Trust eSpeaking

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Welcome to the Spring 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 or succession issues in general, please don't hesitate to contact us. Our details are on the top right of this page.

NZ LAW
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Trusts Act 2019 also affects executors and administrators of wills

Mandatory and default duties explained

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We outline executors' mandatory and default duties as well as briefly discussing some interpretations of the latter.

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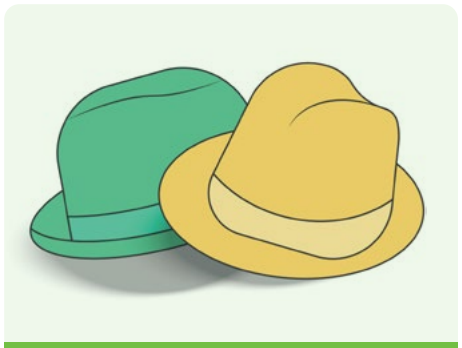

Wearing two hats in a family protection claim

Get independent advice

In a recent case (*Connelly v Eckhout*), the High Court found that a will administrator's default in complying with a court order was so flagrant, it justified issuing an order for arrest of the administrator.

How did this arise and, more importantly, and how could it have been avoided?

The will administrator was wearing two hats – one as an administrator and the second hat as a beneficiary.

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When Lotto winners fall out

The importance of who gets what

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Banking a lump sum can, however, give headaches to families as they not only grapple with newfound wealth, but also sort out how it could be distributed amongst family members.

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Mandatory and default duties explained

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The changes in trust law that came into effect on 30 January 2021 have been incorporated into estate administration law by s4B of the Administration Act 1969. It confirms that trustees' mandatory and default duties set out in the Trusts Act also apply to executors or administrators of estates. This is an important set of protections for beneficiaries of estates who may have concerns about the way an executor is administering estate assets.

Mandatory duties for executors

Executors or administrators are now subject to mandatory duties; these cannot be modified or excluded by the terms of a will. These include the duties to:

- Know the terms of the will
- Act in accordance with the terms of the will
- Act honestly and in good faith
- Act for the benefit of the beneficiaries, and
- Exercise powers under the will for a proper purpose.

All executors and administrators must be familiar with the terms of the will and follow it; they cannot do something contrary to the terms of the will unless all of the beneficiaries agree or the court has authorised the action.

They must act for the benefit of the beneficiaries. This can become difficult in some situations where executors or administrators have a close relationship with one beneficiary, and want to act in that beneficiary's interests, rather than for the benefit of all beneficiaries.

Default duties

The default duties outlined in the Trusts Act 2019 also apply to executors and administrators of wills (unless the will expressly excludes them). Some of the most relevant default duties include the general duty of care, as well as duties to:

- Invest prudently
- Not to exercise powers for the executor or administrator's own benefit
- Avoid conflicts of interest
- Not to profit
- Act for no reward, and to
- Act unanimously.

Modifying the default duties

In some circumstances, these default duties are not always appropriate to a will-maker's circumstances. For example,

often a lawyer or other professional is appointed as executor of a will, and many wills provide that professional executors can charge their usual fees, modifying the duty to act for no reward. Most professionals will not take on an executorship without being paid!

In some cases, it may be desirable for executors or administrators to invest in an asset that doesn't seem, by ordinary standards, to be a prudent investment. Such an investment may benefit the beneficiaries (or one beneficiary), such as owning a home for a beneficiary to live in; the investment may not lead to capital growth and may not earn much (or any) income but will fulfil a social need.

Investments such as the above may bring complaints from other beneficiaries who feel an executor is favouring one beneficiary's interests over their own.

Another example is where a will-maker leaves their spouse or partner a right to live in their joint home, and that home (an asset of the estate) does not increase in value. Such an arrangement, however, may be permitted by the will.

It might also be desirable for an executor who is also a beneficiary, to purchase an estate property in a personal capacity. It means that the executor's personal interest – to buy the property at the lowest price – conflict with the interests of the other beneficiaries, that is to have the property sold for the highest price. The will may allow such a purchase, although to help minimise arguments, it might require a registered valuation to guide the sale price.

Lawyers' obligations

When you're signing your will, we will explain all the modifications of, or

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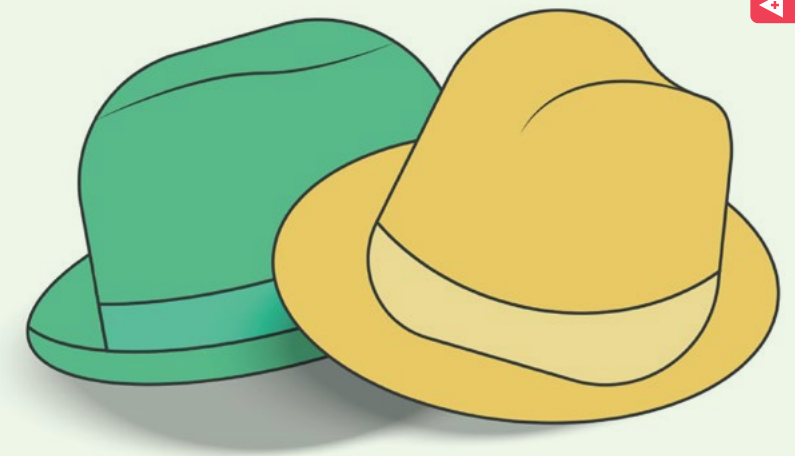
Wearing two hats in a family protection claim



Get independent advice

In a recent case[1], the High Court found that a will administrator's default in complying with a court order was so flagrant, it justified issuing an order for arrest of the administrator. How did this arise and, more importantly, how could it have been avoided? The will administrator was wearing two hats – one hat as a will administrator and the second hat as a beneficiary.

Dan Eckhout died in October 2017. Dan had named a South-African lawyer as executor in his will; that lawyer renounced the executorship. The court then appointed Dan's third wife, Karen Eckhout, as administrator of Dan's estate. Dan's will left almost all of his estate to Karen. As well as Karen, Dan was survived by five adult children, one of whom was a stepchild. The sum of 120,000 South African rand (NZ$12,000) was left in trust for the three children of Dan's second marriage. Michelle Connelly, the second child of Dan's first marriage received nothing. She brought a claim under the Family Protection Act 1955 (FPA) for some provision from Dan's estate. None of Dan's other children brought claims.

Two hats are a no-no

Karen was wearing two hats in the proceedings. Wearing her first hat, Karen was a court-appointed administrator with duties to all the beneficiaries; she also had an obligation to assist the court by making information available about Dan's finances. Wearing her second hat, Karen was the beneficiary who would lose out financially if Michelle's claim succeeded.

An administrator must be neutral in a FPA claim. Karen was definitely not neutral.

Dan's assets

It is fair to say that Karen had a somewhat laissez-faire attitude in providing the court, and Michelle, with information about Dan's finances. It was not made clear how much Dan's estate was worth.

A family trust, of which Karen was a trustee and both Karen and all of Dan's children were beneficiaries, was wound up and the proceeds distributed to Karen only. Karen bought property in Hamilton, sold the New Zealand family home and moved to Perth to look after her sick parents.

Some of these factors were enough to cause Michelle's lawyers to apply for a preservation order over the estate's assets. The application was refused even though Karen did not appear at the hearing. The court, however, required Karen to file a statutory declaration providing precise information on the nature and whereabouts of Dan's assets.

(It is interesting to note that the lawyers who initially represented Karen in each of her capacities were allowed to withdraw from the case, apparently over issues in relation to the payment of their invoices.)

Karen did not file the statutory declaration about Dan's finances in the time allowed. Time was extended and the scheduled FPA hearing was delayed. Eventually, two days after the extended deadline, Karen's new lawyers filed the statutory declaration. Karen declared she had spent about $1 million, but more than $600,000 remained to meet any judgment in Michelle's favour.

Michelle's award

The financial information Karen provided was still not precise, but the court had enough information to approximate the value of Dan's estate at $1,939,000. Karen acknowledged that Dan breached his moral duty to Michelle. Michelle said the breach warranted an award of $850,000. Karen said that was unrealistic and suggested $228,000 would be adequate. The court awarded Michelle $350,000, which it calculated represented 18% of Dan's estate, plus costs, making a total of $449,742.

Failure to pay leads to order for arrest

Karen did not pay Michelle the funds from her father's estate. Charging orders were made over the funds Karen had earlier declared she still had and would use to pay Michelle. The Australian bank in which the funds were held could only pay A$4,828. Alarmingly, this was all that remained of the previously declared $600,000+.

Frustrated with Karen's behaviour, Michelle's lawyers applied for an order for Karen's arrest; Karen did not appear at the hearing of this application. A few days later Karen emailed Michelle's lawyer saying that she would make a substantial, but not full, payment within two weeks.

The court was unimpressed by Karen's knowing failure to comply with its judgment for which absolutely no excuse, reasonable or otherwise, was offered. It issued an order for Karen's arrest. The order 'lay in court' for a month, giving Karen some wiggle room to make the required payment. If Karen failed to pay within this period, the arrest order would be acted on.

1 *Connelly v Eckhout* [2022] NZHC 293.

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When Lotto winners fall out

The importance of who gets what

Winning a Lotto prize is always a reason to celebrate; dreams can be realised and life can be more comfortable. Banking a lump sum can, however, give headaches to families as they not only grapple with newfound wealth, but also how it could be distributed amongst family members. A recent case[2] concerned a family that fell out over its $250,000 Lotto win.

The family comprised Mrs Kaniamma Winter, her children Angeline Narain and Ajnesh Chinappa, and Ajnesh's wife, Vilashni Chinappa.

In January 2009, Angeline bought a Lotto ticket. That ticket was in Mrs Winter's possession when she went shopping with her daughter-in-law, Vilashni, and checked the ticket numbers at a Lotto shop. Even though Mrs Winter said the ticket was her daughter Angeline's, she completed a claim form in her own name on the spot; Mrs Winter used Vilashni's bank account details as she could not remember her own.

When Lotto deposited the winnings, Vilashni transferred $220,000 to a bank account in the names of Mrs Winter and Angeline, leaving $30,000 in her own account.

Mrs Winter signed a gifting certificate for this $30,000; this sum was then transferred to the joint bank account that held the rest of the winnings.

Property purchase

The family, then living in a Kāinga Ora property, decided to use their Lotto winnings to buy a six-bedroom home in Papatoetoe. The deposit of $36,000 was paid from the joint bank account (in the names of Mrs Winter and Angeline), but the property was purchased in the names of Ajnesh and Vilashni Chinappa, who borrowed $288,000 to assist with the purchase. The balance of $37,046.70 that was required to settle was paid from the joint account.

The four family members moved into the property and lived there harmoniously. Angeline contributed generously to the maintenance costs and improvements – until Angeline's new partner, Daniel Prasad, moved in. When relations within the family broke down, Angeline registered a caveat; the Chinappas responded by trespassing Mrs Winter, Angeline and Daniel from the property. The three were forced to rent elsewhere for 10 years while the Chinappas enjoyed exclusive occupation of the Papatoetoe property. The situation deteriorated to the point that the Chinappas filed court proceedings in the High Court.

High Court

The High Court, "faced with completely contradictory narratives" about who owned the Lotto ticket, the status of the gifting certificate and other contributions, found that:

- Angeline owned the Lotto ticket
- Angeline had contributed 20% of the purchase price of the Papatoetoe property
- It was reasonable for Angeline to expect an interest in the property
- Angeline had contributed generously to furnish and upgrade the property, and
- The gifting certificate was drafted solely to meet the bank's requirements, the money was not intended to be a gift and it could not be used to suggest the ticket was Mrs Winter's.

The High Court awarded Angeline a 50% interest in the house, after deduction of the mortgage amount, on the basis of a constructive trust. The decision to award 50% rather than 20% was made on the grounds that Angeline had not had the benefit of occupation for 10 years. The Chinappas appealed this decision.

Court of Appeal

The Court of Appeal agreed that Angeline owned the Lotto ticket, had contributed 20% of the purchase price, and made further direct and indirect contributions to the property. Angeline's indirect contributions to the property, however, were not materially greater than that of the Chinappas, meaning Angeline could not reasonably expect a greater share than the 20% (of the full market value) she contributed under a constructive trust.

A twist in the tail

The Court of Appeal then took a very interesting step that was to award occupation rent to Angeline. This was to compensate Angeline for the 10 years the

2 *Chinappa v Narain* [2022] NZCA 183.

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Trusts Act 2019 also affects executors and administrators of wills

exclusions to, the default duties that are included in the will. We will often include executor/administrator powers that will over-ride some of the default duties, such as those we've explained in the paragraphs on page two.

We will also take reasonable steps to ensure that you understand the meaning and effect of any clause in your new will that modifies, or excludes, those default duties.

This is an additional safeguard to ensure that when you sign your will you understand the implications of the terms of your will. It also means that if beneficiaries have any concerns about the terms of your will, such as in one of the situations we set out on page two, they should have confidence that you intended to word your will in that way and you understood the consequences.

If you have any concerns about your own will, or of a will of which you are acting as a trustee or administrator, please don't hesitate to contact us. +

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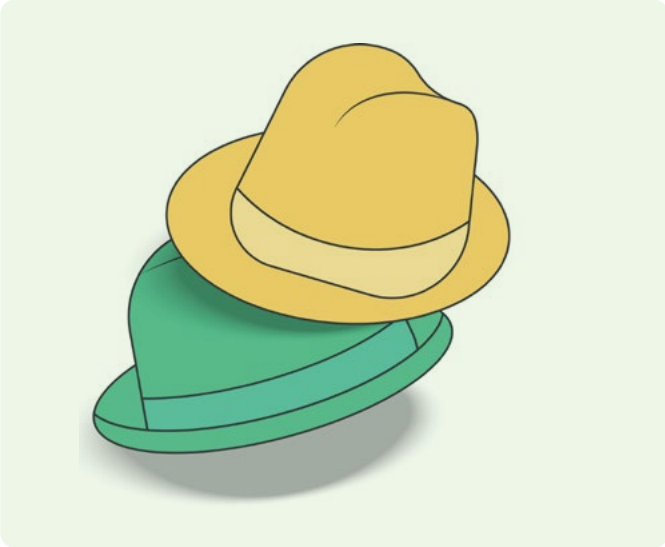
Wearing two hats in a family protection claim

In the absence of news of Karen's arrest (and it would have been newsworthy), we presume that she finally paid Michelle.

Take care if you're wearing two hats

This case serves as a warning to anyone who may be both an administrator and a beneficiary in an estate where a family protection claim is made; we can help if you're in this situation. You will need different lawyers to act for you in each of your different capacities and to help you properly differentiate the roles you have.

Unwittingly wearing two hats is capable of bringing trouble to your door. +



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When Lotto winners fall out

Chinappas had excluded her from occupying the property that was in breach of her reasonable expectation that she would both own a share in the property and be able to occupy it.

The Chinappas were directed to compensate Angeline by paying her occupation rental, calculated at 20% of the market rental for the property, for the period of her exclusion. At the average weekly rental for Papatoetoe, that would amount to an additional $67,600 – a much lower amount than that awarded by the High Court.

Take care when sharing housing

Multi-generational housing is becoming increasingly common as it provides an excellent opportunity for families to support each (for example, through providing child care and, later, elder care). Caution is needed, however, to ensure there is a written agreement that records:

- The basis on which funds are contributed to the purchase, maintenance and outgoings on the property
- Who is occupying the property, and, most importantly
- How the parties will exit the arrangement.

If you are considering multi-generational housing, do talk with us early on so we can advise on an agreement that is fair to all parties. +

The next edition of *Trust eSpeaking* will be published in **Autumn 2023**.