Trust eSpeaking

22 Oxford Street, Richmond
Level 1/54 Montgomery Square, Nelson
PO Box 3300, Richmond 7050
T 03 543 8600

23 Wallace Street, PO Box 182, Motueka 7143
T 03 528 0005

enquiry@atkinsoncrehan.co.nz
www.atkinsoncrehan.co.nz

Atkinson | Crehan Law

ISSUE **37** | Spring **2023**

Welcome to the Spring 2023 edition of *Trust eSpeaking*. We hope the articles in this e-newsletter are both interesting and useful.

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

NZ LAW
Stronger Together.

Decision in 'Alphabet case' could change succession landscape

Significant issues raised

In June 2023, the Supreme Court heard the 'Alphabet case.'

Mr Z severely abused his wife and children physically, psychologically and sexually. He died in 2016 leaving a small estate. He had, however, earlier settled a trust to prevent his children "chasing" his assets. The children, despite the bulk of their father's assets being held in a trust, believed he owed them a fiduciary duty because of the abuse they had suffered. We await the Supreme Court's decision.

PAGE 2 ▶

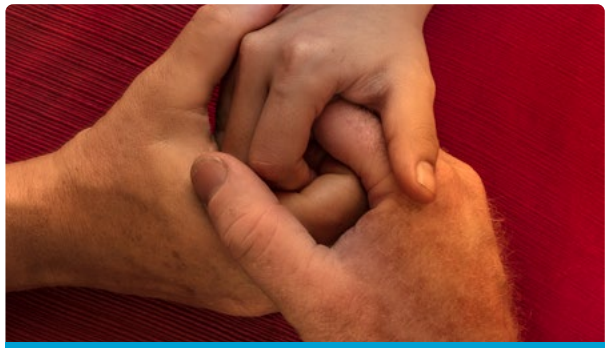
Refusing an inheritance

What options does a trustee have?

This was the question faced by the executor/trustee of the estates of Margaret and Ian Glue. Margaret died in 2005, leaving a life interest in her estate to Ian, and her remaining estate to her two sons. Ian died in 2009, also leaving his estate equally to his two sons, David and John

John received his inheritance. David, however, could not be found despite exhaustive efforts even though it was believed he was alive. The executor/trustee had held David's inheritance for years and wanted to be free of his obligations. We follow the High Court's decision to close this case.

PAGE 3 ▶



Polyamorous relationships

Supreme Court confirms that the Property (Relationships) Act can apply

In a split decision, the Supreme Court recently confirmed that polyamorous relationships can be divided into two or more qualifying relationships, to which the provisions of the Property (Relationships) Act 1976 (PRA) can apply.

This decision may lead to polyamorous couples putting contracting out agreements in place and claims under the PRA following the breakdown of the relationship, or death of a party.

The courts are not, however, finished with this case, it now returns to the Family Court to allocate the division of property.

PAGE 4 ▶

Decision in 'Alphabet case' could change succession landscape

Significant issues raised

In June 2023, the Supreme Court heard the 'Alphabet case.' To understand the significance of what is at stake in this case, it is worth considering the facts that gave rise to the litigation and the High Court's decision.

Abuse of A, B and C by Mr Z

Mr Z and Ms J married in 1958 and separated in 1981. They had four children: G (1960-2015), A (b 1961), B (b 1963) and C (b 1971).

Mr Z severely abused Ms J and the children physically, psychologically and sexually. A was repeatedly raped between the ages of seven and 13, but she did not disclose the abuse to anyone until 1983. She did not tell her mother until 1991. A was unable to face taking action against Mr Z.

Mr Z died in 2016 leaving an estate valued at $46,839. He had, however, settled a trust two years previously for the express purpose of preventing his family from "chasing" his assets, to which he had gifted his home and investments worth $700,000. The children were not beneficiaries of Mr Z's estate or the trust; rather, the trust's beneficiaries were the children of Mr Z's former partner.

Children's claims

That should have been the end of the matter because the Family Protection Act 1955 (FPA), that allows children to challenge their parents' wills, only applies to assets a deceased owned in their personal names; it doesn't apply to trust assets.

However, the children argued that their father owed them a fiduciary duty and, that because of the abuse, he continued to have obligations to them even after they became adults. They said that Mr Z had breached that duty when he gifted his home and shares to the trust in order to prevent his children from claiming against those assets under the FPA.

In the High Court

In the High Court,[1] Justice Gwyn agreed with the children and said they could bring claims under the FPA against the assets that had been transferred to the trust.

The trustees of Mr Z's estate and trust appealed to the Court of Appeal.

Court of Appeal divided over case

The Court of Appeal[2] accepted that Mr Z owed a fiduciary duty to his children and that he breached that duty when he abused them. The issue was whether Mr Z continued to owe those fiduciary duties to his adult children at the time he gifted his assets to the trust.

The majority of the Court of Appeal judges disagreed; they said that the appropriate remedy for the breach of fiduciary duty was equitable compensation (and the children had run out of time to make that claim).

However, one judge said that in some circumstances the inherently fiduciary relationship between a parent and a child may continue after a child becomes an adult (for example, in the case of a severely disabled child).

The judge (who was in the minority, so their views don't affect the final outcome) decided that A's position, owing to the abuse she suffered, was analogous to that of a disabled child. Mr Z therefore had a continuing duty to take steps to remedy, as best he could, the enormous harm he inflicted on A, not only when she was living in his care, but also during her adult life. This meant he was required to protect her interests when considering gifting his principal assets to the trust, and failed to do so.

Decision awaited

The Supreme Court will tell us whether Mr Z owed a continuing fiduciary duty to A into her adult life because of the abuse he perpetrated on her. Many commentators believe that it is stretching the concept of a child/parent fiduciary duty too far.

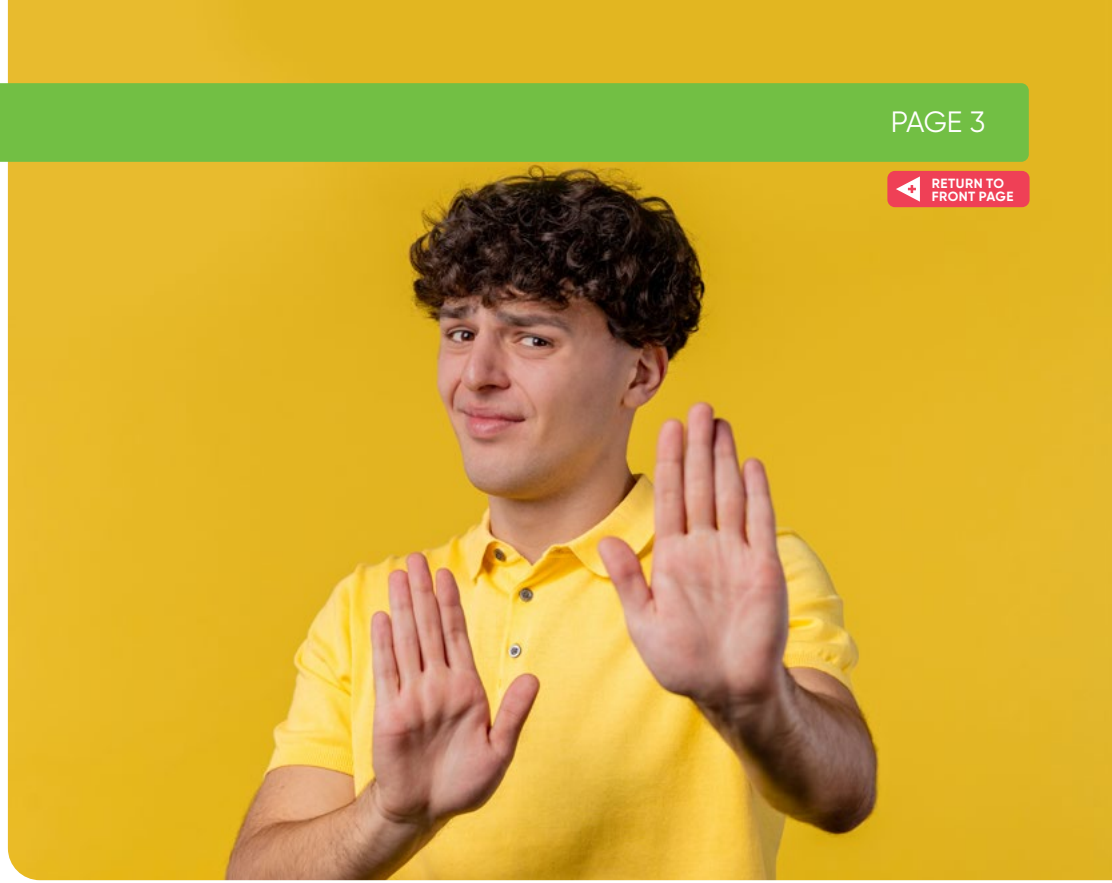
If legal principles cannot evolve, however, a situation may emerge where extraordinarily meritorious claimants are left with no effective relief, simply because too much time has passed, and/or because their parent transferred their assets into a trust to prevent claims after they have died.

That raises two questions:

1. Should time count against people such as A, who have been so seriously abused by a parent?
2. Should parents be allowed to transfer their assets into a trust in order to prevent their children making claims after their death? +

1 [2021] NZHC 2997.
2 [2022] NZCA 430.

Refusing an inheritance



What options does a trustee have?

What is the trustee of an estate supposed to do when a beneficiary will not accept their inheritance?

This was the question faced by Mr Holland, executor and trustee of the estates of Margaret Glue and her husband, Ian Glue.[3] Margaret died in 2005, leaving a life interest in her estate to her husband Ian, and her remaining estate to her two sons. Ian died in 2009, also leaving his estate equally to his two sons, David and John.

Best efforts to contact beneficiary

John received his inheritance shortly after Ian's death in 2009; John died in 2019. David, however, was unable to be contacted, despite Mr Holland's efforts to contact him for well over a decade. His inheritance was worth approximately $300,000 as at August 2022. Mr Holland had written to David advising him of his inheritance and asking for a bank account number so the funds could be deposited.

David lived in London. Mr Holland had arranged for a professional investigator to confirm that David lived at the address known to him, and where correspondence had been sent. It was confirmed that David did live at that address; this was understood to be local authority housing (similar to 'council housing' in New Zealand).

Actively avoiding contact?

There was a suggestion that David may have wished to avoid receiving his inheritance as it could have disqualified him from living in that property. Welfare or social housing benefits are means-tested in many countries; it is common for these to become unavailable if a recipient's assets exceed a certain threshold.

It is possible that David did not want to receive his inheritance because he thought he would be better off with stable and affordable housing, rather than receiving his inheritance that would then be dissipated on more expensive housing and eventually leave him in the same position. There was no specific evidence on the point, however, as David would not engage with the trustee, so this was only conjecture.

What next?

Mr Holland had held the inheritance for more than a decade and he wanted to be freed from his trustee obligations to David. Mr Holland applied to the High Court for an order[4] asking for permission to distribute the inheritance to John's children, on the basis that David was 'missing' and his entitlement should be disregarded. Mr Holland swore an affidavit that he had known Margaret and Ian Glue for many years, and they would have wanted their descendants to benefit from their estate. He thought that Margaret and Ian would have preferred that the beneficiaries of John's estate (i.e. his children) receive the inheritance, than for the money to sit indefinitely in case David eventually decided to accept it.

The High Court noted that section 136 of the Trusts Act 2019 applied to beneficiaries who are 'missing.' It said that David was 'decidedly not missing'; he could be found, but he simply would not engage with the trustee or accept his inheritance. Initially the court proposed that the money be paid to the Crown to be held in case David ever made a claim, but it was persuaded that this was not what Margaret and Ian would have wanted.

The High Court found that even though David was not missing, section 136 applied anyway because:

1. The trustee had taken reasonable steps to bring the inheritance to David's attention, over more than 10 years
2. More than 60 days had passed since the trustee's last attempt to contact David, and
3. In the circumstances, it was reasonable to disregard David's position and direct that the inheritance be paid to John's estate (and therefore to his beneficiaries), as though David did not exist.

The lessons in this case

While it is unusual for a beneficiary to fail to claim their inheritance, it can happen, and they may have good reasons for doing so. That can, however, make things difficult for an executor or trustee who is holding funds on their behalf.

This case is a good reminder that a trustee who is in this situation may have other options and will not be forced to hold the funds indefinitely. +

3 *Re Holland* [2023] NZHC 464.
4 Under section 136 of the Trusts Act 2019.

Polyamorous relationships

Supreme Court confirms that the Property (Relationships) Act can apply

In a split decision, the Supreme Court recently confirmed by 3:2 that polyamorous relationships (that is, relationships between three or more people) can be subdivided into two or more qualifying relationships, to which the provisions of the Property (Relationships) Act 1976 (which applies to relationships between two people) can apply.

Background

Brett and Lilach Paul married in 1993. In about 1999, Brett and Lilach met Fiona. The three formed a triangular relationship in 2002.

During their 15-year relationship, all three lived on a farm at Kumeu that was registered in Fiona's name. Lilach separated from Fiona and Brett in 2017. Fiona and Brett separated a few months later in 2018.

Family Court

In 2019, Lilach brought an application in the Family Court, in which she sought orders determining the parties' respective shares in relationship property, including the Kumeu farm.

Fiona objected to the court's jurisdiction, on the basis that the parties were not in a qualifying relationship for the purposes of the Property (Relationships) Act 1976 (PRA).

The Family Court sought guidance from the High Court about its jurisdiction to hear the case.

High Court

In the High Court, Justice Hinton held that the Family Court did not have the jurisdiction to determine the property rights of three people in a polyamorous relationship, because the requirement, under section 2D of the PRA that the parties be living together as a couple, excluded a scenario where all three people are participating in a multi-partner relationship.

Lilach appealed and the case went to the Court of Appeal.

5 *Mead v Paul* [2023] NZSC 70.

Court of Appeal

The Court of Appeal disagreed with the High Court's framing of the question put to it and found that jurisdiction could exist in the case of a polyamorous relationship.

The court agreed that the PRA was concerned with relationships between two people, meaning that polyamorous or multi-partner relationships are not qualifying relationships under the PRA. The court noted, however, that sections 52A and 52B of the PRA specifically provide for claims where a person is in multiple contemporaneous qualifying relationships. It found that the PRA does not require exclusive coupledom.

Within that context, the court held that the relationship between the parties could be viewed as three separate, but contemporaneous, qualifying relationships – a marriage between Brett and Lilach, a de facto relationship between Brett and Fiona and a de facto relationship between Lilach and Fiona.

Fiona appealed to the Supreme Court.

Supreme Court decision in June

In a decision released in June 2023,[5] the Supreme Court (by a 3:2 majority) dismissed the appeal and confirmed that the PRA could apply to polyamorous relationships.

Specifically, the court held that:

1. A triangular (three-party) relationship cannot itself be a qualifying relationship, but
2. A triangular relationship can be subdivided into two or more qualifying relationships.

In reaching this conclusion, the three Supreme Court judges who were in the majority noted that it was not contentious that the PRA applied to what it referred to as 'vee' relationships. A vee relationship is one where party A is married to party B, and A is also in a consecutive or concurrent de facto relationship with C, but where parties B and C may not know about each other, and may or may not live in the same residence.

The question was then whether the 'triangularity' of the relationship (ie: the existence of a relationship between parties B and C) makes any difference to the analysis. The majority held that it did not.

As noted, the Supreme Court decision was spilt 3:2, with the minority indicating that they would have allowed the appeal.

Practical implications

Following this decision, there may be increased interest by parties in polyamorous relationships in having contracting out agreements put in place. There are also likely to be claims under the PRA following the breakdown of a relationship, or on the death of a party to the relationship.

As all the decisions to this point have dealt only with the question of jurisdiction, no decisions have been made yet about the division of property between Lilach, Fiona and Brett. That issue will be sent back to the Family Court. +