 years of marriage. During the marriage, Mr Clayton established a number of Trusts, including the Vaughan Road Property Trust ('the Trust'). The discretionary beneficiaries of the Trust were Mr Clayton and Mrs Clayton, together with their two children, who were also the Trust's final beneficiaries. The Trust Deed nominated Mr Clayton as the 'Principal Family Member', which conferred on him certain powers including: exclusive powers of appointment and removal of trustees and beneficiaries, wide powers that permitted the Trustees to act contrary to the benefit of the Trust's beneficiaries, and the power to distribute Trust assets to himself.

Family Court decision

The Family Court held that the Trust's assets were relationship property for the purposes of the Act, as the Trust was "illusory". It was held to be an illusory Trust because the powers conferred upon the Trustees hamstrung the ability of the Trust's beneficiaries to hold the Trustees to account. This type of administration over the Trust was described as a "convenient structure for commercial purposes, carrying few hallmarks of a Trust".

High Court decision

On appeal, the High Court also held that the Trust was "illusory" but for different reasons. The High Court held that the powers conferred on Mr Clayton were analogous to ownership over the Trust's assets, allowing Mr Clayton to manage the Trust's assets, as though the Trust itself did not exist. As a result the High Court held that the Trust's assets were relationship property for the purposes of the Act.

Court of Appeal decision

On appeal, the Court of Appeal disagreed that the Trust was "illusory" and concluded that the Trust was valid. However, the Court considered the wide definition of property in the Act, which defines property to include "any other right or interest". The Court held that Mr Clayton's power to appoint and remove beneficiaries met that definition. As a result the Trust's assets were relationship property for the purposes of the Act. The Court went on to hold that the value of Mr Clayton's powers would be equal to the value of the Trust's assets.

Practical implications

The Supreme Court is yet to deliver its judgement; however, the Family Court, High Court and the Court of Appeal all reached the same conclusion; that the Trust's assets were relationship property for the purposes of the Act, but for different reasons.

The Court of Appeal's decision means that Trust powers may now be possibly defined as relationship

property for the purposes of the Act, despite being sheltered behind a validly constructed Trust.

While the implications of Clayton are fact specific, it is a current reminder of the critical importance of both effective asset planning and Trust drafting. Clayton compels those drafting Trust Deeds to carefully contemplate the nature and extent of Trust powers. If you think your situation may be effected by the decision of Clayton it is recommended that you seek professional legal advice.

Tax changes for settlements and the proposed “bright-line” test

With effect from 1 October 2015, there are new requirements around disclosure of tax information when buying, selling and transferring New Zealand property. There is also a new proposed “bright-line” test that will apply solely to residential land transactions to clarify and supplement the existing laws around taxation of property transactions.

The disclosure changes (which do not apply when the party is dealing with their “main home”) require parties to a property transaction to provide their IRD numbers, and where applicable, their taxpayer identification number from any overseas countries where they have to pay tax on their worldwide income.

Where a Trust is dealing with property, the IRD number to be supplied must be the IRD number for the Trust itself – not the trustees’ personal IRD numbers.

One effect is that entities involved in property transactions (other than in some specific exempt transactions, for example where the property sold satisfies the requirements of the “main home” exemption) will need an IRD number to complete the transaction. It is therefore advisable to consider the time it may take for you to obtain an IRD number when agreeing to timeframes in any property transaction.

Tying into the new disclosure requirements is the proposed bright-line test that will apply to residential property transactions entered into on or after 1 October 2015. This proposed test (which has not as yet been enacted and may be subject to changes before being passed) is intended to complement our current property tax rules.

The bright-line test is expected to require income tax to be paid on any gains made from the sale of residential property within two years of purchase. The current proposed exceptions are if the transaction relates to the “main home”, to a relationship property transfer, or to inherited property.

Under existing law, gains from the sale of land can already be taxed as income if that land was acquired for the purpose or intention of disposing of the land. This law remains unchanged, but has proved problematic for the IRD to implement as the IRD cannot always prove intention on the part of the taxpayer. The proposed bright-line test was introduced in part to resolve this problem for the IRD.

As the bright-line test is only intended to apply to residential land, there is also an associated definition of residential land. Residential land means land that has a dwelling on it, or for which there is an arrangement to build a dwelling, or bare land that is capable of having a dwelling on it due to its area and nature.

If you are involved in or anticipating entering into a property transaction in the near future it is important that you make sure you can comply with these new disclosure requirements and have considered the bright-line test and its potential effect.

Modernising Child, Youth and Family Services – Interim Report

In April 2015, Hon. Anne Tolley, the Minister for Social Development, established the Modernising Child, Youth and Family (‘CYF’) Expert Panel (‘the Panel’). The Panel was tasked with reviewing and analysing the current issues facing the care, protection and youth justice systems. It is the latest in a long line of almost continuous reviews stretching back to the introduction of the Children, Young Persons and Their Families Act 1989. The panel’s interim report (‘the report’) was released 24 September 2015.

It is unlikely to come as a surprise to many that the report has in effect given a failing grade to the current CYF system. A key finding of the report is that CYF, in its current operational state, is failing to adequately protect children from harm.

In line with the numerous previous reviews, the report has identified that the challenges facing CYF must be addressed through fundamental legislative and systemic changes. Of particular note was the identification that the current system as a whole focusses on managing immediate risk,

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leaving little in the way of resources to focus on successful long-term outcomes for our vulnerable children and young people. Although there have been opportunities for change in the past, the report proposes changes not only within CYF but also across agencies, providers and the community.

Key areas identified
In formulating a plan for the modernisation of CYF, the panel has set out four key areas that would underpin a new operating model:

- **A child centred system** that hears and incorporates the voices of children and young people and their families,
- **An investment approach** encouraging earlier intervention with an eye on lifetime costs and benefits,
- **A professional practice framework** that states clearly the mandatory tasks for front line workers to ensure the safety and wellbeing of vulnerable children and young people, and
- **Greater engagement with all New Zealanders** by encouraging New Zealanders to take action and be supportive of vulnerable children and young people and provide them with safe, loving and stable family care.

The panel propose that CYF improves its tracking of children in state care and contracts out to other organisations where appropriate. The finer details of the proposed restructuring and how it will be implemented are expected in the final report, due to be released December 2015.

Where to from here
While the final report is due in December 2015, there will be no short-term quick fix of such a large, complex and important government department. Change on this scale is likely to take years and will be inherently costly. A clear strategic direction is required to reverse the current and distressing patterns of repeat abuse, poor life outcomes and the overuse of custodial and institutional responses facing too many of our children and young people.

A significant number of New Zealand children continue to experience disturbing levels of harm, abuse and neglect. While any attempt to keep our children safe must be applauded, it remains to be seen whether this latest review will deliver on promises of a better future for our children and young people now and into the future. This review is yet another opportunity to make a difference to our vulnerable children and young people. Lives depend upon it being successful.

Snippets

Alcohol control
It is not an offence per se to have alcohol in a public place.

It is however an offence to breach council bylaws. Each council makes their own alcohol control rules that best suit their circumstances. You might therefore find each holiday hotspot applies liquor bans differently.

Using Tauranga as a famous example, parts of Papamoa are liquor-free from 9pm to 7am each night, while other popular public areas are liquor-free permanently, such as Mount Maunganui, Mount town and main beach, and Tauranga CBD. From 26 December to 6 January the ban in these public areas is significantly extended to cover other past problem areas, including Pilot Bay, Marine Parade and its adjacent beach, and Papamoa beach.

Alcohol in an unopened container can typically be transported through a liquor-controlled area to a private residence, although this should be prompt - storing alcohol in a vehicle will not protect you. Recent changes mean a breach of a liquor ban will likely mean an instant $250 fine and your alcohol confiscated.

Trans-Pacific Partnership Agreement update
In October 2015 the final form of the Trans-Pacific Partnership Agreement ('TPPA') was agreed upon in principle by the trade representatives for each of the 12 member states – although this does not mean it has yet become law.

The TPPA process has proved to be controversial, with the secrecy of negotiations and contents of the leaked TPPA text being criticised in some quarters.

Under a rule set by the US, the full text of the TPPA should be released to the public within 30 days, and the TPPA cannot be ratified by any country within 90 days of conclusion of negotiations. The Ministry of Foreign Affairs and Trade advises that the final text may however be delayed due to ongoing discussions as to the interpretation of some the terms of the agreement between the negotiators, which has affected preparation of a complete text.

Once the TPPA text is released it is expected to go through the parliamentary treaty examination process. Being an international treaty it is, if approved, ratified by Cabinet and not Parliament.

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

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