INNES DEAN TARARUA LAW
LAWYERS

ISSUE 22 | AUTUMN 2016

TRUST eSpeaking

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Welcome to the first edition of *Trust eSpeaking* for 2016. We hope you find the articles in this e-newsletter both interesting and useful.

If you would like to talk further about any of the items in *Trust eSpeaking*, or about trusts and asset planning in general, please don't hesitate to contact us – our details are above.

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The next issue of Trust eSpeaking *will be published in September 2016*

Increase in Claims on Estates

How you can help avoid a claim on your own estate

In December 2015 the Sunday Star Times *reported on a dispute amongst the members of the Ropati family in respect of their mother's estate. The article contains the following statements:*

"Figures released by the Ministry of Justice show that the number of disputes over wills rose by nearly a third in just two years … In 2012 there were 252 contested wills, and last year the figure reached 325 … Claims against estates can be brought by widows, widowers, de-facto partners, children, step-children and grandchildren … A claimant has to prove that the deceased failed to discharge a moral duty to provide for him or her … In one extreme case, two sisters battling over their mother's $80,000 estate took their fight to the Supreme Court … The dispute between Judith Guerin and Marta Hayes lasted more than five years."

Similarly, statistics from the UK show an increase in estate claims over recent years[1]. What is the reason for this?

» People are living longer and amassing more significant assets. In particular the values of house properties in Auckland mean that estates are often sizeable

» It's now more common for a person to form a second or third relationship, following the death of a spouse or breakdown of a long-term relationship and this, in turn, frequently leads to relationship property claims

» Disputes are arising between the adult children of a first marriage and the second or subsequent spouse/partner

» Many people hold significant assets in their personal names and also in a family trust or trusts. There is no guarantee that any provision will be made for a family member. Challenging the deceased's Will can force a distribution from the trustees, and

» Balancing the competing claims of close family members can be a very difficult; the rules are unclear.

Unfortunately many people assume that if they make a claim it will be resolved quickly and cheaply in their favour. In fact, in many cases, the opposite is true: the claim is expensive to pursue, the court system is slow and frequently there are valid competing arguments which mean that the outcome is far from certain.

Litigation usually results in the parties being permanently alienated. Few people realise how stressful and unpleasant litigation can be.

Will-makers frequently underestimate the consequences of decisions they make and also misjudge the potential for serious arguments to arise. Many decisions are poorly considered and often made without the benefit of full advice.

Avoiding estate disasters

» Get competent legal and accounting advice from professionals who practise in this area

» Be clear about the ownership structures. You need to understand why assets should be owned personally, by a trust or through a company and how they can be used to avoid claims

» In the absence of good reasons, it's unwise to cut out close family members from a Will or provide significant rewards to family members ahead of their siblings

» Family farms and businesses commonly create problems; often it is only realistic for one member of the family to carry on the family farm/business, and

» Having suitable trustees is critical.

Inheritance planning requires careful thought and good advice. Attempts to 'punish' or 'reward' family members seldom have the desired effect, and create disharmony and a family breakdown. Careful thought and good advice can usually prevent this. ■

1 In the UK between 2010–2014, an average of 633 will/trust and probate cases were heard each year at the Chancery Court in London compared with an average of 485 per year in the previous five years.

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Your Will

Who pays for your funeral?

Most Wills have a clause directing the executors to pay funeral expenses as well as other usual estate liabilities. Often there is also a clause saying whether you want burial or cremation. Are these directions binding?

Surprisingly, a direction in a Will concerning cremation or burial is not necessarily binding. The law has long said that no one owns a dead body and therefore there cannot be any binding directions. The New Zealand Supreme Court has ruled that:

» These decisions should be made in the first place by the executor or executors named in the Will

» When making these decisions executors must act reasonably and consider the views of the deceased and family, and

» If anyone disputes the executor's decision, then this can only be resolved by the High Court.

Those points were decided in a 2012 New Zealand Supreme Court case[2]. The court also agreed that the estate should meet funeral, and cremation or burial costs. The executor/s should pay those costs if there is money available. If there is no executor then the family has responsibility for the funeral.

It's also quite hard for executors to get out of paying funeral expenses by saying there is no money in the estate. In a 2004 case[3], the only asset in the estate was a one-third share in a property. The widow owned the other two-thirds share and had a lifetime right of occupation. Nevertheless the court ruled that the executor was obliged to pay for the funeral out of the estate. The executor had to raise a loan secured against the one-third share in the property. The amount of the loan, with interest, will have to be repaid when the property is sold.

The funeral director will expect to be paid from the estate. It is usually the family members who arrange the funeral. They will look to the executors to cover the cost if possible. However, if there is really nothing in the estate then the family members who signed the funeral director's forms may themselves be liable for the cost.

Possible government assistance

It's possible to get a funeral grant from the **Ministry of Social Development/Work and Income**. However this is subject to an income and asset test, and the person who died must have normally lived in New Zealand. As at 1 April 2015 the maximum funeral grant was set at $2,008.76. The Ministry will also look at the assets of the estate and any surviving spouse or partner. If the person who died was under 18, MSD may take into account the assets of the parents. It's also be possible to obtain help with funeral costs from ACC or Veterans' Affairs – in some cases.

Pre-paid funerals

Because of the high cost of a funeral, many people want to relieve their family from the burden of paying for this. One option is to make an arrangement with a local funeral director to pay for the funeral in advance. This may restrict your family's choice about who will organise the funeral. The arrangement will usually have some built-in adjustment for increased costs due to inflation.

Another alternative is a funeral trust. This means money is held in a trust fund and interest is earned on the money. This is then available to meet the costs of the funeral. A number of pre-paid funeral trusts have been approved by the Ministry so that the amount in the trust will not be taken into account if you apply for a subsidy for your long term residential care.

Points to remember

It's helpful to say in your Will what sort of funeral, or burial or cremation you want. This gives guidance to your executors and family. You can also include an organ donation clause but you need to discuss this with your family and your doctor: your Will may not be read until after your funeral. The funeral costs normally come from your estate but the family should be involved in arranging the funeral. Some financial assistance is available from Work and Income in cases of hardship. It can make it easier for your family if you have a pre-paid funeral or funeral trust.

2 *Takamore v Clarke* [2012] NZSC 116.
3 *Public Trustee v Kapiti Coast Funeral Home Ltd* [2004] 3 NZLR 560.

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Parallel Trusts

Could be the best option for you

With the growth of multiple relationships and blended families many couples are having to consider ways to ringfence assets and protect inheritances. One option is to establish parallel trusts – so you each have your own trust for your share of the assets

A typical parallel trust structure

	David's Trust		Sally's Trust
Settlor:	David	*Settlor:*	Sally
Trustees:	David, Sally and an independent trustee	*Trustees:*	Sally, David and an independent trustee
Beneficiaries:	David, Sally, and only David's children, grandchildren and direct family members	*Beneficiaries:*	Sally, David, and only Sally's children, grandchildren and direct family members
Naming new trustees or beneficiaries:	David decides, not Sally	*Naming new trustees or beneficiaries:*	Sally decides, not David

Advantages of parallel trusts

At the start of a new relationship, a couple may already have assets they wish to protect, particularly when one partner brings more assets to the relationship. They may each wish to provide for children from previous relationships.

If the couple buys a property the two trusts can be co-owners in equal shares (or unequal shares, depending on how much they each put in). Each party can arrange financing in a way that suits them.

If either person receives an inheritance, it can be kept in his or her trust. Having parallel trusts can protect against a claim to a half share if there is a separation.

If your parents are willing to change their Wills, your future inheritance can be left to your trust. In most cases it would be unwise for any inherited property to be paid to one trust set up for the two of you.

If an inheritance is put into a single trust and the couple separates later, the trust assets will usually have to be divided equally so that one half of any inheritance will go to each former partner's trust.

In the event of a separation, the parallel trust structure means most of the available assets are already divided equally between two trusts. Fifty per cent of the sale proceeds of each jointly-owned asset would go to each partner's trust. Each partner can then simply change his or her trust to remove the other partner as a beneficiary and trustee.

Where one partner dies, the surviving partner may have further children or enter into a new relationship. Parallel trusts ensure that, when one partner dies, the assets owned by the deceased partner's trust at that time are protected for the benefit of the deceased partner's children or beneficiaries. The surviving partner can still have the use of the shared assets. The deceased partner's share of the assets cannot be diverted to third parties. The surviving partner can add more beneficiaries to their trust, such as a new partner or children.

Where couples or partners in a relationship are thinking of transferring assets to trusts there is always the question of who needs to receive independent advice and the extent of that advice. Valuations may be required to ensure that future rights under the Property (Relationships) Act 1976 are not affected. In most cases, dividing assets 50/50 between parallel trusts may avoid expensive valuations, particularly for business assets.

Obtaining independent advice is, in most cases, more straightforward and in turn less expensive.

The downside of parallel trusts

There will be some additional cost but having two trusts, rather than one, does not mean double the cost. We believe the advantages to a couple having parallel trusts far outweigh this extra expense.

If you would like to know more about parallel trusts, talk to us about whether they are the best protection for you. ■

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