

# Trust eSpeaking

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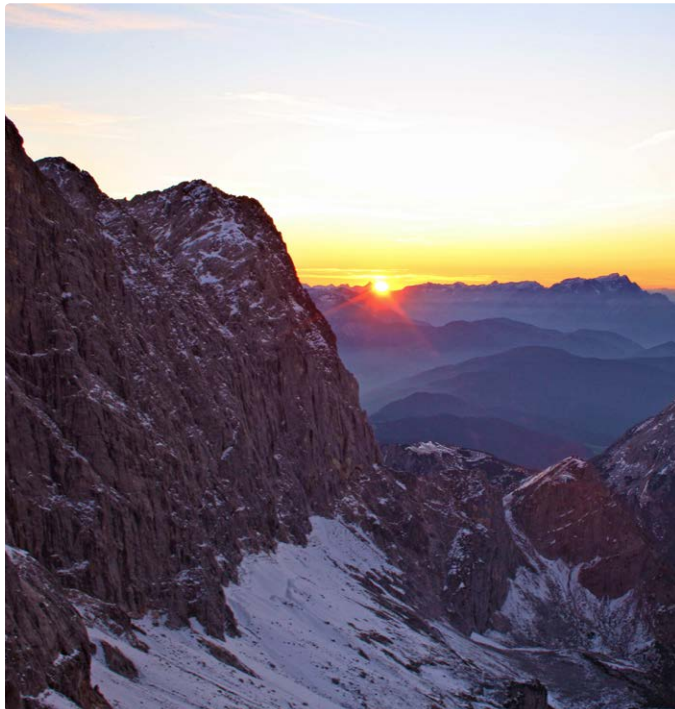
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LAWYERS

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

If you would like to find out more about any of the topics covered in this e-newsletter, or about trusts in general, please don't hesitate to contact us – our details are on the right.



## Accessing the assets of a trust

### What the future may hold for separating couples with a trust

When a marriage, civil union or de facto relationship breaks down, the couple will usually divide their property according to the Property (Relationships) Act 1976 (the PRA). However, these two people often hold property in a trust rather than personally. The PRA has limited remedies to access property which has been put in a trust, and this can result in unfairness when a couple separates if there are no assets that they own personally.

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### It's a time-consuming and expensive process if you don't have an EPA

Most people are now aware of the importance of having an enduring power of attorney (EPA). If you are unable to make decisions for yourself at any stage (either temporarily or longer term) it is important there is someone in place to act on your behalf. What happens to you, and your family situation, if you have no EPA?

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### Helping your children – with care

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# Accessing the assets of a trust

## What the future may hold for separating couples with a trust

When a marriage, civil union or de facto relationship breaks down, the couple will usually divide their property according to the Property (Relationships) Act 1976 (the PRA). However, these two people often hold property in a trust rather than personally.

The PRA has limited remedies to access property which has been put in a trust, and this can result in unfairness when a couple separates if there are no assets that they own personally.

The Law Commission has undertaken a review of the PRA and proposed that the legislation be changed to make it easier to access trust property when a couple separates.

### The situation now

In its current form, the PRA gives very limited access to trust property. As a result, New Zealand courts have found a number of other methods to dismantle a trust when a relationship breaks down.

For example, the courts have developed ways to help partners who make valuable contributions to trust property in the expectation that their relationship would continue and they would continue to receive benefits as a result of their work or contribution.

Going to court is, however, very expensive. It is already time-consuming to pursue a division of relationship property under the PRA. It can be unrealistic for many people to try and bring a separate claim to try to attack a trust. Attacking a trust can sometimes mean bringing claims in two different courts at the same time, or it can mean more expensive High Court proceedings, rather than less expensive Family Court hearings. This means some people cannot pursue what might be their 'fair share' of relationship property if there was no trust involved.

### Law Commission proposal

Late last year, the Law Commission released its [Preferred Approach Paper](#) which sets out a proposal on accessing the assets of a trust. The commission proposes that the PRA contains a single, comprehensive remedy that will allow a



court to make orders when a trust holds property that was produced, preserved, or enhanced by a marriage, civil union or de facto relationship. The amended section of the PRA is expected to apply in three different situations:

1. Where property is put in trust during a relationship or in contemplation of the relationship, and putting the property in trust has had the effect of defeating either of the partner's rights
2. Where trust property has been sustained by relationship property (i.e. income) or by the actions of either partner, or

3. Where any increase in the value of trust property, or any income from the trust property, is due to either partner's actions or to the use of their relationship property (i.e. income).

### Family Court will have significant power

This proposed provision will give the Family Court significant power. It is expected to apply when one partner uses their income during a relationship to improve or maintain a trust-owned property, rather



## No enduring power of attorney?

**It's a time-consuming and expensive process if you don't have an EPA**

Most people are now aware of the importance of having an enduring power of attorney (EPA). If you are unable to make decisions for yourself at any stage (either temporarily or longer term) it is important there is someone in place to act on your behalf. What happens to you, and your family situation, if you have no EPA?

Ensuring you have EPAs (for property and for your health and welfare) is a very important part of keeping your personal

affairs in order. An EPA can be used if you are out of the country for a long time and you need someone to keep an eye on your financial affairs, or if you become mentally incapacitated and cannot look after your property or yourself.

Mental incapacity can happen for a variety of reasons – a car crash or other accident, old age or a medical event. If anything like this happens and you can't manage your own affairs, unless you have a signed EPA, there is no one with an automatic right to step in. Your spouse or partner may be able to deal with some of your jointly-owned assets but they are not authorised to sign on your behalf if you're mentally incapacitated. If there is no EPA, then it is necessary to apply to the Family Court.

### Family Court orders

The Family Court has power to make a number of orders under the Protection of Personal and Property Rights Act 1988. The two most important orders are the appointment of:

1. A welfare guardian to look after the person's personal care and welfare, and
2. A manager or managers to take care of the person's property – this includes everything that person owns (bank accounts, investments and so on).

### Court process

With no EPA, if you need someone to manage your affairs, an application

must be filed in the Family Court before an appointment is made. A doctor's certificate is needed to prove you are mentally incapacitated. The court will appoint an independent lawyer to speak on your behalf – who will usually need to meet you. Other members of your family will usually need to be notified as they have a right to put their views before the court. After hearing from the appointed lawyer, and anyone else who has made their views known, the court will make a decision based on what it thinks is best for you.

Often the court process will only take two or three months. However, it can take longer, especially if some family members oppose the proposed appointment. Other issues can arise, for example, if the

# The bank of mum and dad

## Helping your children – with care



Contributions by family members to the purchase of a property and how this is recorded can affect property ownership. We discuss how you can help your children and, at the same time, lessen the risks to you as parents.

New Zealand houses have never been more unaffordable: in the 1950s to 1980s a house cost two to three times the average

household income. In the 1990s it was four times the average, and by the 2000s it was up to six times the average household income. When you add in the fact that households are now far more likely to have two incomes (compared with the single income norm of the 1950s), housing looks even less affordable.

### Parents are increasingly helping out

Unaffordability has led Kiwi families to get creative when it comes to purchasing

and financing the purchase of real estate. Many parents have undertaken to:

- » Gift money to children
- » Lend their children money
- » Lend the children money but then sign a gifting certificate to their child's lender
- » Buy a property with children (with or without the expectation they would live there), or
- » Buy the property but the children pay all the outgoings, sometimes in lieu of rent, but often in the expectation that the property is 'theirs'.

### Put it in writing

All of these options add a layer of complexity to property ownership that, if not clearly agreed and recorded in writing, can cause problems later on.

One example is parents who jointly contribute to a multi-unit property with their child and that child's partner. Both couples live in the property, but the parents do not have any interest recorded on the title to the property, nor any underlying documentation recording the arrangement. If the child's relationship

breaks down years later and the lender's records from the joint purchase are long gone, the parents are very vulnerable to a claim by their child's partner that the contribution was a gift – that the partner is entitled under relationship property law to an interest in one half of the property.

Another common example is where parents lend a young couple a capital sum to assist with the deposit on their first home on the understanding that it is a loan. However, nothing is recorded because the purchase can be more complicated if the lender knows the purchasers are borrowing money from more than one source. If the child's relationship breaks down, the law assumes (in the absence of evidence to the contrary) that the money is a gift and the child's partner may take the benefit of half of that gift.

### Yes, it can seem unfair

The reason for these seemingly unfair outcomes is that the law creates a presumption that where a parent transfers money or property to a child then, in the absence of evidence to the contrary, the transfer will be presumed to be a gift.

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## Accessing the assets of a trust

than spending their income on assets which are jointly owned or benefit both parties.

The section is also expected to apply when, in the early stages of dating, one party thinks that the relationship might last long-term, and puts their home in trust to protect against the possibility of a future claim from the other. If that home later becomes the family home, and would otherwise have been divisible under the PRA, the court may be able to access it despite the home having been put in trust.

## Early days yet

One unknown is the definition of what is 'reasonable contemplation' of a relationship. If the relationship has not begun and the couple is only casually dating, can they still put their assets in trust and expect protection? What if one party 'reasonably contemplates' the relationship but the other does not? It is not at all clear when it will be safe to put property in trust.

If the Law Commission's proposal becomes law, the best option is likely to be to formally contract out of the PRA. If both parties have independent legal advice and agree not to claim against trust property, the court is much more likely to respect that.

If you are contemplating a long-term relationship and are unsure how to safeguard your assets, please don't hesitate to contact us. ■

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## No enduring power of attorney?

property manager also asks for permission to make a will on your behalf<sup>1</sup>.

## Review and reporting requirements

Court appointments do not last indefinitely, unlike EPAs which last until you pass away. The court will usually require the manager and welfare guardians to apply for a review of their appointment after three years. The manager or welfare guardians can be reappointed, but the court must be satisfied their appointment is still necessary and in your best interests. The entire court process, including appointment of an independent lawyer, has to be followed again.

Property managers also need to file a report every year stating the extent of the

assets under administration<sup>2</sup>. There is a specified form for this; the report is reviewed by Public Trust.

The appointment of a property manager or welfare guardian is not straightforward. There are ongoing reporting and review requirements which all add to the cost. Our advice is usually to avoid having to do this if at all possible.

## How to avoid all this? Get an EPA

It's much easier and more straightforward to ensure you have an EPA, and for you to review it every few years. For your family to go through the Family Court to appoint a property manager and/or welfare guardian is expensive and time-consuming.

Do the sensible thing and get your EPA organised soon. ■

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## The bank of mum and dad

This is of course directly opposite to the presumption in non-family circumstances, where a similar advance is presumed to be a loan.

## Questions to ask yourselves

You need to be extremely careful when helping your children to purchase a home. If you're thinking of helping your children to buy property, ask yourselves the following:

- » Is the money a gift or a loan?
- » Is interest payable?
- » If it is a loan, when it is repayable? On death? On the sale of the home?
- » Do you expect a share in the value of the home?
- » What will happen if you want your money back?
- » What will happen if the recipients are in a relationship or marriage and they separate?

It is critical that you, your child and their partner discuss and agree the basis for the advance, and that agreement is recorded in writing. If you don't go through the process above, you all could be facing completely unexpected and distressing consequences. ■

<sup>1</sup> Section 55 Protection of Personal and Property Rights Act 1988 (PPPR Act)

<sup>2</sup> Managers must also file a report within three months after first being appointed and after their appointment ceases – s45 PPPR Act.