Trust eSpeaking

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WOODWARD CHRISP

Level 3, Victoria Plaza Complex, 40 Reads Quay
P O Box 347, Gisborne | Ph: 06 869 0900 | Fax: 06 867 8012
mail@wwclaw.co.nz

Welcome to the Spring 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 covered in *Trust eSpeaking*, or about trusts in general, please don't hesitate to contact us – our details are on the right.

Legal documents signed during lockdown

Best to sign again after lockdown to avoid later complications

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PAGE 2 »

Trustees' decisions

Decision-making can be affected by bias

The recent *Unkovich* case was a good illustration of the difficulties that trustees can face where they may have personal knowledge or biases that affect their decision-making. Trustees should ensure they give fair consideration to all their decisions and make their own enquiries to verify information about beneficiaries that is presented to them.

PAGE 3 »

Relationship property claims

Sign a contracting out agreement

When entering a second or subsequent relationship, it is common to want to keep assets safe from relationship property claims. An effective way to do this can be by transferring assets to a trust. Care needs to be taken, however, to ensure you do this within the law. A recent court case illustrates this point.

PAGE 4 »

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return to front page

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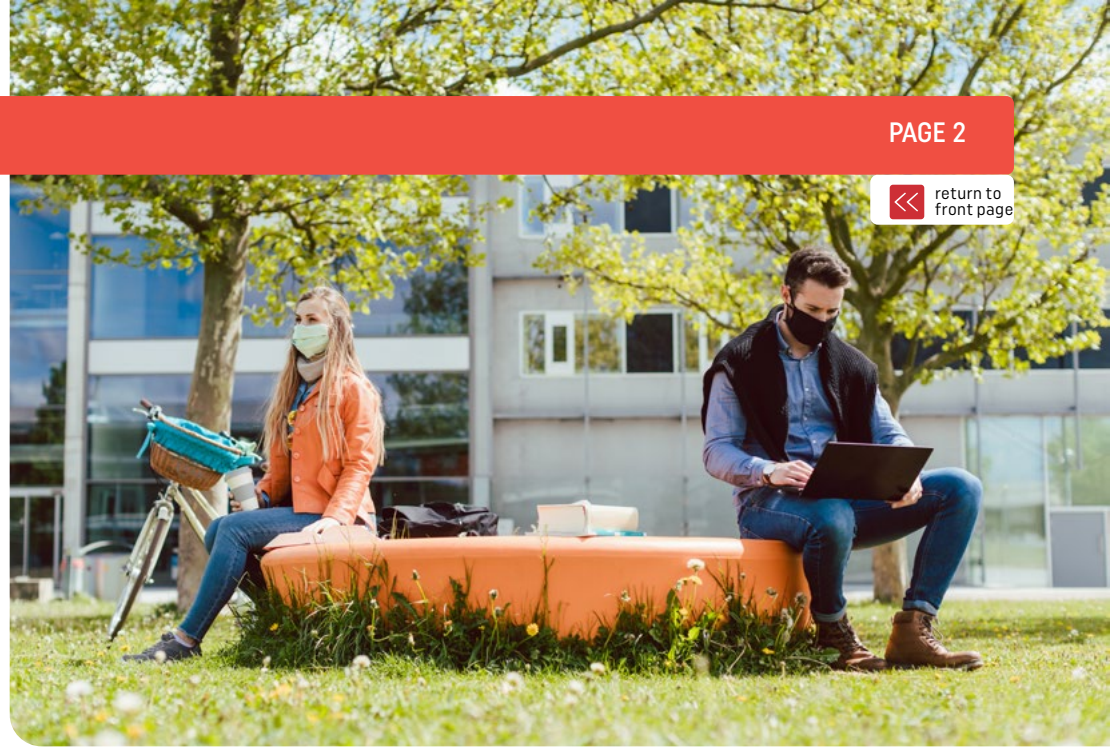

Best to sign again after lockdown to avoid later complications

During the COVID lockdown, special rules applied to the signing of some legal documents. Obviously it was, and is, not possible to have your signature witnessed by someone outside your bubble in Levels 3 and 4. So the law allowed signing over audio-visual link (AVL) and other similar arrangements. While these documents will remain valid in the future, it may be wise to have wills and enduring powers of attorney (EPAs) signed out of lockdown to avoid any time-consuming queries later on.

Many legal documents need to be signed in a particular way or before a particular person. For example, some documents such as affidavits must be signed in front of a JP or lawyer. As this was, and is, not possible during lockdown, special rules were put in place to enable people to sign documents such as wills, EPAs, affidavits and so on.

The Epidemic Preparedness Act 2006 had anticipated that some special changes might be needed depending on the nature of any emergency that might arise. This meant that while an Epidemic Notice is in force, special regulations can allow documents to be witnessed by AVL. The Epidemic Notice came into force on 25 March 2020 and was renewed later so that it will not expire until 24 September 2020. This does not mean that documents signed under the special regulations will not continue to be valid after 24 September 2020. It just means that the special dispensations from strict requirements for witnessing documents will no longer apply after 24 September unless the Notice is renewed again.

Witnessing documents

Normally a will, in order to be valid, must be witnessed by two people neither of whom benefits under the will. The will-maker and both witnesses all need to be together at the same time and see each other sign. During the period while the Epidemic Notice is in force, it is possible for all three people to be in different places and to see each other sign using an AVL.[1] That means each person signs a different copy of the will. But all three copies will together make up one document.

Similarly, EPAs can be signed using an AVL. The witness to an EPA needs to be a lawyer or qualified legal executive.[2] The special regulation[3] allows the donor of the EPA to sign in a different place from the lawyer or other person witnessing the EPA. Similarly, each of the attorneys can sign in a different location from the person witnessing the attorney's signature. Effectively each of these people will be signing a different copy of the EPA but together all of these copies will make up one legal document. Similar rules apply to signing affidavits and affirmations.[4]

Arrangements have also been made for some court hearings to be conducted remotely by AVL during lockdown.

How long will the documents last?

Even after the Epidemic Notice has expired, documents signed using the special arrangements put in place remain valid. From a purely legal point of view, there will be no reason to have to sign any of these documents again.

1 Epidemic Preparedness (Wills Act 2007 – Signing and Witnessing of Wills) Immediate Modification Order 2020.

2 Some staff of trustee corporations are also able to witness EPAs.

3 Epidemic Preparedness (Protection of Personal and Property Rights Act 1988 – Enduring Powers of Attorney) Immediate Modification Order 2020.

4 Epidemic Preparedness (Oaths and Declarations Act 1957) Immediate Modification Order 2020.

continues on page 5 »

return to front page

Trustees' decisions

Decision-making can be affected by bias

In a recent case[5], trustees' decision-making came under scrutiny from the High Court.

Lara Unkovich was a young teenager when her grandfather died in 2016, leaving her a share of his estate. Her share was worth around $65,000. Under his will Lara would not receive the funds until she was 21 years old. The trustees, however, had the power to make payments towards her 'maintenance, education, advancement or benefit.' The trustees were her aunt Margaret and a lawyer.

Request for beneficiary to be paid out early

In October 2016, Lara's mother wrote to Margaret about Lara's share of the estate. She asked that Lara's share be immediately paid out on the basis that Lara needed it for her education in Australia. Lara's mother said that this Australian education would provide Lara with the best opportunity to improve her national tennis ranking and then possibly gain a scholarship to a US university.

The trustees refused. In September 2017, Lara's parents sent a detailed request to the trustees explaining the nature and the purpose of the request for funds.

Arguments continued for some time about the proposal to fund Lara's education in Australia. The trustees were critical of the funds being used when Lara was only 16 years old and believed the chances of her becoming a professional tennis player were slim.

Lara's parents thought that the trustees were mistaken in their understanding of the request for funds; they advised the trustees that because of Lara's stellar academic record and tennis ability, she was on track to obtain a fully-funded tennis scholarship to a US university, which was very valuable. Their argument was that Lara's future success as a professional tennis player was irrelevant; her tennis aptitude and academic results had opened up educational opportunities. To take advantage of these, Lara needed to continue her tennis coaching and education in Australia.

High Court decision

Eventually the matter came before the High Court, which found that:

- The trustees were mistaken as to the nature and purpose of the request for funds – being Lara's education – for which tennis was the means but not necessarily the end
- The trustees were working under an unsupported assumption that Lara's parents were financially unstable and imprudent, and
- Because the trustees' mistakes (above) were material, the trustees had breached their fiduciary duty in failing to give proper consideration as to whether advancing the trust funds to Lara's parents would be for Lara's maintenance, education, advancement or benefit.

An interesting feature of this case is that Margaret had legal advice throughout and she continually relied on it. The court found that the advice appeared to have relied on Margaret's instructions that, among other things, Lara's parents were financially imprudent. The court found that while Margaret did not have a duty to be right when she made trustee decisions, she did have a duty to make proper enquiries and give fair consideration to the matter, which she failed to do.

Issues around costs

Costs are also an interesting feature of this case. Margaret was not entitled to reimbursement from the trust fund for the legal costs she had incurred. (While this

5 *Unkovich v Clapham* [2020] NZHC 952.

continues on page 5 »

Relationship property claims

Sign a contracting out agreement

When entering a second or subsequent relationship, it is common to want to keep assets safe from relationship property claims. An effective way to do this can be by transferring assets to a trust. Care needs to be taken, however, to ensure you do this within the law.

A recent case[6] reminds us that transferring assets to trust will generally be ineffective where:

- You have already met someone, and the relationship is 'in contemplation', and
- You don't sign a contracting out agreement.

Background

Ms K, a Hong Kong resident, met Mr R, a builder from Tauranga, when she was in New Zealand as a tourist in August 2008. They quickly developed a relationship and Ms K relocated to New Zealand to be with Mr R. They began living together on 1 March 2009 and Mr R proposed marriage to Ms K in May 2009, though they never actually married.

Mr R, having seen his assets halved on two occasions as a result of relationship property proceedings, was committed to the relationship but wanted to protect his own assets. He was particularly concerned about a section in Tauranga (purchased shortly after the couple met but before their relationship began), where he intended to build a house in which both he and Ms K would live.

After the couple had lived together for about two and a half years, Mr R sought advice from a law firm about the best way to protect his assets. He told the lawyer that he had tried to talk to Ms K about a contracting out agreement, but she got angry and refused to do this.

The lawyer advised Mr R to set up a trust before the relationship got to the three-year mark and to transfer the section into it. Mr R and Ms K then built a house on the section, using Mr R's separate property (apart from about $100,000 borrowed from the bank in order to complete the build). Mr R and Ms K lived in the new house as a couple until their relationship came to an end in September 2016.

Legal issues

After they separated, Ms K was left with nothing but her personal effects and $900, and so the matter went to court. The court found that section 44 of the Property (Relationships) Act 1976 (PRA) applied. That section says that if someone transfers property (for example, to a trust) *with the intention* (our italics) of putting it out of the reach of their partner, then the court has the power to transfer that property back, and divide it as it sees fit.

Mr R tried to argue that s 44 should not apply, because the relationship hadn't been in existence for three years when he transferred the property to his trust. The court found, however, that it did not matter whether Ms K had any rights to the property at the point it was transferred. The only issue was Mr R's intention, and his very clear evidence was that his intention in creating the trust was to protect his property from any claim from Ms K.

Outcome

Mr R was ordered to pay half the value of the home to Ms K. He then sued his lawyers; the court found that the lawyers should have made it clear that transferring assets to a trust once a relationship was already contemplated had a good chance of resulting in successful claims under the PRA. Mr R was awarded damages equal to the half share in the home he had been ordered to pay Ms K, plus the initial legal fees and costs.

Get a contracting out agreement signed

When transferring assets to a trust, for the purpose of putting them beyond the reach of a PRA claim and in circumstances where a relationship is in contemplation, the best course of action is to enter into a contracting out agreement at an early stage. You cannot use a trust to avoid an awkward conversation. ●

6 *K v R* [2020] NZHC 923.

return to front page

« continued from page 2

Legal documents signed during lockdown

There may, however, be some difficulty later on in establishing that the document was correctly signed in accordance with the regulations. As time passes, memories fade and at some time in the future it may be difficult to remember exactly what was required for signing a will or an EPA during lockdown.

If someone dies sometime in the future and leaves a will that was signed during lockdown, the High Court may want extra documents filed to prove that the will was signed correctly under the Epidemic Preparedness Order relating to wills.

Similarly, if someone wishes to rely on an EPA some years in the future, it may be tricky having to produce multiple copies of the document each signed by a different person or that person's witness.

For these reasons, we would recommend that any will or EPA that has been signed during the lockdown periods using the special procedures should be signed again. There is no rush about this, but it would be wise to sign a fresh will and fresh EPA just to avoid any unnecessary complications. Getting probate of a will, for example, can be a very messy and time-consuming business if the will is in any way unusual. The registrar will often require further affidavits to prove the will was properly signed. Preparing these affidavits costs money and if you can avoid those complications by signing a new will in the usual way, this would be a good idea. ●

« continued from page 3

Trustees' decisions

may seem fair in the case of a smaller trust fund for Lara's benefit, and given that Lara was successful, trustees are entitled to be paid their costs reasonably incurred in the course of the trust administration.) Margaret was also ordered to pay court costs to Lara in relation to part of the litigation. The judgment does not consider the other trustee's legal fees or liability for costs.

Lessons to be learned by trustees

This case is a good illustration of the difficulties that trustees can face, particularly in family trust situations where trustees may have personal knowledge or biases that affect their decision-making. It is not uncommon for one trustee to have concerns about a beneficiary's financial ability, particularly when they are closely related, but trustees need to ensure that they are giving fair consideration to the beneficiary in question.

Professional trustees should also take care to make their own inquiries to verify information about beneficiaries. If trustees do not have sufficient evidence to rely on to confirm their unease, they may face their decisions being overturned and then possibly having to pay court costs. ●