

# Trust eSpeaking

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LAWYERS

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Welcome to the first issue of *Trust eSpeaking* for 2018. We hope the year has started well for you.

Enjoy reading this e-newsletter; we trust you will find these articles both interesting and useful.

To talk further on any of the topics covered, or about trusts in general, please don't hesitate to contact us – our details are above.



## Option A or Option B? That is the question!

When your spouse or partner dies you will need to make a very important decision between your entitlements under their will and potential claims against their estate. We discuss the implications of that decision, some of the issues that it raises and the consequences of the choice that you make.

PAGE 2 >>

## When Grandma comes to live with us

As parents age, their children often find they need to take an increasing role in looking after them. Unpalatable as it seems, it's important to think about the legal difficulties that can arise where one member of the family has assumed responsibility. If questions are asked some time later, it may not be enough to say "but that is what mum/dad wanted". We explain the restrictions on when the person who holds the Enduring Power of Attorney can benefit from the decisions they make, and we also touch on the issues where a parent later needs to go into care.

PAGE 3 >>

## Trustees' personal liability for litigation costs

It can be an unpleasant surprise

Trustees and executors are not always entitled to reimbursement for their litigation costs. While most trustees and executors will assume that costs incurred in the course of their trustee or executorship will be paid from the estate or trust, a recent decision illustrates the perils that trustees or executors can face when they go to court.

PAGE 4 >>



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# Option A or Option B? That is the question!

## Entitlements under your spouse or partner's will

When your spouse or partner dies you will need to make a very important decision between your entitlements under their will and potential claims against their estate. We discuss the implications of that decision, some of the issues that it raises and the consequences of the choice that you make.

In 2002 the law in New Zealand was changed so that when one of the spouses to a marriage or one of the partners in a de facto relationship of more than three years dies, the death for most purposes is treated the same as separation. Under the Matrimonial Property Act 1976, when a married couple separated the general rule was that their matrimonial property was split 50/50.

The changes to the law in 2002 extended this division to the situation where one of the spouses or de facto couples dies leaving a surviving spouse or partner. For

practical purposes, death is treated the same as a separation under the Property (Relationships) Act 1976, known as the PRA.

## Making a choice

There are specific provisions in part 8 of the PRA dealing with the division of relationship property on death. In essence, the surviving spouse has to make the following choice within six months of probate being granted:

- » **Option A** which is to make an application to the court under the PRA for a division of relationship property, or
- » **Option B** which is to elect not to make an application under the PRA for division of relationship property but to accept the provision made for them under their partner or spouse's will and in any other way by the deceased.

Significantly, if Option A is chosen then the surviving spouse loses all gifts made to him or her in the deceased's will. It needs to be remembered, however, that when applying to court for the division of the relationship property, as part of the court application, the surviving spouse can ask the court for an order that the gifts under the will be reinstated.

If the surviving spouse or partner does not make an election within six months of the date of probate being granted then he or she is deemed to have chosen Option B – that is accept what they receive under the will. This is, in effect, the default option.

## The options

1. If Colin and Diane are married (or in a de facto relationship of more than three years) and Colin dies leaving most or all of his estate to Diane, then Diane does not have to do anything in terms of electing Option A or B. In this situation Diane is better off taking what she receives under Colin's will (Option B). If she does not choose one of the options, then six months after probate being granted she will be deemed to have chosen Option B anyway.
2. On the other hand, if Colin's will gives 50% or more of his estate to his children of his first marriage then Diane may very well be better off to get advice about choosing Option A. When she applies to the court under the PRA, she will ask the court to reinstate the provisions in Colin's will for her.



# When Grandma comes to live with us

As parents age, their children often find they need to take an increasing role in looking after them. Unpalatable as it seems, it's important to think about the legal difficulties that can arise where one member of the family has assumed responsibility.

If questions are asked some time later, it may not be enough to say "but that is what mum/dad wanted". We also explain the restrictions on when an attorney (the person who holds the Enduring Power of Attorney) can benefit from the decisions they make. We touch on the issues where a parent later needs to go into care.

Often elderly people do not want to live alone. Buying a unit in a retirement village, or some other form of sheltered accommodation, may be a good option. Others may find buying a unit is not financially possible or desirable. Some prefer to stay with one of the family. In that case, an increasing burden may be thrown on the family member who is providing care. These arrangements should be recorded carefully and it's important to get legal advice.

Often the son or daughter who is providing care may also hold an Enduring Power of Attorney (EPA). In 2016, the Court of Appeal heard the Vernon case<sup>1</sup>. This concerned an elderly man who went to live with his son and daughter-in-law. In less than two years, almost all of his money had been paid out for the benefit of the son and his family. The son said this was done with his father's approval, but the court wasn't convinced. The court believed he had misused his position as carer – and as attorney under the EPA – for his own benefit. The son was required to pay back the money he had received and to meet some of the court costs.

In some cases, the parent may lend money to their son or daughter to help fund adding an extra room where the parent will be able to live. In other cases, a parent may pay for a relocatable unit or granny flat. Unless there is some other arrangement, the extra room or building will legally be the property of the son or daughter and their spouse/partner as owners of the land. If this is not intended, then a written agreement should be signed. There are a number of things to think about. What is to happen when the arrangement comes to an end? Is the money to be treated as a gift or a loan?

<sup>1</sup> *Vernon v Public Trust* [2016] NZCA 398

When should any loan be repaid and is interest to be paid?

Parents may also need to think about whether it's fair to help one son or daughter by paying for an extension to their home without giving something similar to others in the family.

What is to happen if, after a few months, the arrangement with Grandma is not working out? Can mum get her money back and move somewhere else? Will the son or daughter be able to pay her back if the money has all been spent on extensions to their home in order to accommodate mum?

More importantly, the son or daughter needs to be able to show that the arrangement is fair and that the parent is not being taken advantage of. To avoid these risks, it is advisable for the parent to have independent legal advice and for the arrangements to be clearly documented.

## Long-term residential care

If a parent later needs to go into care, there may be a further difficulty. Government subsidies for long-term care are subject to asset testing. Money previously given away can be clawed back and treated as if mum or dad still had the money. There are exemptions, and you



can hold on to some funds, but those rules change from time to time.

If mum has given her son money to pay for a granny flat or extension to his house, so she can live with him, this may be treated as 'deprivation of assets' and a residential care subsidy refused. If the money was a loan, not a gift, then the son would be expected to pay it back so that the money can be used to meet the cost of care.

## EPA attorneys who benefit from their own decisions

Family members who act as an attorney under an EPA also need to understand that they are not entitled to benefit personally. Section 107 of the Protection

# Trustees' personal liability for litigation costs

## It can be an unpleasant surprise

Trustees and executors are not always entitled to reimbursement for their litigation costs.

While most trustees and executors will assume that costs incurred in the course of their trustee or executorship will be paid from the estate or trust, the recent decision in *Courteney v Pratley*<sup>2</sup> is an illustration of the perils that trustees or executors can face when they go to court.

Trustees and executors are in charge of the property of others. They are not expected to pay for their own expenses in doing so and, as such, are usually entitled to reimbursement of the costs they incur.

When trustees and executors go to court, however, they are only entitled to be reimbursed for their litigation expenses where those were 'properly incurred' in the course of their trustee or executorship. These factors will be relevant to whether the cost was properly incurred:

- » Whether the cost arose from actions taken within the scope of the trustee or executorship
- » Whether the cost was incurred because the trustee or executor's obligations required them to incur the costs, and
- » Whether the expense incurred was reasonable.<sup>3</sup>

Where trustees are litigating against a third party to protect trust property, they will generally expect to be reimbursed because they are maximising, or trying to maximise, the property available to the beneficiaries.<sup>4</sup>

## The need to be careful

Last year's decision in *Courteney v Pratley*, however, suggests that executors and trustees may need to be more careful. In this case, Mr Pratley had been appointed by the High Court as executor shortly before a civil claim against the estate was to be heard in the District Court. Mr Pratley sought independent advice as to the merits of defending the claim and instructed lawyers to defend the claim on behalf of the estate. The estate was worth about \$500,000 and the claim against the

estate was for less than 10% of this. The estate lost the District Court case and was ordered to pay costs.

At a later stage the eventual beneficiary of the estate challenged Mr Pratley's right to reimbursement of the litigation costs of the lawyers who had been instructed to defend the District Court case. The beneficiary said that the estate should not have defended the litigation and that the expense had not been properly incurred because it was not reasonable in all of the circumstances.

Justice Cull agreed with the plaintiff, Mr Courteney, and found that Mr Pratley was not entitled to reimbursement for the lawyers' expenses incurred defending the District Court proceeding against the estate. She acknowledged that Mr Pratley had acted in good faith, and on legal advice, and that he believed he was protecting the estate assets.

However, Justice Cull found that executors and trustees should be cautious before proceeding with expensive litigation. She said that Mr Pratley ought to have applied to the High Court for directions as to whether he was to defend the District Court litigation or not. Even though the situation was urgent, and Mr Pratley had not been able to have the District Court

case put off, Justice Cull still found that he should have urgently applied to the High Court for authorisation before instructing lawyers to defend the case.

## Hostile litigation

When executors and trustees engage in litigation against beneficiaries (known as 'hostile litigation') they are often aware of the possibility that they will not be reimbursed for their costs in doing so. Most trustees and executors will assume, however, that if they are incurring legal costs in the course of defending trust or estate assets they will be entitled to reimbursement from the trust or estate.

Instead, the *Courteney* decision suggests that trustees and executors must carefully consider the size of the trust or estate, the likely costs that are expected to be incurred in the course of any litigation and, if they are unsure whether the steps they plan to take are reasonable or not, they should apply to the High Court for directions as to how to proceed.

It would be wise for executors and trustees to consider doing this at an early stage if litigation is contemplated or has been started against them, in order to avoid finding themselves personally liable for the litigation costs. ●

<sup>2</sup> *Courteney v Pratley* [2017] NZHC 3285.

<sup>3</sup> *Re O'Donoghue* [1998] 1 NZLR 116.

<sup>4</sup> *Re Buckton* [1907] 2 Ch 406.

<< continued from page 2

## Option A or Option B? That is the question!

A further important point to bear in mind is that quite separate from the division of relationship property, when a person dies he or she has duties to make provision for the maintenance and support of a surviving spouse or de facto partner. This is totally separate from a PRA claim and this obligation specifically applies to the deceased's separate property.

Therefore in example (2) on page 2 Diane can claim one half of her and Colin's relationship property by choosing Option A and, at the same time, she can also pursue a claim under the Family Protection Act 1955 for further provision for her maintenance and support from Colin's estate. In determining the claim for maintenance and support the court will take into account what Diane has received under Colin's will and/or what she will receive from a division of relationship property. The court will also take into account factors such as the length of their relationship, the competing claims and whether Colin has made provision for Diane through, for example, a family trust.

## Deciding on A or B?

To make an informed decision about which option to choose, it's very important that surviving spouses or partners obtain full details of the deceased's assets, copies of all relevant documents and get prompt legal advice.

To make a valid and enforceable choice of Option A or B, it's necessary for a document in a prescribed form to be signed and this document must be accompanied by a certificate signed by a lawyer who certifies that the effect and implications of the notice have been explained to the surviving spouse or partner. The document must then be lodged with the administrator of the estate.

## Timeframe

Claims against estates are usually subject to specific time limits; not complying with these restrictions will often mean that legal rights disappear. For example, if Option A is not chosen in time and the estate has been fully and finally distributed, it may not be possible to belatedly pursue a PRA claim. Prompt advice is, therefore, essential. ■

<< continued from page 3

## When Grandma comes to live with us

of Personal and Property Rights Act 1988 says that an attorney can only benefit personally if:

- » The EPA specifically allows this
- » The court authorises the attorney to receive a benefit
- » The attorney is recovering out-of-pocket expenses
- » The attorney is the spouse or partner and is dealing with their jointly owned property
- » The attorney makes a loan or investment which a trustee would be able to make when looking after trust money, or
- » The attorney is a professional, such as a lawyer or accountant, and charges the usual professional fees for such professional work.

The wording of the EPA can override any of these last four exceptions.

If you have one of your parents coming to live with you, it would be wise to check what their EPA does and doesn't allow. As well it would be prudent to ensure that any financial arrangements are well thought through. ■

