Trust eSpeaking

ISSUE 30
Autumn 2020

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BARRISTERS AND SOLICITORS

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Welcome to the Autumn edition of *Trust eSpeaking;* we hope you find the articles both interesting and useful.

If you would like to know more about any of the topics in *Trust eSpeaking*, or about trusts in general, please don't hesitate to contact us – our details are on the right.

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How many people should you name as attorneys?

In previous articles, we have explained why it is important to have an enduring power of attorney (EPA) and the problems that can be created if you do not have one when the need arises. You should have two EPAs – one for property, and the other for personal care and welfare. We explain why it is preferable for you to have more than one attorney.

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Succession law in New Zealand

Law Commission to review conflicting inheritance laws

In late 2019 the Law Commission reported back to the government on its review of the Property (Relationships) Act 1976 (PRA). Discussion on Part 8 of the PRA that deals with the division of relationship property on the death of a spouse or partner was specifically excluded from the scope of that review.

Acknowledging the issues that could arise by not addressing the division of property when a spouse/partner dies, in December last year the government asked the Law Commission to review the law of succession – that is, the law that governs who inherits a person's property when they die.

A particular focus of the Law Commission's succession project will be the conflict between two statutes – the PRA and the Family Protection Act 1955 (FPA).

Property (Relationships) Act 1976

The PRA provides that when a spouse or partner dies, the surviving spouse/partner must choose 'Option A' or 'Option B'.

Option A requires the survivor to apply to the Family Court for a division of the relationship property which means:

- All the property that the deceased spouse owned is presumed to be relationship property, and the onus is on the executor to prove that property is not relationship property, and
- Unless a contrary intention is expressed in the will (or a court orders otherwise), the survivor forfeits any benefit they would have received under the will or on an intestacy (that is, when there is no will).

In Option B, the surviving spouse or partner receives what they have been given under the will or what they are entitled to if there is an intestacy.

An example of how both options could work is below.

Jack and Jill had been in a relationship for 10 years when Jack died. They did not have a pre-nuptial/contracting out agreement. The family home, worth $750,000, was owned by Jack, and he and Jill had joint savings of $150,000. Jill also owned a rental property in her sole name (her previous home) worth $500,000. In his will, Jack left Jill a life interest in the family home, with the home going to his children after Jill dies.

If Jill elects Option A, she must file proceedings in the Family Court for a division of relationship property. If successful, she could receive half the value of the family home and half the money in the bank account. She runs the risk, however, that the increase in value of her rental property could be found to be relationship property, and she would also have to move out of the family home.

If Jill elects Option B, she may keep her rental property, all the cash, and she can keep living in the family home.

Family Protection Act 1955

The FPA allows spouses and children who have not been adequately provided for in their late spouse or parents' wills to make a claim on their estates. (We have an article on page 4 on the recent *Carson* case where disinherited children claimed under the FPA.)

Conflict between the PRA and the FPA

A conflict that commonly arises is when a parent in a second or subsequent relationship leaves their entire estate to their surviving spouse or partner, and nothing to their children from previous

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Enduring powers of attorney

How many people should you name as attorneys?

In previous articles in *Trust eSpeaking*, we have explained why it is important to have an enduring power of attorney (EPA) and the problems that can be created if you do not have one when the need arises. You should have two EPAs – one for property, and the other for personal care and welfare.

In your EPA, you should also take care to name appropriate people as your attorneys. Ideally you should name two people to manage your property, which also includes your finances and investments.

Property EPA

If your property EPA only names one person to act for you there can be risks. Naming two people who act together (known as your 'attorneys')[1] should mean there are some checks and balances. A property attorney's job is to look after your money and property, not to benefit personally from an involvement in your affairs. Unfortunately, some attorneys forget this and need someone to remind them.

An example of the problems that can arise from naming a single attorney is the 2015 *Vernon* case[2]. A son, who was the sole attorney named in his father's EPA, made personal use of most of his father's money. When his father died, there was nothing left for other members of the family to inherit. The court decided the son had misused his authority as the sole attorney and ordered him to repay the money he had used for his own benefit – but only after long and expensive court proceedings.

Too many cooks?

Naming two attorneys in your property EPA can provide some important safeguards. Naming more than two can be problematic – too many cooks perhaps?! Sometimes it is tempting to avoid family rivalries by naming all of your children as attorneys; this can be impractical. Usually the attorneys must all act unanimously and having more than two attorneys can be very difficult if they do not work well together or some of them live some distance away. Often it is a case of two is company but three is a crowd.

1 An 'attorney' appointed by an EPA does not need to be a lawyer. An attorney is a person who can speak for you and act on your behalf.
2 *Public Trust v Vernon* [2015] NZHC 1928; *Vernon v Public Trust* [2016] NZCA 388.

Must attorneys' decisions be unanimous?

Your EPA can state whether the attorneys must all act unanimously or the EPA can allow any one of the attorneys to act alone. The legal terms are 'joint' attorneys and 'several' attorneys. The law allows two or more people to be appointed as attorneys (either jointly or severally). Acting 'severally' means each attorney can take action without involving the other attorney/s.

Allowing any one of the attorneys to make decisions alone can also be risky. The attorneys may impede each other or act at cross-purposes. Except in rare circumstances, it is usually best to require the attorneys to act together (jointly).

To make that workable, there really should be two, or at most three, attorneys.

Personal care and welfare EPA

The position is different with an EPA for personal care and welfare; only one person can act at a time in respect of personal care and welfare.

It is also important to remember that the property attorneys, and the personal care and welfare attorney, must be able to work together. Sometimes different attorneys are named in an effort to be fair and to ensure everyone in the family is involved. While you want to keep peace within the family, it is also important to ensure that you have attorneys who can easily collaborate together.

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Claims on an estate

How much can a disinherited child expect?

The Family Protection Act 1955 allows children to bring claims against the estate of a deceased parent on the basis that their parent did not adequately provide for their 'proper maintenance and support'. Exactly what constitutes 'proper maintenance and support' is the subject of considerable litigation, as well as extensive commentary in the media.

Since a trio of Court of Appeal decisions in the early 2000s, a general understanding has emerged that awards under the family protection legislation can be quantified by referring to a percentage of the relevant estate. It has long been said that a financially-stable adult child might expect to receive between 10%–20% of the estate of their deceased parent, depending on a number of factors including the size of the estate and the position of others under the will or those people who are entitled to make a claim. In many cases, the 10%–20% threshold has become an informal benchmark when assessing the position of a financially-stable adult child making a claim against a modest, but not insignificant, estate.

Carson case discarded percentage-based claims

The late 2019 case of *Carson v Lane*[3] put the percentage-based approach squarely back into the spotlight. In the *Carson* case, the father (Mr Carson) died leaving an estate of $17 million, but he made no provision for his four adult children or six grandchildren in his will. Instead he left the four children as discretionary beneficiaries under a trust that inherited the residue of his estate (around $15m). The trust, however, had a number of other discretionary beneficiaries and the children did not enjoy any preferential status under the terms of the trust deed. They had no particular entitlement beyond a right to due consideration by the trustees from time to time.

All four children made claims against the estate under the Family Protection Act 1955, as did their own children (the grandchildren). The children claimed that they should each receive 20% of the estate, that is 80% should be awarded to the children, and then further provision should be made for the six grandchildren. The counter-argument was that Mr Carson's wishes should come first, the trust should be able to operate with meaningful resources and the four children's needs should be addressed by each being awarded a specific sum of money, rather than being awarded a percentage of the estate. This was the way in which the court decided to proceed.

The children were ultimately awarded $1.25 million each, being about 8% of the estate per child. No award was made to the grandchildren. The judge decided that, in the circumstances, making an award to the six grandchildren was not necessary.

New guidance for disinherited children

The *Carson* decision has provided a useful update for disinherited children. It confirmed that the percentage-based approach may still be useful in smaller estates.

For larger situations such as the *Carson* estate, however, the parties should instead focus on what specific sum of money is adequate to meet the child's need for proper maintenance and support.

In many large estates, parents will have given particular thought to the needs of their children and have chosen to leave a specific sum of money to address those needs. Those parents may be comforted to know that if a challenge is brought against their will/s, the court will acknowledge the size of the estate when deciding whether a particular sum adequately meets their child's need for maintenance and support. Ultimately, the court will only intervene to the minimum extent necessary. ●

3 *Carson v Lane* [2019] NZHC 3259.

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Succession law in New Zealand

relationships. There is currently no ability for financially independent stepchildren to make a claim against a step-parent's estate; this means they must either reach agreement with their step-parent, or they must file a claim under the FPA against their deceased parent's estate.

Another problem is that the surviving spouse or partner is commonly appointed as the executor of the estate and, worse, the couple's property is often held jointly, meaning its ownership passes by survivorship to the surviving spouse.

The effect of this is that there is often no estate against which to claim, and so the children must first ask the executor to apply for a division of relationship property.

This could be even messier where, as is common, the surviving spouse is also the executor. He or she may be reluctant to make that application and, therefore, a preliminary application must be made to replace them as executor. The three-stage process therefore involves applications:

1. To replace the executor
2. For the classification and division of relationship property, and then
3. For a share of their parent's portion of the relationship property.

All of this makes for very expensive litigation for families. We hope that the Law Commission reviews both the ability of stepchildren to apply for provision from their step-parent's estate, and ways in which the process may be simplified to make it more accessible and cost-effective.

Concluding thoughts

It is also timely to review the 20 or so disparate statutes (such as the Law Reform (Testamentary Promises) Act 1949), some of which stretch back 100 years, that currently deal with succession in New Zealand.

New Zealanders may want to take part in a discussion about our society's belief as to who should be entitled to inherit property. Themes to consider could include:

- Whether the rights and needs of the surviving spouse or partner should take precedence over a deceased's children from prior relationships. If so, to what extent?
- The expectations (or rights) of financially-stable adult children to any inheritance.
- Claims on an estate being limited to those in 'need'.
- An ability to 'claw back' assets that have been gifted to a trust during the deceased's lifetime with the intention of defeating a spouse or children's ability to claim.

If you would like to contribute to the discussion, click **here**.

In the meantime, however, if you have any queries on the current succession laws, please don't hesitate to contact us. ●

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Enduring powers of attorney

Substitute attorneys

The law also allows you to name a substitute who can step in if the first attorney is no longer willing or not able to act. Both EPAs for property and EPAs for personal care and welfare can name a substitute or a series of substitutes. This can avoid the situation where your EPA is ineffective because the named attorney has died, is too ill, or is out of the country and is difficult to contact.

Review your EPA now

If you do not already have an EPA for both property and health and welfare, it is important that you get this organised. If you already have EPAs, it may be a good time to check you have named the right people – and the right number of people.

Above all, it is important to consider the risk of naming a single family member who may, with the best of intentions, fail to realise that what they are doing is wrong. Having a second person to work with is always helpful. ●