Trust eSpeaking

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Welcome to the Autumn 2024 edition of *Trust eSpeaking*. We hope you enjoy reading these articles, and that they are both useful and interesting.

To know more about any of the topics covered in *Trust eSpeaking*, or about trust or wills issues in general, please don't hesitate to contact us. Our details are on the top right of this page.

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Making a bequest to a charity

Careful will drafting is essential

For many charities, gifts in wills (bequests) are a significant source of funding.

Sometimes, however, charitable bequests cannot take effect when wills are not carefully drafted. There can be considerable time and cost associated with addressing that situation and trying to ensure the gift can go to the charity you intended. This article looks at ways your wishes for a charitable bequest have the best prospect of being fulfilled.

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Estates and guarantees

Can cause difficult legal issues

Guarantees entered into during your lifetime can create some difficult legal issues for your executor on your death.

This can be a difficult situation for an executor, particularly where (for example) a guarantee is important for the ongoing viability of, say, a family member's business.

When the interests of all beneficiaries must be prioritised, the executor must pick their way through what could be a legal minefield. We outline some of the issues to be taken into account.

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Can your ex-spouse claim your property when you die?

Agreeing on a division of relationship property after you and your spouse separate can be fraught. Usually, emotions are highly charged.

When de facto couples separate, they can resolve their relationship property division immediately, and have no further financial involvement with each other. When married couples separate, however, they cannot divorce for two years and often divide their relationship property while still married. When a divorce does not take place immediately, this can mean the separated spouses still have rights – for example, to inherit if one of them dies. If the separated spouses do not intend this, their relationship property division must specifically address inheritance in order to prevent unintended consequences.

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Most of the time, bequests to charities fail (and cannot take effect) because there are changes in charitable organisations over time, the will is not updated for many years and/or the will does not contain a suitable power for the executors to address these situations.

Changes in charities over time

It is common for charities to restructure. Many charities once had a number of local branches, which were all registered as individual charities, but they have now consolidated into one overall national organisation, and the local branches disestablished. Some organisations may have changed their name or amalgamated with other charities.

Wills frequently misdescribe charities. The name of the charity may not have been checked on the Charities Register to ensure it was correctly described or the organisation may have restructured since the will was prepared. Wills commonly leave bequests to charities that no longer exist. This can mean the bequest fails.

Wills can include special clauses

In some cases, these problems can be addressed by careful will drafting. Wills can include clauses addressing the potential for charitable organisations to be misdescribed or to change over time. Also, many wills contain a power for an executor to pay funds to the trustees or officers of a charitable organisation without being required to follow up on how the gift is then used. For example:

+ A power could be included providing that if a charitable organisation has been misdescribed, the executor of the will may pay the gift, at their discretion, to what they consider to be the correct organisation, and
+ A power could be included that says that if a particular charitable organisation no longer exists in the form described, the gift may be paid to:
  - Any successor organisation
  - Any amalgamated organisation which the named organisation became a part of or its assets were transferred to, or
  - If the organisation has entirely ceased to exist, to such charitable organisation as the trustees, at their discretion, consider most closely carries out the same charitable purposes.

Where wills do not contain clauses to this effect, the High Court may be able to assist, although this can be very expensive.

1 *Re Barrow* [2023] NZHC 1146.

An example

In a recent case[1], Margaret Barrow's will (which was drafted in 2000) left funds to the Medical Research Council of New Zealand (MRC). The MRC existed until 1990 when it was dissolved by Parliament, and a new Crown entity, the Health Research Council of New Zealand (HRC), was created in its place.

Ms Barrow's executor applied to the High Court to interpret the reference to the MRC as referring to the HRC.

Despite the fact that the MRC had not existed for 10 years when the will was drafted, it appeared that neither Ms Barrow nor her lawyer had realised that the MRC had been succeeded by the HRC. The will file, which was more than 20 years old, had been destroyed, so there was no record of Ms Barrow's instructions to her lawyer. Evidence was given, however, that in 2000, there was no online register of charities, and it is possible that this was the reason for the misdescription.

The High Court noted that the assets and liabilities of the MRC had become the assets and liabilities of the HRC, and the HRC was clearly the successor organisation. It ordered that Ms Barrow's will should be interpreted as referring to the HRC rather than the MRC.

If the High Court had not been able to interpret Ms Barrow's will to refer to the HRC, the next step may have been to prepare a scheme under the Charitable Trusts Act 1957. That process is time-consuming and often more expensive than applying to the High Court to interpret a will. If an application to interpret the will is an option, it will usually be faster and less expensive. However, it is best if an application to the High Court can be avoided entirely.

Check the Charities Register

When making bequests to a charity, it is prudent to check the Charities Register **here** to ensure that charity still exists. It is also useful to include clauses in wills that address the possibility of the charity being restructured or disestablished. This can save time and cost, and help carry out a will-maker's intentions more effectively. +

Estates and guarantees

Can cause difficult legal issues

Guarantees entered into by a person during their lifetime can create some difficult legal issues for their executor after they die.

Limiting a guarantee

The terms of most guarantees allow a guarantor to give notice; this stops further liabilities accruing. In an estate situation, this will not alter the liabilities accrued to date, however the executor who is aware that an estate is liable under a guarantee may need to issue a stop notice to protect the estate's position to maximise the value of the estate.

This can be a difficult decision for an executor, particularly where (for example) a guarantee is important for the ongoing viability of, say, a family member's business. However, where the estate does not have an interest in that business, the executor may need to do this anyway as the estate's position is the executor's responsibility, and the interests of all beneficiaries must be prioritised, even if the decision causes dissatisfaction for one.

Calling up a guarantee

Where a guarantor has died, and the guarantee is called up after their death, the estate is liable to the lender in the usual way.

In the situation where the estate is only one of several co-guarantors, the executor may need to decide whether to seek contributions from the co-guarantors. The executor may also need to take legal action to enforce payment by co-guarantors.

Where any of the co-guarantors are also beneficiaries of the estate, it may also be necessary for the executor to take advice about the extent to which any liability for contribution to the guarantee can be met by funds that the beneficiary is to receive under the terms of the will.

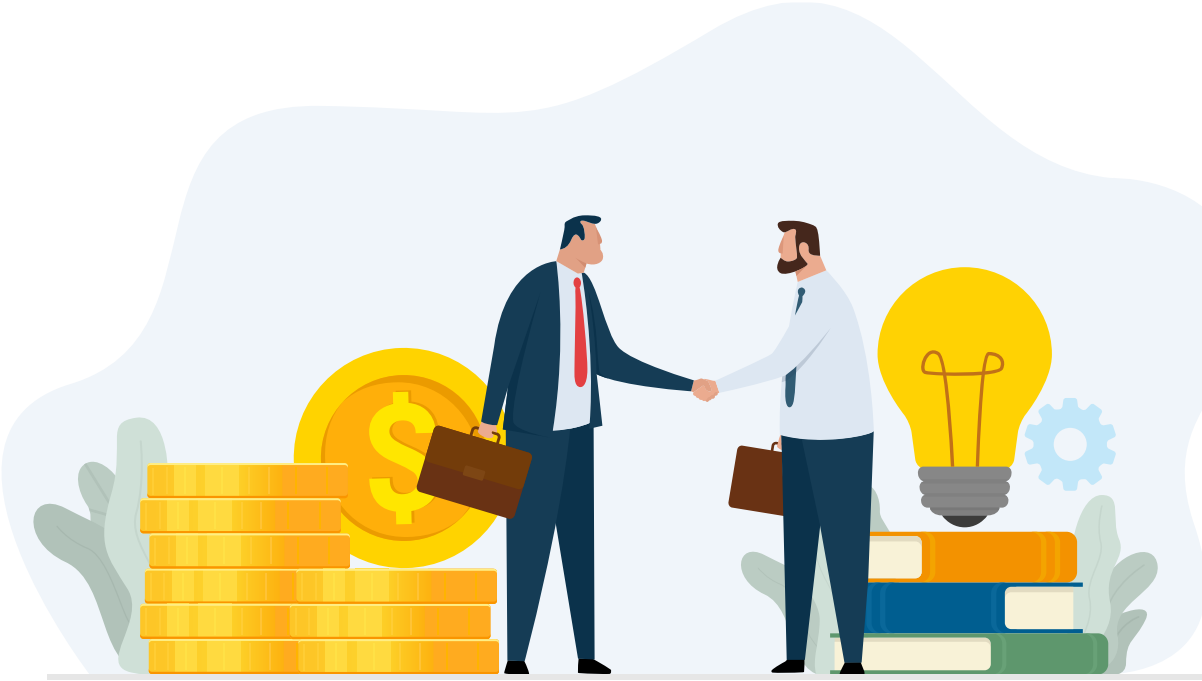
Rights of contribution between co-guarantors

The default position is that co-guarantors share an equal liability to meet a common debt. Where one guarantor pays more than their fair share of the debt to the lender, they are entitled at equity to seek an equal contribution from their co-guarantors.

Complications can arise, however, where a co-guarantor is insolvent. In that situation, the other solvent co-guarantors may have to contribute proportionally to meet the shared debt. This means that an estate might be held liable for more than its 'fair' share of the debt.

Co-guarantors who are also beneficiaries

The situation becomes more complex when a co-guarantor is also a beneficiary of the estate that has paid the debt. Can the executor claim contributions towards the debt paid by withholding the beneficiary's share of that debt from their entitlement under the will? Although the court has confirmed that a beneficiary owing money



to an estate cannot claim a share of their interest without first settling the debt, an executor should not automatically deduct a debt from a beneficiary's entitlement.

Rather, the first step will usually be for the executor to approach the relevant beneficiary first by letter and then a formal demand. If a beneficiary persistently refuses to fulfil their debt, an executor can then retain that beneficiary's share or interest to recover their relevant contribution. The executor should then seek the approval of the High Court to deduct the beneficiary's share of the debt from their estate entitlement.

Interests of beneficiaries take priority

Personal guarantees can create tricky issues for an executor to deal with, particularly in family situations. The estate's position is the executor's responsibility, and the interests of the beneficiaries of the estate must be the executor's priority – even if it means one beneficiary is unhappy because they are affected by the executor's decision.

While it does not commonly arise, the right of contribution is also something the executor may need to explore for the benefit of the estate as a whole and seek some advice. In some circumstances the executor may also need to go to the High Court for assistance where one beneficiary will not cooperate. +

Can your ex-spouse claim your property when you die?

Agreeing on a division of relationship property after you and your spouse separate can be fraught. Usually, emotions are highly charged.

When de facto couples separate, they can resolve their relationship property division immediately, and have no further financial involvement with each other. When married couples separate, however, they cannot divorce for two years and often divide their relationship property while still married. When a divorce does not take place immediately, this can mean the separated spouses still have rights – for example, to inherit if one of them dies. If the separated spouses do not intend this, their relationship property division must specifically address inheritance in order to prevent unintended consequences.

Relationship property agreement

A recent High Court decision[2] illustrates the type of problems that can arise. Alan O'Donoghue and Marc Comia married in 2016 and separated in 2019. The couple entered into a 2020 agreement about the division of their relationship property which was stated to be 'in full and final settlement of all property claims each party has against the other, under any statutory enactment, in equity or in common law.' The marriage was never formally dissolved. Alan died in 2021 without a will, so was 'intestate.'

Separated spouse to benefit from intestacy?

Alan and Marc had no children. Alan was survived by his mother, but she gave up any interest in his estate. In those circumstances, unless the 2020 agreement was effective to resolve inheritance as well as relationship property matters, then Marc, as Alan's husband (despite the separation) was entitled to the whole of Alan's estate by virtue of section 77 of the Administration Act 1969, the legislation that sets out the shares in which surviving relatives are entitled to an intestate deceased's estate.

Usually, unless there are special circumstances, the person with the highest beneficial interest in an estate will also be appointed administrator. Marc applied for letters of administration in Alan's estate without disclosing the existence of the agreement. Marc knew that Alan's brother, Russell, took the view that the agreement meant Marc was no longer entitled to inherit any of Alan's property. If Marc had contracted out of any entitlements under s77 then Russell, rather than Marc, was entitled to his late brother's estate and therefore entitled to letters of administration.

Contracting out of succession rights

The High Court had to grapple with the question of whether it was possible to contract out of a statutory entitlement to inherit on intestacy under s77. Cases considering this issue are rare because it is usual for a person who has separated and entered a relationship property settlement to make a new will.

Further, the issue only arises where a marriage has not been formally dissolved after a separation; de facto relationships come to an end when the relationship finishes. It is only a marriage which can subsist after separation, and until the parties formally divorce.

The High Court determined, following a 2013 case,[3] that, as a matter of policy, contracting out of an interest under s77 was possible. However, for the 'contracting out' to be effective, the agreement in which it is undertaken must comply with the safe-guarding conditions set out in the Property Relationships Act 1976 (PRA). These conditions include that each party to the agreement receives independent legal advice before signing and that a lawyer who witnesses a party's signature must certify that the implications of the agreement have been explained to that party.

In *Donoghue* the agreement did not comply with these requirements. However, there is a procedure whereby a non-complying agreement can be declared to have effect anyway. Therefore, the court recalled the grant of letters of administration to Marc, appointed Russell as administrator of his brother's estate and directed Russell to

2 *O'Donoghue v Comia* [2023] NZHC 2735.
3 *Warrender v Warrender* [2013] NZHC 787.

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apply to the Family Court for a determination on the effectiveness of the agreement.

All these extra steps could have been avoided.

Lessons to be learned

It is very welcome that the High Court has confirmed that it is possible for separating spouses to contract out of their entitlements under the Administration Act 1969. Naturally for any such agreement to be effective, it must comply with requirements of the PRA. The situation in which Alan left his brother Russell could have been avoided entirely if Alan had made a new will at the same time the agreement was entered into in 2020, which should be usual practice, or if Alan and Marc had divorced after their separation.

If you are going through a separation, we strongly recommend you both make a new will immediately after the separation documentation is completed and/or you divorce as soon as practicable. It could save you and your family a great deal of time, money and emotion. +

The next edition of *Trust eSpeaking* will be published in **early Spring**.