Trust eSpeaking

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

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

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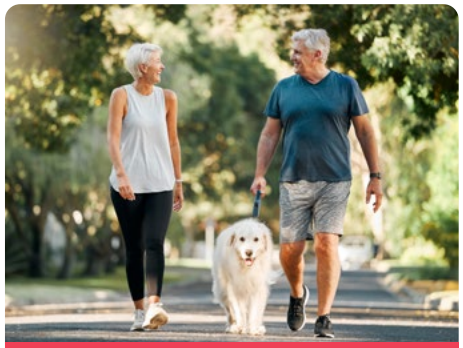

Contracting out agreements for relationships late in life

A wise move as financial affairs are more complex

You may think that a 'pre nup' is most commonly used when a young couple begins a relationship and there is a significant difference in their financial position. However, these agreements, formally known as contracting out agreements (COAs), can be entered into at any time during a relationship. They are particularly useful for couples entering into a de facto relationship, or marrying later in life, as both parties are more likely to come to the relationship with more complex financial affairs.

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Non-traditional family structures can result in unfair estate outcomes

When a parent dies and leaves their child or children out of their will, those children are entitled to bring a claim against their parent's estate. While a financially stable adult child may not have a claim to a large proportion of their parent's estate, they will usually still have a claim for 'recognition.'

The same is not true for children claiming against the estate of a stepparent; they are only entitled to bring a claim against the estate of a stepparent in very limited circumstances.

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Will-making when you have overseas assets

Some key considerations

For New Zealanders with overseas assets, ensuring your estate planning arrangements are in order requires careful thought and consultation with us and a tax expert here in New Zealand, as well as in the countries in which those assets are located.

We outline some of the key legal considerations, highlighting potential issues that may arise if these factors are not properly addressed.

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Contracting out agreements for relationships late in life

A wise move as financial affairs are more complex

You may think that a 'pre nup' is most commonly used when a young couple begins a relationship and there is a significant difference in their financial position. However, these agreements, formally known as contracting out agreements (COAs), can be entered into at any time during a relationship. They are particularly useful for couples entering into a de facto relationship, or marrying later in life, as both parties are more likely to come to the relationship with more complex financial affairs.

Why have a COA?

One of the couple may have been through a previous separation or the loss of a spouse. They may have children – dependent or adult. They may also have trust or company structures that make their overall asset profile less straightforward from a relationship property perspective than younger couples who are just getting started with their lives together.

In these cases, a COA can give both parties (and their families) clarity about what will happen to their assets if one of them dies, or if they decide to separate.

A COA is a way of opting out of the default rules as to how the division of property is dealt with under the Property (Relationships) Act 1976 (PRA). Without a COA, the default approach would apply; this generally means that relationship property assets are divided 50:50. An equal split, however, is not always appropriate. In complex cases, parties can end up in protracted court cases trying to figure out how the PRA applies to their particular situation.

While the default rules are a helpful fallback position where people cannot agree how property will be divided, the PRA does not necessarily reflect what all couples would regard as 'fairness.' The legislation also does not take account of fact-specific or unusual cases. COAs allow couples to set in place clear and bespoke rules that apply to their particular circumstances, and their specific assets, in the event their relationship or marriage breaks down.

Opens up discussion

One of the benefits of considering a COA is that it opens up the discussion between a couple as to what they would like to happen to their property, or what they might consider fair, in the event that one of them dies or they separate. Often we find that couples have never had this conversation, but have made assumptions about what will happen or what their partner thinks should happen.

In particular, these assumptions can be harshly tested and shown to be wrong when a partner dies unexpectedly. The surviving partner may find that they have radically different expectations about what will happen compared with the deceased partner's children and any other parties involved in such an estate.

The same issue can arise if a couple separates. Efforts to resolve relationship property issues may be made in

circumstances where the partners' perceptions of fairness have changed over time. There may have been unequal financial contributions made during the relationship or owing to events, such as infidelity, that have occurred during or which ended the relationship.

Complex finances

Where a couple has a complex financial situation, including trust and company structures, a COA should be supported by documents between the parties and the trusts or companies, so that no assets fall through the cracks or fail to be taken into consideration. It is important for couples to seek independent advice about the types of documents required, and their effect.

Review a COA regularly

It is also critical that couples review their COA as life changes. When properties are bought and sold, home improvements funded or other big changes happen, the COA may become out of date and difficult to apply. A new agreement, or an amendment to an existing agreement, can ensure that everyone has clarity about what the changes mean and what their effect will be if there is a death or separation.

A COA can only be enforced if both parties have received independent legal advice and both lawyers certify the agreement. This requirement ensures that both parties are fully informed about the effect of the agreement. +

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Non-traditional family structures can result in unfair estate outcomes

When a parent dies and leaves their child or children out of their will, those children are entitled to bring a claim against their parent's estate under the Family Protection Act 1955 (FPA). While a financially stable adult child may not have a claim to a large proportion of their parent's estate, they will usually still have a claim for 'recognition.'

The same is not true for children claiming against the estate of a stepparent.

Stepchildren are only entitled to bring a claim against the estate of a stepparent in very limited circumstances – usually when they are financially dependent on their stepparent at the date of their death.

This can become a real problem when a parent dies, leaving everything to their spouse or partner, who is trusted to make provision in their own will for their stepchildren, but fails to do so. Stepchildren are often left without a remedy, and this is an increasing source of perceived unfairness in a society where non-traditional family structures are becoming common.[1]

How does the law respond?

When someone inherits all their partner's property, but ultimately fails to provide for their partner's children in their own will, those stepchildren typically must look for alternative ways to bring a claim against the estate of their stepparent, outside of the FPA. Commonly this includes two possible actions:

1. Making a mutual wills claim

Where the parent and stepparent originally had wills which left everything to each other, and then after the death of the second, made provision for each of their families, it might be argued that the wills were intended to be binding and that the stepparent was not intended to be able to change their will later on to leave out their stepchildren. If successful, a mutual wills claim would bind the stepparent's estate to make the promised provision for their stepchildren.

The difficulty is often found in showing that there was an agreement between the parent and stepparent that the wills would not be changed. This may have been assumed, but it is rarely spoken about or expressed in writing. It can also be difficult when the stepparent clearly did not feel that they were bound by such an agreement.

2. Testamentary promise claims

Claims are sometimes brought under the Law Reform (Testamentary Promises) Act 1949. As the name suggests, these claims require some sort of promise to have been made. The stepchild will need to show that:

- They rendered services to their stepparent
- Their stepparent promised to reward them for those services in their will
- The promise was motivated by the services, and
- The stepparent failed to keep their promise in their will.

Difficulties often arise in showing 'qualifying services.' Normal things that one might do for a close family member, such as helping in their older age, will not usually qualify. While some stepchildren have successfully argued that they abstained from making a claim against their parent's estate, and that was a service to their stepparent, many children don't ever seriously think about making such a claim, so it is hard to make that out as a 'service.'

Promises are often vague, and New Zealanders do not always like to talk about money.

Even where there are services, and a promise to reward, in many cases the promise is found to have been motivated by the close relationship rather than the services themselves.

It can be very hard to make a successful testamentary promises claim.

Case example

In a 2015 case,[2] a child failed in several claims against his stepfather's estate. The High Court said:

"While I have sympathy for the position Paul finds himself in, his personal claims against the estate appear to me to fall within the rock of the [Family Protection Act 1955] and the hard place of the [Law Reform (Testamentary Promises) Act 1949]."

There are also a variety of claims available to stepchildren such as a constructive

trust, estoppel or unjust enrichment. These generally make similar arguments, but often fail for the same reasons as in the *Blumenthal* case.

Stepchildren often miss out because they wanted to do the right thing when their parent died, and they made the unfortunate decision to trust their stepparent to do the right thing later.

Will this change?

The Law Commission identified the plight of stepchildren in its 2021 Succession Review Issues Paper, but it did not propose any new avenue for stepchildren to bring claims against the estate of a stepparent, simply because they have 'missed out' on their parent's estate.[3]

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1 The Law Commission noted in 2021 that only 7% of children lived from birth to age 15 in households containing only nuclear family members: Te Aka Matua o te Ture | Law Commission Review of Succession Law: Rights to a person's property on death (April 2021, Wellington, NZIPC 46) at [1.15].

2 *Blumenthal v Stewart* [2015] NZHC 3187, affirmed on appeal.

3 Te Aka Matua o te Ture | Law Commission *Review of Succession Law: Rights to a person's property on death* (April 2021, Wellington, NZIPC 46) at [4.70].

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Succession in different countries

New Zealanders enjoy a reasonable degree of freedom in how their wills are drafted and to whom they leave their assets. This is, however, not always the case in countries (such as France and The Netherlands) that have 'forced heirship' rules. This commonly means that an estate is divided into two parts. One part is distributed to family according to specific rules, and the other part can be dealt with in a will.

Different countries often have different rules for property which is immovable (such as land) and property which is moveable (such as shares or bank accounts). This principle is known as 'scission.' It means that succession to land and immovable property is governed by the law in the country where your property is situated, whereas succession to movable property is governed by the law of your last place of domicile.

For people who are, for example, domiciled in New Zealand but own property in France, if your house in France is left to a friend, French succession law will apply as the house is immovable property. Whether such a gift can be validly made will be determined under French law.

Multiple wills

Not only are there differences in succession laws in different countries, but there can be different taxes applying to property and estates in those countries. For people with immovable assets in multiple countries, there should be consultation with experts to determine whether separate wills are required for each country.

Back to the above French example: there should be one will for New Zealand assets, and a French will should be drafted by a French lawyer that applies to the French assets.

There are, however, traps when multiple wills are signed. The wording is critical and, most importantly, it is essential multiple wills do not inadvertently revoke each other.

A case in 2021[4] illustrates what can happen if proper care is not taken. Beverly McLean signed two wills: an earlier one applying to her New Zealand assets, and a later one applying to her South African assets. Despite her instructions emailed to her lawyer that the two wills were to deal only with the assets in each respective country, the court confirmed that the later South African will inadvertently revoked the earlier New Zealand will as it stated, 'I, [name] revoke all previous testamentary dispositions and declare the following to be my Last Will.' As a result, all of the assets in the estate passed under the South African will.

The clause which featured in the above case is a common clause in a will. However, where a will-maker has multiple wills dealing with assets in different countries, the clause is not appropriate and should not be used.

Tax implications

Wills can have surprising tax consequences. The choice of executor can be important, and overseas beneficiaries may need to pay tax on their share of an estate.

The situation is straightforward when an executor of a New Zealand estate is a New Zealand resident.

If a will appoints an overseas-based executor, or a person who later moves overseas, this can lead to the New Zealand estate being caught by an overseas tax regime, or the New Zealand estate being treated differently by Inland Revenue. This can be a particular problem between Australia and New Zealand as in Australia, an estate is treated as any other trust for tax purposes. One way to address this in a will is to specify that an executor's appointment is only valid if they remain in New Zealand.

Beneficiaries can also be liable for tax on their share of an estate. This usually occurs when they live overseas. If they live in a country with inheritance taxes, they may receive a much smaller share of the estate than other beneficiaries who live in a country with no inheritance tax.

4 *Re McLean* [2021] NZHC 1463.

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The plight of stepchildren

Further, the law reform project has stalled, leaving things in a rather unsatisfactory position for stepchildren who are more and more commonly in this situation.

This situation for stepchildren highlights the continued importance of having proper estate planning arrangements in place – particularly for blended families. There can be a significant financial and emotional cost when these things are not discussed and addressed while both parents and stepparents are alive and capable. +

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If some of the beneficiaries live overseas, the estate can pay these taxes so that each beneficiary receives the same amount. A will needs to state this clearly, otherwise the default position is for the beneficiary to pay tax on their share of the estate.

Some overseas countries have deadlines for inheritance tax payments. Payment is sometimes required before the beneficiary has received their inheritance. A will can provide for an executor to advance funds in that case, so that the beneficiary is not out of pocket while waiting for their inheritance.

Be proactive

Preparing wills in New Zealand is becoming complicated as more of us live and travel overseas, and acquire international assets. When considering the provisions in your will, or when reviewing your current will, it's essential to list your overseas assets, where they are located, and whether overseas lawyers and accountants will be needed.

If you need advice about your will and where your assets are located, please don't hesitate to contact us. We are happy to help. +

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The next edition of *Trust eSpeaking* will be published in **Autumn 2025**.