Trust eSpeaking

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Welcome to the Spring edition of *Trust eSpeaking*. We hope you find these articles thought-provoking, as well as being 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.

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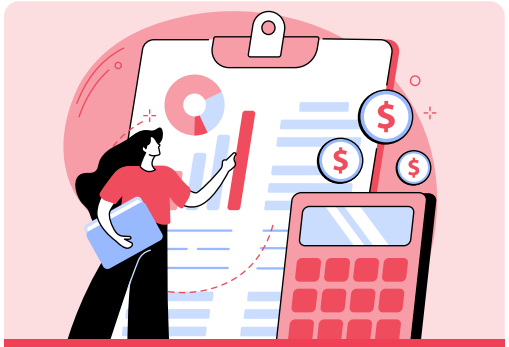

The office of executor: does it ever end?

An executor is named in a will as the person the will-maker appoints to administer their estate after their death and to carry out the terms of their will.

Executors have a number of responsibilities. Their first task is usually to locate the deceased's most recent will and, through their lawyer, apply for a grant of probate, so they have authority to manage the estate.

Once the executor has that authority, they must identify estate assets and bring them into the estate. This means putting those assets into the name of the estate, closing bank accounts, withdrawing KiwiSaver, selling shares and, in many cases, selling land or property.

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Enduring Power of Attorney

Is the attorney carrying out their role correctly?

If your family member is losing capacity and has an Enduring Power of Attorney in place, you will be reassured that their attorney is working in your loved one's (the donor's) best interests.

Very occasionally, however, this isn't the case. If you are suspicious that the attorney is not working in the donor's best interests, you should gather information about what the attorney is actually doing.

Ask them for a broad overview of the steps that they are taking on behalf of the donor and discuss with them any concerns that you might have.

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Trustees signing unlimited bank guarantees?

Danger of breaching duties

When you buy a house in your own name, and you need a loan to do it, you will be the borrower, the owner and the security provider (mortgagor).

In some situations, these are different people: the owners might be the trustees of a trust, but the borrower is an individual. There are good reasons for this sort of structure, particularly from a relationship property or creditor protection perspective. This does, however, make things complicated from the lender's perspective, and can sometimes cause them to inadvertently ask trustees to breach their duties.

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What is an executor?

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Executors have a number of responsibilities. Their first task is usually to locate the will-maker's most recent will and, through their lawyer, apply for a grant of probate, so they have authority to manage the estate. Where a will doesn't name an executor, or they are unwilling or unable to take on the role, an application must instead be made for a grant of administration, and that person will be known as an administrator. Their role is the same as an executor's role.

Once the executor has authority to do so, they must identify estate assets and bring them into the estate. This means putting those assets into the name of the estate, closing bank accounts, withdrawing KiwiSaver, selling shares and, in many cases, selling land or property. Sometimes executors need to recover estate assets by filing claims in court. Executors are also responsible for paying any estate debts and liabilities.

Executors must also comply with any other legal obligations, such as keeping detailed records, providing information to certain people, filing tax returns and following any court orders.

1 *Schischka v Schischka* [2023] NZHC 2275 at [60].

Is an executor a trustee?

An executor's role is similar to, but not the same as, the role of a trustee. Three key similarities are:

1. Executors and trustees must both act in the interests of the beneficiaries, rather than in their own interests
2. They must follow the terms of the will or trust document, and
3. They cannot be paid for their role unless the will or trust document allows this.

An executorship typically lasts until all of the estate assets have been identified and brought into the estate, all debts have been paid, and any litigation about the validity or terms of the will, or how the estate should be distributed, has finished.

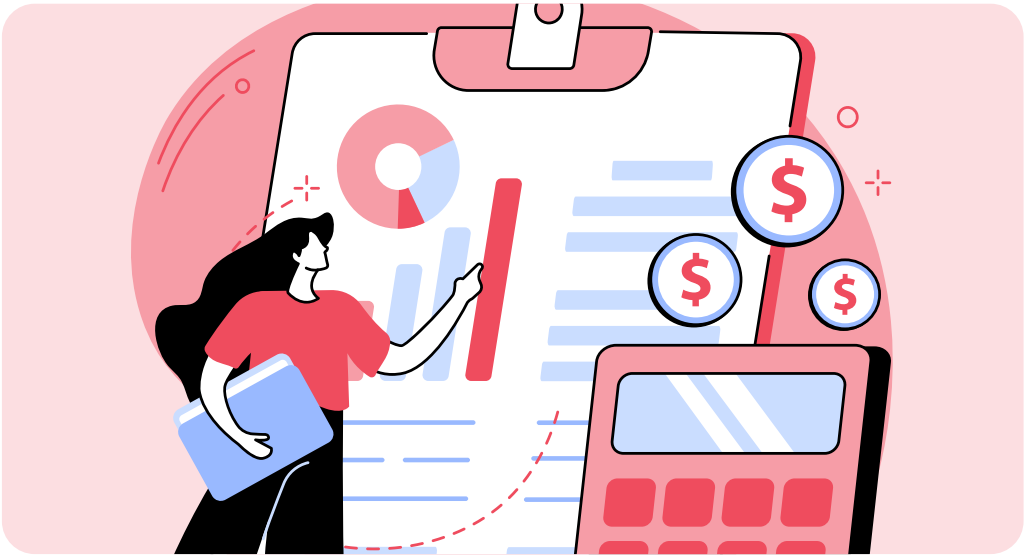
After all those steps are completed, an executor 'transitions' to become a trustee. At that stage the executor has become a trustee and holds the estate assets on trust for the beneficiaries of the estate. Once certain time limits have passed, the estate assets will usually need to be distributed to the beneficiaries.

Distribution

An executor's role is often thought to come to an end when the estate assets are distributed to the beneficiaries. This is known as 'final distribution.' Usually, there is nothing left for an executor to do at this point.

However, the role of executor (or administrator) never truly comes to an end. Unless an executor or administrator is appointed by the court for a limited period or purpose, it is an appointment which lasts for life. After the final distribution, the executor role essentially becomes dormant as there are no more assets for the executor to administer. In some cases, though, that will change unexpectedly.

As set out in a 2023 case,[1] further assets might be discovered which need to be



administered by an executor or administrator. This may happen when the will-maker:

- Had assets in multiple countries, such as bank accounts, some of which were not discovered immediately after their death
- Was entitled to an inheritance, but payment was delayed for many years (for example, until a house was sold or a different relative died), or
- Became entitled to an insurance or compensation payment some years after their death, but which was not originally known about at the time of their death (for example, as an insurance policy was held overseas).

When an estate receives new assets, this will revive the role of the executor or trustee, even if that role had previously come to an end.

The good, and the bad

An executor's role can also be revived for less happy reasons. Sometimes a new liability is discovered after all the assets have been distributed; the executor is responsible for dealing with this. As long as the executor has advertised for creditors under section 79 of the Trusts Act 2019, they will usually be protected from being personally responsible for paying the liability.

This illustrates the importance of attending to the estate administration thoroughly, and taking legal advice before making a final distribution – or what you might think is a final distribution!

Conclusion

Being an executor is a big responsibility, and it is not always over when you think it has been completed. If you are considering who to name as executor in your will, you should be aware that the role is very important and can last longer than expected.

If you are named as an executor, think carefully before accepting the role, and to take legal advice if you are unsure about anything. +

Enduring Power of Attorney

Is the attorney carrying out their role correctly?

If your family member is losing capacity and has an Enduring Power of Attorney (EPA) in place, you will be reassured that their attorney is working in your loved one's best interests. Very occasionally, however, this isn't the case. In this article, we look at how an EPA works and what can be done if you believe the attorney is not doing their job properly.

Enduring power of attorney

An EPA is a legal document that allows someone else to step into another's shoes and make decisions on their behalf if they lose the capacity to make important decisions for themselves. An attorney is usually a close relative or trusted friend of the person losing capacity (the donor).

There are two types of EPA: for personal care and welfare, and for property.

An EPA for personal care and welfare allows the attorney to make decisions on behalf of the donor about things such as medical treatment and living situations – including residential care.

An EPA for property allows the attorney to make decisions about a person's assets and allows them to directly access bank accounts, selling property, making payments on the donor's behalf and so on.

EPAs can be a very effective way of ensuring that decisions can be made in a timely and cost-effective way for the benefit of the donor. An EPA also allows the donor to decide, in advance of losing capacity, who they want making decisions on their behalf should the need arise. But, as an EPA provides the attorney with significant powers, an EPA can be misused or abused.

Getting information

If you are suspicious that the attorney is not working in the donor's best interests, you should gather information about what the attorney is actually doing.

Ask them for a broad overview of the steps that they are taking on behalf of the donor and discuss with them any concerns that you might have.

When the donor made the EPA, one of the questions they will have been asked is whether they wanted their attorney to consult with other family members before making decisions, or whether they wanted their attorney to provide information to other family members.

If you have not seen the EPA document, you can ask if either of those provisions were included. If the donor made it a requirement that the attorney either consults with you or provides information to you, then that will give you enhanced powers to obtain important information.

If the donor did not include a requirement that the attorney consult with you or provide you with information, you can still ask for an overview; many attorneys will be happy to provide that.

But if you are not receiving information and you have ongoing concerns – what can you do?

Could the attorney transfer assets to themselves?

As an attorney has the ability to access the donor's assets, sometimes issues can arise where the attorney will act for their own benefit, and not the benefit of the donor. They may transfer money to themselves, withdraw and fail to account for cash, or make personal use of the donor's property, for example living in their property without paying rent or making use of their car.

If you are concerned that this is happening to your family member, you can apply to the Family Court under the Protection of Personal and Property Rights Act 1988 to have the court review particular transactions or decisions made by the attorney. It is also possible to apply to the Family Court to have the attorney removed and replaced if they are acting outside of the powers given to them by the donor.

The court process is not straightforward, but it can provide effective remedies to protect the donor and their assets from abuse.

Assets taken by the attorney after donor dies?

It is not uncommon for an attorney's actions to come to light only after the death of the donor, usually when there is significantly less in the donor's estate than was expected.

The Family Court can review an attorney's decisions either before or after the donor's death. It is not necessarily too late to recover assets that the attorney has transferred to themselves without authority.

Conclusion

There are steps that concerned family members can take if they are suspicious about the actions of a donor's attorney. These include obtaining information, recovering misappropriated assets and having the attorney removed if needed.

If you are unsure of the status of your family member's affairs, don't hesitate to contact us – we are here to help. +

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In some situations, these are different people. For example, the owners might be the trustees of a trust, but the borrower is an individual. There are good reasons for this sort of structure, particularly from a relationship property or creditor protection perspective. This does, however, make things complicated from the lender's perspective, and can sometimes cause them to inadvertently ask trustees to breach their duties, as this article will explore.

Borrowing vs security

Whoever buys a property, be that you or your partner, a company or the trustees of a trust, as the owners you are the only ones who can give the lender a mortgage. The reason is that you cannot grant a mortgage, which is a type of security that is registered against a title to 'real property' (another word for land or 'bricks and mortar') unless you are named on the record of title as the owner or owners of the property.

There are a number of reasons why the borrower (person borrowing the money from the lender) and the security provider (person giving a mortgage or a guarantee) might not be the same person:

- For asset protection purposes you will usually be the borrower, while the trustees will provide a mortgage by way of security, and there will be a guarantee linking them together (sometimes called an 'interlocking guarantee')
- If a child is borrowing money to buy a house and their income is deemed insufficient to service a mortgage, a parent might guarantee their lending, or
- If a company borrows 100% of the purchase price of a property, the shareholders (and sometimes the director/s), will be required to sign a guarantee (and often mortgage security over another property as well).

Trustee duties

When trustees are asked to provide security, whether in the form of a mortgage, a guarantee (or both), they must be mindful of their duties to all of the beneficiaries of a trust. These include duties:

- To invest prudently, and in doing so must exercise the care and skill that a prudent person of business would exercise in managing the affairs of others[2]
- Not to bind or commit trustees to future exercise of discretion:[3] they may, for example, be called on to honour the guarantee in the future by paying the beneficiary's lending, and
- To be impartial as between the beneficiaries:[4] Will giving the guarantee be unfairly partial to one beneficiary if the trustees cannot do the same for another?

Trustees also have an overarching duty of care which encapsulates hundreds of years of case law[5] which makes it clear the trustees' duty is to hold or deal with trust property for the benefit of the beneficiaries as a whole.

Unlimited guarantees

An unlimited guarantee states that the guarantor is liable for all amounts the borrower owes, however much that is, until every cent owing has been repaid, or the guarantor is released from their obligations.

As an example, if a beneficiary of a trust borrows $750,000 to buy their first home, and the trustees of the trust sign an *unlimited* guarantee, the trustees' liability can extend to:

- The $750,000 loan
- The borrower's car loan they take out a year later
- The new loan for renovations taken out three years after that, and/or
- The borrower's credit card debt.

This could breach a number of the trustees' duties.

Best practice

Trustees should not sign an *unlimited guarantee* without first considering their duties to all the beneficiaries. In many cases, consideration of their duties will lead trustees to realise that it would be more prudent to sign a *limited guarantee*.

While all the major lenders are familiar with and will grant a limited guarantee, they will issue an unlimited guarantee by default unless you ask specifically.

If you think that as a trustee you will be asked to guarantee a beneficiary's lending, make sure you ask for that to be a limited guarantee. +

2 Section 30, Trusts Act 2019.
3 Section 33.
4 Section 35.
5 Section 29.

The next edition of *Trust eSpeaking* will be published in **March 2026**.