

RETIREMENT VILLAGES – LEGAL TITLE

Retirement villages are becoming an increasingly popular choice for older New Zealanders who wish to take advantage of the security and flexibility of the lifestyle on offer.

If you are considering purchasing a home in a retirement village, then you need to be aware of exactly what it is you are buying and in particular the sort of legal title that you will purchase when you acquire your new home.

The most common types of legal title used for retirement villages are:

LICENCE TO OCCUPY

A licence to occupy entitles the resident to live in the unit but ownership of the unit is retained by the retirement village. For that reason, it is usually not possible to borrow funds from a bank or other financial institution secured against a licence to occupy.

UNIT TITLE

A unit title is issued under the Unit Titles Act 1972 and confers legal ownership of the unit or house upon the resident. It is therefore technically possible for the resident to borrow against the value of the property. However, the occupation agreement with the retirement village will

probably include re-sale restrictions which will in turn restrict the resident's ability to borrow.

CROSS LEASE

A cross lease title is one whereby the ownership of the freehold is shared by all of the residents who then grant leases to each other to live in the units and/or houses for a token rent.

LEASE FOR LIFE

The retirement village owner grants a lease in a unit or house in the village which continues on until the resident either dies or leaves the village.

NEW LAW

The Retirement Villages Act 2003 (the "Act") introduced new compliance procedures for retirement village operators, which are in the process of being phased in. These procedures include a requirement for the following documents to be provided to all intending residents:

- a Disclosure Statement, which includes information about the type of legal title offered and the ownership and management structure of the village, and
- an Occupation Right Agreement, which confers the right of occupation of a unit

or house upon a resident, together with the right to use services and shared facilities in the village.

In addition, the Act provides that with effect from 1 May 2007, each retirement village must have a Code of Residents Rights. This code summarises the basic rights which all retirement village residents are entitled to and covers matters such as consultation, dispute resolution and the right to be provided with services and other benefits promised in the Occupation Right Agreement.

The Act makes it mandatory for intending residents of a retirement village to receive independent legal advice before signing an Occupation Right Agreement. This means the resident's signature has to be witnessed by a lawyer who must certify that he or she has explained the general effect of the agreement and its implications in such a manner which is easily understood by the intending resident. An agreement that has not been properly certified may not be enforceable by the retirement village operator.

In summary, the new compliance procedures introduced by the Act should afford greater protection and security to retirement village residents.

LEGAL DEFINITIONS (TRUST DEEDS)

Below are some of the terms commonly used in trust deeds:

TRUSTEE(S): The person(s) who are responsible for ensuring that the trust is administered correctly and who hold the trust fund on trust to be applied for the benefit of the named beneficiaries.

SETTLOR(S): The settlor(s) are the

person(s) who establish the trust and transfer assets to it.

TRUST FUND: The assets that are transferred to the trust by the settlor and held by the trustees for the beneficiaries.

BENEFICIARIES: The persons or entities who are entitled to benefit from the trust fund.

VESTING DATE: The date upon which all assets held on trust by the trustees must be distributed to the beneficiaries. A vesting date cannot exceed eighty years from the date the trust is established.

APPOINTOR: The person who has the power pursuant to the trust deed to appoint a new trustee or advisory trustee and/or to remove any or all of the trustees.

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LAW 2 DAY

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WELCOME TO ANOTHER EDITION OF LAW2DAY

You will find another wide ranging selection of articles and we are sure that you will find some that are of interest to you. If you know someone who would be interested in receiving their own copy of Law2Day, then let us know and we will send out a copy to them. It's free!

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Happy reading.

If we can help you in any way please do not hesitate to contact us.

The team at Galbraiths

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THINKING ABOUT RENTING OUT YOUR HOME OR INVESTMENT PROPERTY?

The purchase of a residential property with a view to letting it out is a popular investment choice for many New Zealanders.

If you are considering such an investment, or indeed already rent out a property, then you need to be familiar with the provisions of the Residential Tenancies Act 1986 (the "Act") which sets out the requirements for many residential tenancies.

Some of the main points are as follows:

TENANCY AGREEMENTS TO BE IN WRITING

The Act provides that all residential tenancy agreements must be in writing. However, an agreement is still enforceable even if it is not in writing.

TERM OF TENANCY

The Act recognises two types of tenancies:

- Fixed term tenancies that are for a specified term;
- Periodic tenancies that are not for a defined term but continue until terminated by either party.

The Act does not apply to fixed term residential tenancies that are for less than 120 days or for five or more years. However, in the latter situation, both the landlord and

the tenant must agree that the Act will not apply.

BOND

The Act permits the landlord to require a prospective tenant to pay up to four weeks rent as a bond in advance. The money is held by the Tenancy Tribunal and is only refundable once both parties sign a form agreeing on the amount to be allocated to the tenant and/or the landlord. The landlord is entitled to deduct from the bond the cost of any repairs that are the responsibility of the tenant but cannot use it to recover costs associated with fair wear and tear. If the parties cannot agree upon the amount of bond to be refunded, then the matter will have to be referred to the Tenancy Tribunal.

FORM OF TENANCY AGREEMENT

The Act prescribes a simple form of tenancy agreement; a copy can be downloaded from the website of the Tenancy Tribunal: www.dbh.govt.nz.

TERMINATING A RESIDENTIAL TENANCY

Either the landlord or the tenant can give notice to bring a tenancy to an end. In the case of the tenant, at least 21 days notice

must be given. In the case of a landlord, 90 days notice must be given but only 42 days is required if the landlord:

- Requires the premises for his or her own use or that of his or her immediate family;
- Has entered into an agreement to sell the property and the terms of that agreement require vacant possession;
- Requires the property in order that one of his or her employees can live in it so long as the landlord has previously notified the tenant that the premises are normally used for that purpose.

All notices to terminate a tenancy must be in writing.

DISPUTES

The Tenancy Tribunal deals with all disputes arising out of residential tenancy agreements regardless of the issues involved. Either party can make an application to the Tribunal either during the tenancy or after it has ended.

If you are a landlord, it pays to fully familiarise yourself with the responsibilities and duties imposed upon you by the Act. It could save you a lot of time and trouble in the future.

REVERSE MORTGAGES

For many New Zealanders, the family home is their most valuable asset. For some people this can mean they are asset rich but cash poor. It is such people who are being targeted in marketing campaigns for reverse mortgages. These mortgages are relatively new in New Zealand and can have serious implications for the home owner.

WHAT ARE THEY?

Reverse mortgages usually involve a loan borrowed against the equity in the home owner's property. Generally, the loan is repayable on the sale of the property or upon the owner's death, whichever occurs first. They are particularly attractive to people who have retired and whose home is mortgage free.

HOW MUCH DO REVERSE MORTGAGES COST?

Reverse mortgage schemes are often advertised on the basis that there are no regular repayments. Whilst this is true, interest and fees are still charged for so long as the loan continues and are added to the balance, which will ultimately have to be repaid.

The interest rate will usually be higher than an average bank loan. There may also be fees payable in addition to interest and these can include a valuation fee, commission (e.g. to a broker), early repayment charges and other costs which may be payable in the event that the home owner decides to sell the home.

BE AWARE OF THE DOWNSIDE

Advertising for reverse mortgages is often presented in attractive terms, which suggest that money can be made available to fund things that most people desire, such as holidays, home renovations and travel.

While reverse mortgages can make it possible to obtain money from the family home for these purposes, the cost is significant.

Most importantly, the increasing value of your home may not keep pace with the debt owed under the terms of the mortgage.

Interest may compound. The amount owing will continue to increase the longer the loan remains unpaid. This will not present a problem so long as you continue

to live in your home. However, if you wish to sell your home then the mortgage will be repayable and you may find that the amount that you receive after repaying the loan is insufficient to enable you to buy another home of an equivalent standard.

SEEK ADVICE

If you are contemplating taking out a reverse mortgage, it is absolutely vital that you obtain independent advice from your lawyer, and fully understand the terms of the loan and the long term implications for you. Reputable companies offering reverse mortgages will require you to take independent advice before proceeding.

Although the Government has indicated that a code of practice is to be established for reverse mortgage schemes, it is not yet in place. Home owners should be wary of any reverse mortgage scheme which does not state that it is mandatory for the home owner to obtain independent legal advice before proceeding.

TRUSTS – THE PAPERWORK IS CRUCIAL!

Trusts are a popular choice for people who are concerned about protecting their assets for themselves and for their children. However, the formation of a trust by the execution of a trust deed and transfer of assets to the trust is only the start. A successful trust is one that is regularly monitored by the trustees and where there is a clear paper trail evidencing the ongoing administration of the trust by the trustees.

WHY THE NEED FOR PAPERWORK?

If the trust is not properly administered, there is a risk that it may be seen to have either "lapsed" or that it is simply a "sham". This usually occurs where the assets which form part of the trust fund are treated by the trustees as if they are their own personal property held for their own benefit rather than assets held by them for the benefit of the beneficiaries of the trust. Given that

trustees are frequently both trustees and beneficiaries of the trust, it is all the more



important that a clear distinction exists in the minds of the trustees regarding assets

which are held by them personally and those which belong to the trust.

ESSENTIAL PAPERWORK

The administration of a trust will depend very much on the nature of the assets which make up the trust fund. A trust fund that consists of the family home in which the beneficiaries reside will not require the trustees to do a great deal for so long as that situation continues. If there is a debt owing by the trust to the settlors of the trust (i.e. the persons who originally set up the trust and transferred assets to it) then the debt should be gifted by the settlors in annual increments of \$27,000.00 (for each settlor) until the entire debt has been forgiven. As house prices continue to rise, the gifting process is taking longer and trustees should be vigilant in ensuring that gifting continues as this will

maximise the benefit of the asset for the beneficiaries of the trust.

In addition to gifting, trustees should meet at least once a year to review the trust fund and the manner in which the trust fund has been applied for the benefit of the beneficiaries. There may be no need for the trustees to make any decisions but the important point is that:

- a) the trustees have turned their minds to their duties and responsibilities, and
- b) a trustee resolution records how those duties have been discharged over the previous 12 month period.

In the case of trusts that hold income producing assets (such as investment

properties and shares), the matters which trustees should attend to include:

- Regularly reviewing the performance of investments.
- Preparing and filing a tax return.
- Ensuring that the trustees meet at least annually and possibly more frequently, depending on the nature of the investments which they are monitoring.
- Ensuring that any new investments and or transactions that the trust may enter into are properly documented and supported by appropriate resolutions.

Minutes of trustees' meetings should be kept and particular care taken to record

decisions taken concerning investment of trust funds and distributions to the beneficiaries.

CONCLUSION

In summary, the advantages of keeping the paperwork for your trust up to date cannot be overstated. A trust which is properly administered will provide a much greater degree of protection than one which is effectively dormant because the trustees have not turned their minds to their duties and responsibilities under the terms of the trust deed.

If you have any doubts as to whether your trust is being properly maintained, consult your lawyer.

ECONOMIC DISPARITY CLAIMS

The amended relationship property legislation introduced in 2002 signalled a shift in the way the law viewed relationships, by recognising that the contributions made by parties in a relationship are equal, particularly in the area of earning capacity.

Where a relationship ends and one spouse earns considerably more than the other, section 15 of the Property (Relationships) Act 1976 allows for the disadvantaged spouse to make a claim for compensation as a result of this "economic disparity".

GROUND FOR ECONOMIC DISPARITY

The initial challenge is making out the grounds for an economic disparity claim. Firstly, the living standards and income of one spouse must be significantly higher than the other. What constitutes 'significant' is unclear as Court decisions vary.

Secondly, the living standards and income must be due to the effects of the division of functions during the relationship. In most cases this has arisen due to one spouse sacrificing career advancement to remain at home to care for the children thereby allowing the other spouse to advance his or her career.

Once the grounds have been made out,

the Court has discretion as to whether it considers an award to be just in the circumstances and if it does, then the amount of compensation will need to be determined.

This resolution may sound straight forward in theory. However, Court decisions regarding economic disparity claims have proved to be inconsistent. Even in cases where claims have been successful, awards have typically been conservative. As a result, it can be difficult to establish the grounds for economic disparity as it is unclear how much weight will be attached to any particular factor.

CAREER OR FAMILY?

The decision to advance one's career or take a more domestic role is one that many people face when having families – but what are the consequences upon separation?

In a recent Family Court case, a wife brought a claim for economic disparity for \$686,000 on the basis that had she not given up work to care for the children she would be earning a similar income to her husband. The claim was initially rejected by the Family Court on the grounds that the economic disparity was caused by her own decision not to return to the workforce,

rather than any real need for her to remain at home. The case was appealed to the High Court and the much awaited decision was released recently.

On appeal, the High Court agreed that the division of roles within the marriage was a choice. However, the Court did not consider it appropriate to suggest a different choice could or should have been made. It found the division of roles within the marriage was the primary reason for the disparity in income. The Judge stated: "It is the classic case of a man being given full rein to develop his career and maximise his earning potential while his wife puts her career on hold. The causal link between the economic disparity and the division of roles in the marriage could not be clearer."

The case is currently being appealed to the Court of Appeal; however the High Court judgment sends a clear message that the decision to take a domestic role or advance one's career is a choice. However, just because one spouse chooses to remain in a domestic role, despite other opportunities being available, does not mean they should be treated as the author of their own misfortune. After all, the purpose of the Act is to recognise equal contributions made by parties in a relationship and every type of contribution must be considered.