Trust eSpeaking

315 Hardy St Nelson
22 Oxford St Richmond
218 High St Motueka
T 03 544 7888
E enquiry@knapps.co.nz
W knapps.co.nz

KNAPPS LAWYERS

ISSUE **34** | Autumn **2022**

Welcome to the Autumn 2022 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.

Gift or loan?

The importance of properly documenting advances between family members

The trusty Kiwi "She'll be right" approach is often manifested in a reluctance to formally document intra-family lending arrangements. Catch cries of "I trust the kids to sort things out between themselves after I'm gone" and "My new partner says she will never make a claim and I believe her" are common, but all too often lead to disputes down the track.

In this article, we look at three different scenarios that illustrate how important it is to properly record intra-family lending.

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Caring for Kiwis who cannot make decisions for themselves

Comparing with Britney Spears' conservatorship

In the Spring 2021 edition, we looked at whether someone in New Zealand could end up in a similar situation to American entertainer Britney Spears. Britney was under a conservatorship (or guardianship) arrangement that was against her wishes.

Britney Spears' conservatorship has now been formally ended. Since then, she has made a number of specific allegations against her conservators. We discuss how these issues would be dealt with in a New Zealand context.

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Where there is a will, what is the way?

A parent dies, but the child is unaware of the death

A child (of whatever age, although minors need a guardian's help) can make a claim against the estate of their parent under the Family Protection Act 1955 if their parent dies and makes insufficient provision for them in their will. What happens, however, when a parent dies and their children aren't aware of the fact? We offer some guidance for executors.

We also discuss the Law Commission's report on succession law that has some specific recommendations for family claims on an estate.

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Gift or loan?

The importance of properly documenting advances between family members

The trusty Kiwi "She'll be right" approach is often manifested in a reluctance to formally document intra-family lending arrangements. Catch cries of "I trust the kids to sort things out between themselves after I'm gone" and "My new partner says she will never make a claim and I believe her" are common, but all too often lead to disputes down the track.

In this article, we look at three different scenarios that are based on Maddy's story.

Maddy's parents help out

In 2016, Maddy's parents decide to help her buy her first home. The bank will not lend to Maddy without a 20% deposit; her parents offer to lend her $250,000 to make up the 20%. The bank's rules also require her parents to sign a gifting certificate, confirming that they will not require repayment of the money. Despite that, Maddy and her parents agree verbally that the money is a loan, not a gift, and Maddy will pay them back when she can. This is important to Maddy's parents, as they also want to help their younger daughter, Sarah, into her first home in a few years' time once Maddy has enough equity in her home to repay them. Maddy takes out a bank loan, secured by a first ranking all obligations mortgage in favour of the bank and buys her first home. Exciting times.

Let's look at three different ways in which the failure to document that loan could play out.

Scenario 1: Insolvency

Maddy also owns a hospitality business, which she operates as a sole trader. Maddy doesn't really understand how it all works, but is pleased that having a mortgage means she gets better lending rates for the business, which improves her café's cash flow no end.

Unfortunately, in 2020 Covid hits. While the business manages to hang in there for some time thanks to the Covid business loan and the wage subsidy, the recent removal of all government financial assistance and the move to red level in the traffic light system tip the business over the edge. It owes more than $500,000 to the bank, as well as the debt to the government and various suppliers. Maddy's creditors file bankruptcy proceedings.

Maddy receive a demand from the bank to pay the $500,000-plus it is owed, which means she must sell her house. There is just enough money left after doing that to repay the bank and all the unsecured creditors.

In an attempt to salvage something from the situation, Maddy argues that the amount her parents contributed to the equity was a loan and not a gift. Unfortunately, there is no documentation to support that; the only documentation is the signed gifting certificate. The creditors rightly say that there is no evidence the money was a loan, and therefore they require repayment of their debts in full.

Scenario 2: Succession

Maddy's parents died shortly after lending her the $250,000 house deposit. Younger sister, Sarah, is shocked when the estate lawyer says that there is only a house property to divide; Sarah says that she knows her parents had more than $250,000 in the bank which they had lent to Maddy to help buy her house.

Sarah appeals to Maddy, saying that they both know their parents lent Maddy the money. Maddy disagrees, pointing to the bank gifting certificate: she says that it was clearly a gift and she refuses to pay anything back. Lacking any evidence of the arrangements between her parents and Maddy, Sarah is forced to reluctantly accept a lesser inheritance than she believes she was entitled to.

Scenario 3: Relationship property

Maddy's boyfriend Tom moved into her new home shortly after she bought it. Their relationship broke down four years later in 2020 and Tom claims half the equity in the home under the Property (Relationships) Act 1976.

Maddy accepts that the home is their 'family home' and that the equity must be divided equally. She argues, however, that in addition to the bank loan they need to

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In the Spring 2021 edition of *Trust eSpeaking*, we looked at whether someone in New Zealand could end up in a similar situation to American entertainer Britney Spears. Britney was under a conservatorship (or guardianship) arrangement that was established against her wishes.

Britney Spears' conservatorship has now been formally ended. Since then, she has made a number of specific allegations against her conservators including these four points:

1. She was paid $2,000 per week, despite earning millions per year; this was less than her conservators were paid
2. Her conservators were unwilling to allow her to marry
3. Her conservators required her to use contraception so she could not become pregnant, despite her wanting to start a family, and
4. Britney was forced to work long hours, against her wishes, and despite her sometimes being very unwell.

Could any of these things have happened in New Zealand under the Protection of Personal and Property Rights Act 1988 (PPPRA)? This legislation allows for the appointment of property managers and welfare guardians to make decisions for people who are unable to make decisions for themselves.

The PPPRA also contains what is known as the 'minimum intervention principle'. When making orders, the court must 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.

Let's look at the four major issues brought up by Britney to illustrate how they would be dealt with in New Zealand. We will call the property manager, Aroha; the welfare guardian, Sam; and Jane is the person whose affairs they manage.

Spending allowance

In New Zealand, Aroha could provide an allowance for Jane. An allowance will help ensure Jane does not spend all of her money and jeopardise her future wellbeing; this allowance will usually be proportionate to Jane's assets and income. If Jane asks for an increased allowance, the funding for which is available and can be responsibly released, Aroha may well release that money in accordance with the minimum intervention principle.[1]

Aroha can be reimbursed for her out–of-pocket costs, but will not usually be paid for her time administering Jane's affairs unless the Family Court directs this.[2] Usually only lawyers or other professionals would be paid to act as property manager — not family members.

Marriage

In New Zealand, marriage is not just a social issue; it is a decision that has significant consequences for property under the Property (Relationships) Act 1976. Sam, as Jane's welfare guardian, may not sign marriage documents on Jane's behalf nor apply for a divorce for Jane. Marriages have been declared void on the basis that a person did not have sufficient capacity to understand the implications of their decision, particularly the property consequences.[3]

If Jane wants to marry, and given Sam cannot sign marriage documents on her behalf, Jane could approach the Family Court for a capacity assessment and a determination as to whether or not she had capacity to understand the consequences of her decision.

It is possible that Jane may still be able to enter into a de facto relationship; as with a marriage this may also have consequences relating to any property Jane holds.[4]

Medical decisions

Sam can make medical decisions for Jane. It is possible for Sam to decide that Jane should use contraception. If there are concerns about Jane becoming pregnant, the court will usually order long-term reversible contraception rather than sterilisation, in accordance with the minimum intervention principle.[5]

1. Section 28, Protection of Personal and Property Rights Act 1988.
2. Ibid, Section 50.
3. *X v X* [2000] NZFLR 1125; see also *Re W* [1994] 3 NZLR 600.
4. See the discussion in *E v E* (High Court Wellington, CIV-2009-485-2335, 20/11/2009, Simon France J) at [30]-[35] and [57]-[60].
5. See the discussion in *Darzi v Darzi* [2014] NZFC 359 at [32]-[37], although sterilisation was ultimately ordered in that case.

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Where there is a will, what is the way?

A parent dies, but the child is unaware of the death

A child (of whatever age) can make a claim[6] against the estate of their parent under the Family Protection Act 1955 (FPA) if their parent dies and makes insufficient provision for them in their will. What happens, however, when a parent dies and their children aren't aware of the fact?

This situation can be a tricky position for the executor of a will. Executors are obliged to carry out the terms of the will, and they have duties toward the beneficiaries. However they also have duties toward prospective claimants against a will. When an executor is aware that a person intends to make a claim against an estate, they owe a duty of even-handedness toward that person; this includes ensuring that they do not actively and dishonestly conceal relevant material about the estate from potential claimants who seek information about the estate.[7]

This means that if a child has, for example, engaged a lawyer to act for them and indicated that they intend to make a claim against an estate, the executor must provide information to them and consider their position when administering the estate. The executor cannot sneakily pay out all of the estate assets without telling the child or their lawyer.

There is no general duty, however, on an executor to search for all possible claimants against an estate, nor to inform those people of the fact of death or of their right to make a claim against an estate. In a 2018 case concerning a relatively small estate, the High Court commented that when assessing an executor's obligations, 'regard must be had to the cost and difficulty' of locating possible claimants or interested parties.[8]

This means that if a child is estranged from their parent and may not be aware that their parent has died, an executor does not have to find them and tell them — particularly if the estate is small and a significant cost would be incurred. By the time the child finds out about their parent's death, the estate might have been distributed and the child may no longer be able to make a claim.

The extent of an executor's obligations toward those of whose claims an executor *should* be aware has not yet been decided by the New Zealand courts. This might be the case where there is a very large estate and the executor knows a child is impoverished and receives nothing under the will. The child might have contacted the executor at some point, but has not indicated they intend to make a claim against the estate. It is not clear, legally speaking, whether the executor has obligations to that child before distributing the estate and, if so, what those obligations are.

The Law Commission's report

In December 2021, the New Zealand Law Commission released its final report on the law of succession, along with its recommendations for the government, including a new Succession Act. The report includes recommendations regarding an executor's duty toward prospective claimants against an estate.

One of the two options that the Law Commission recommends in respect of claims by children is that only children under 25 years old or with a disability be able to make a claim for further provision from an estate. This would limit the ability of adult children to bring claims, which they can currently do under the FPA.

The Commission also recommends that the law should require an executor to notify prospective claimants of relevant information related to their rights. If the first recommendation is accepted, this would mean an executor only needs to notify children under 25 years old or with a disability that the death has occurred and of their rights.

Where a prospective claimant is not known or cannot be found, the Commission proposes that an executor's duty will be satisfied where they take reasonable steps to search for and give notice to that person. This means that if an executor is unaware of a child, and reasonable searches for information do not disclose the child's existence, the executor won't be liable for failing to provide notice or information to that child.

Alternatively, and if the government decides to allow all children to continue to make claims against an estate, the

6. Minor children, however, will need someone to bring the application on their behalf.
7. *Sadler v Public Trust* [2009] NZCA 364, (2009) 28 FRNZ 474 at [35] and [41]; as referred to in *Re Application by Lane (in their capacity as trustees and executors of the estate of the late Carson)* [2017] NZHC 3144.
8. *Rattray v Palestine Children's Relief Fund* [2018] NZHC 466.

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take into account the $250,000 owed to her parents. Tom says that is the first he heard of any loan from Maddy's parents, and points to the gifting certificate that he found when he was cleaning out some drawers. Maddy is unable to produce any evidence to support her argument that money is owed to her parents, and has to divide the equity without factoring that in.

The lesson

In every scenario outlined above, a dispute could have been avoided, or minimised, had Maddy and her parents entered into a simple agreement recording the existence of the loan. A deed of acknowledgment of debt, prepared at the time that Maddy bought her house, could have been produced for a minimal fee, thus preventing a multitude of unintended consequences later on.

If you are lending money within your family, do contact us to ensure the loan is documented in a way that protects everyone – both now and in the future.

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Caring for Kiwis who cannot make decisions for themselves

If Sam thought it was important for Jane to use contraceptives, Sam should consult Jane to discuss her wishes. The court might hear from all parties if Jane did not use contraception.

If there was no risk of sexual activity then contraception might not be necessary. If Jane was in a relationship and wanted to have children, the court would consider her capacity to make that decision and direct accordingly.

Working

Jane's property manager (Aroha) and welfare guardian (Sam) are required to have her best interests at heart. If Jane does not want to work, and is financially secure, it is unlikely that either Aroha or Sam could force Jane to work against her will – even if Jane could generate a substantial income for herself.

Could Britney's situation arise in New Zealand?

It seems much less likely that someone in New Zealand such as Jane would end up in Britney's position.

The safeguards discussed in the Spring 2021 edition of *Trust eSpeaking* would go a long way towards protecting Jane from suffering at the hands of Aroha or Sam. Many of Britney's specific complaints simply are not permitted under New Zealand law, and others would depend on her capacity.If Britney had capacity to make any specific decision, she would be able to make it herself.

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Where there is a will, what is the way?

Law Commission does not recommend that executors be required to notify children of the death and/or of their rights. This would continue the current situation.

Conclusion

The Law Commission's recommendations may dramatically change the law about who can claim against their parent's estate. If the government takes up those recommendations, the Law Commission also proposes that an executor's duties should change, and that an executor be required to notify children under 25 or disabled children that their parent has died and what their rights are. This could lead to an increase in estate litigation, though in a smaller group of eligible claimants than is currently the case.

NZ LAW Stronger Together.

The next edition of *Trust eSpeaking* will be published in **Spring 2022**.