

Trust eSpeaking

M A C T O D D

L A W Y E R S

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Welcome to the Spring 2021 edition of *Trust eSpeaking*. We hope you find the articles in this e-newsletter both interesting and useful.

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



Buying your first home using KiwiSaver funds

But you're already the trustee of a trust

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PAGE 2 ▶



Estate laws due for a shake-up

Law Commission proposals

The laws about the administration of estates are being reviewed by the Law Commission.

Much of what has been proposed so far is uncontroversial but there are some recommendations that may prove unpopular, although they are likely to be refined during the Parliamentary process.

The major areas the Commission's recommendations cover are dying without a will, family protection proposals and blended family issues.

PAGE 3 ▶



Britney Spears' conservatorship

Could it happen in New Zealand?

The American entertainer Britney Spears' conservatorship has recently been in the headlines. She is asking American courts to reconsider the conservatorship which has been in place for some years.

We look at the 'sort of' New Zealand equivalent of guardianship where a person does not have an Enduring Power of Attorney in place.

In this country, a legal arrangement overseen by the Family Court gives a third party control over a person's affairs if they lack mental capacity in some way.

PAGE 4 ▶

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But you're already the trustee of a trust

The rules around the use of KiwiSaver have evolved over recent years as banks and other financial institutions have developed their understanding of the KiwiSaver regime.

KiwiSaver members may use their funds to help buy their first home; this is straightforward. What happens, however, if you want to buy your first home and you are already a trustee of a trust that owns property?

Initially, you could only access your KiwiSaver funds to buy your first home in your personal name; using a trust as a vehicle to purchase was not allowed. Now, however, the situation is more nuanced. An increasing number of lenders allow KiwiSaver members to make a withdrawal to finance the purchase of a first home, even where trusts are involved.

Let's look at three scenarios to illustrate how this can work.

1. You are a trustee of your friend's trust, but not a beneficiary; as a trustee, your name is on the title to your friend's home
2. You are a trustee and a beneficiary of your parents' trust; your name is on the title to their home, and
3. You are a trustee and a beneficiary of a trust that has just been settled and so far only holds the initial \$100 settlement; the trust does not hold property.

Trustee but not beneficiary

In scenario #1, the general rule is that if you are currently registered on the title to a property or land you will not qualify for a KiwiSaver first home withdrawal. The Financial Services Council of New Zealand, however, suggests that you will be eligible if you are registered as an owner of 'an estate in land as a trustee who is not a beneficiary under the relevant trust', because you haven't previously held an estate in land (as you didn't have a beneficial interest)¹.

Your argument will be even stronger where the trust of which you are a trustee has sold the property and you can establish that you received no financial gain from the sale.

Trustee and beneficiary

In scenario #2 where you are a trustee and a beneficiary of a trust which already owns property, it is necessary to establish that you have 'no reasonable expectation that you will be entitled to occupy the land as your principal place of residence before the death of the occupier or of their survivor.'²

It may be difficult to establish that you have no reasonable expectation of being entitled to occupy the land as your principal place of residence if, for example, you are:

- + 18 years old or over
- + A trustee of the trust
- + Named on the title to the trust property, and
- + Occupying the home with your parents under a resolution that says 'the settlors and their children aged under 20 years may occupy the property on the basis that they pay the rates, insurance and all outgoings usually payable from income.'

However, you could argue that once you turned 20 you would no longer have a reasonable expectation until after the death of your parents.

If there is no resolution in place, however, or a resolution that only authorises the settlors to occupy the home, then you may be able to argue that you have no reasonable expectation of being *entitled* to occupy the land as your principal place of residence (that is, you are there at the whim of your parents/the trustees and they can ask you to leave at any time).

Trustee and beneficiary of new trust

In scenario #3 where the trust has not purchased any property, some lenders, such as ASB, now allow the withdrawal of KiwiSaver funds to purchase your first home through a trust. The provisos are that the property being purchased is your



1. Financial Services Council of New Zealand.
2. Clause 8(5), Schedule 1, KiwiSaver Act 2006.



Estate laws due for a shake-up

Law Commission proposals

The laws about the administration of estates are being reviewed by the Law Commission. Much of what has been proposed so far is uncontroversial but there are some recommendations that may prove unpopular, although they are likely to be refined during the Parliamentary process.

The Law Commission has called this project *Succession Law* – that is the system of rules that governs who gets a person's property when they die and rights to make a claim against an estate. There are two main

laws that govern this area of the law: the Administration Act 1969 that rules the way estates are administered and the Family Protection Act 1955 that is the law about claims against estates. Both these statutes are out of date.

Other laws under review include:

- + Rules about who gets what if a person dies without a will (intestacy)³
- + Part of the relationship property law concerning the right to bring a claim after one spouse/partner has died⁴, and
- + Testamentary promises legislation (bringing a claim against an estate for work or assistance for the deceased in reliance on a promise to reward them in the will)⁵.

3. Ss77 to 79 Administration Act 1969.

4. S 88 Property (Relationships) Act 1976.

5. Law Reform (Testamentary Promises) Act 1949.

Intestacy

At present, if someone dies without a will, leaving a spouse/partner and children, the spouse or partner receives the household and personal items, \$155,000 (with interest) and one-third of the rest of their estate. The children share the other two-thirds. This can mean that the surviving spouse or partner does not even get to keep the house unless it is jointly owned.

One option being considered is that the surviving spouse/partner would inherit the entire estate if the deceased's children are all from that relationship. In other situations, the spouse/partner would get half and the children would get the other half.

Family protection

Probably the most controversial proposals concern the Family Protection Act. This legislation allows a spouse or partner, or the children or grandchildren (and sometimes dependent stepchildren), to bring a claim against the estate. Over the last 20 or so years, judges have become quite cautious about allowing such claims. A spouse/partner or dependent children will usually have a good claim, especially if there is a genuine need. An adult child who is self-supporting may, at best, have a 'recognition claim' that is usually a small percentage of the estate that acknowledges them as a member of the family.

The Law Commission proposes that adult children who are not in any need should not be able to claim or should get only a small item, or taonga in some cases, from a parent's estate. In theory this may sound fine. If asked however, "Should your family be allowed to contest your will?" most people would say "No". But, if they were asked, "Should you be allowed to contest

your parent's will if you've been left out completely?" most people would say "Yes". The reality is human beings make mistakes sometimes and their wills are no exception. Being able to fix up an unreasonable will is an important safeguard for families.

Blended family issues

One issue not fully considered by the Law Commission is second marriages/relationships and the rights of stepchildren. A typical example would be:

- + John and Mary get together later in life. They each have children by a previous marriage.
- + They share all of their property and money, and they each make a will leaving everything to each other.
- + When John dies his children are in a difficult position. They hope Mary will include them in her will along with her own children. After all Mary has inherited everything John worked for, but they can't be sure she won't change her mind and leave her estate only to her own children.
- + John's children can bring a claim under the Family Protection Act but this may wreck their relationship with Mary. If they don't bring a claim now, they will have no right to claim after Mary dies.

There is also a proposal to include some 'claw back' rules in the Family Protection Act. This could mean that anything you put in your trust, or give away shortly before your death, could be treated as part of the estate in order that a claim could be made.

Looking ahead

If you are concerned about family disputes after you die, you could consider

Britney Spears' conservatorship

Could it happen in New Zealand?

The American entertainer Britney Spears' conservatorship has recently been in the headlines. She is asking American courts to reconsider the conservatorship which has been in place for some years.

A conservatorship is like a guardianship in New Zealand – a court puts a legal arrangement in place to give a third party control over a person's affairs if they lack mental capacity in some way.

Britney has claimed that her conservatorship has:

- + Forced her to work, against her wishes, for a number of years
- + Enriched her conservators, who are paid a substantial income, and
- + Prevented her from taking control of, or making decisions about, her own life.

In mid-August, Britney's father stepped down from his role as conservator; he will work with the court in the appointment of a new conservator for his daughter.

Could this happen in New Zealand?

Many people in New Zealand have Enduring Powers of Attorney (EPAs) that allow them to decide in advance who will take control of their affairs if, or when, they lose mental capacity. It is when a person does not have EPAs that the Family Court will often become involved and can appoint people to make decisions on that person's behalf. These kinds of appointments are common in New Zealand. However, there are many safeguards, as set out in column 4 of this article, that ought to prevent the kind of abuse Britney claims to have suffered.

The Protection of Personal and Property Rights Act 1988 (PPPRA) allows the Family Court to intervene in relation to a person's personal care and welfare (where they live, medical treatment, etc) and in relation to their property. The court can only intervene when medical evidence shows that a person is unable to look after themselves, including making decisions about their future and their property.

The PPPRA contains what is known as the 'minimum intervention principle.' When making orders, the court is required to make the least restrictive intervention possible in a person's life. Any orders which are made must enable that person to exercise and develop any capacity they may have, to the greatest extent possible.

Personal care and welfare

The Family Court can make specific decisions about a person's care and welfare, such as directing that they live in a certain place or it can appoint a welfare guardian.

Appointing a welfare guardian is a significant restriction on a person's autonomy; an appointment will only be made when a person wholly lacks capacity or does not have the ability to communicate, and when there is no other satisfactory way to ensure decisions are made. If a person only partly lacks capacity and can communicate their preferences, the court can only make specific orders about their welfare, such as an order that they live in a certain place or receive certain medical treatment. It cannot appoint someone to make all decisions.

Property

The Family Court may appoint a property manager when a person wholly, or partly, lacks capacity to manage their own affairs in relation to their property. However, s25 of the PPPRA, states that a person does not lack capacity simply because they make, or intend to make, imprudent decisions in relation to their property.

When appointing a property manager, the court considers the minimum intervention principle. It can appoint a manager in relation to only some part of the person's property, rather than in relation to all the property the person holds. It can also give limited powers to a property manager. There are a number of restrictions on a manager making decisions about property worth more than \$120,000.

Unless the court approves, property managers are not allowed to be paid. If a fee is paid, this would usually be very limited, even for a professional manager, such as a trustee corporation.

A property manager or welfare guardian cannot force a person to work, and if either of those people signed a contract requiring the person to work against their wishes, the person could ask the court to review that decision and/or appoint different managers.

Safeguards

The PPPRA has a number of safeguards built in to protect the person. Each time an application is made to the Family Court for orders under the PPPRA, the court must appoint a lawyer (usually state-funded) to represent that person's interests. That lawyer has duties to:

- + Contact and meet with the person
- + Explain the nature and purpose of the application
- + Ascertain that person's wishes, and
- + Evaluate possible solutions, including the minimum intervention principle.



CONTINUED
FROM PAGE 2

Buying your first home using KiwiSaver funds

first home, you are both a trustee and beneficiary of the trust, and you intend to live in the property as your principal place of residence.

To be eligible, your name (as the KiwiSaver member applying for a first home withdrawal) must be on the sale and purchase agreement or on a deed of nomination. This is good news for first home buyers who have good reason to want to hold assets in a trust, though care must be taken to ensure that your KiwiSaver provider will agree you are effectively in the same position as a first home buyer: one way to ensure that is to apply for approval prior to finding a property.

Being a trustee of a property-owning trust can create unwitting complications if you want to buy your first home using KiwiSaver funds. If you need some help in steering your way through the process, please don't hesitate to be in touch. +

CONTINUED
FROM PAGE 3

Estate laws due for a shake-up

ringfencing your property by putting it into a trust, for example. It is by no means certain that claw back rules will come into law at some stage but, if they do, anything put into the trust years before is unlikely to be caught by a possible claw back rule.

Above all, make sure you have a will or make sure your current will is up-to-date. The default intestacy rules may not fit your circumstances; if you have a will, you get to decide who will benefit. +

CONTINUED
FROM PAGE 4

Britney Spears' conservatorship

The appointed lawyer represents a significant safeguard, and is present every time a PPPRA case is before the court. They report to the court on what the person wants and their capacity.

They can propose a new capacity assessment if, for example, they think the person has become capable of managing their own affairs.

In addition to this, welfare guardianship and property orders must be reviewed every three years (in some cases, every five years). The court reviews the matter, usually obtains an updated capacity assessment, and appoints a lawyer to act for the person and reports back to the court.

Britney in New Zealand?

It seems less likely that someone in this country would end up in Britney's position. If Britney lived in New Zealand and was subject to the PPPRA, the court would review her situation every few years, and her views would be put forward by an independent lawyer. If Britney thought she had capacity, the court could order a medical review. If Britney wanted control of her own affairs, or a different person in charge, the court would be obliged to take this into account. There are a number of safeguards built into the New Zealand system which would help prevent Britney's current situation in the US from arising. +

