



Protecting the elderly

Using an enduring power of attorney

People often find themselves looking after someone else's money or property under an enduring power of attorney (EPA) but they are unsure what they are supposed to do. A recent High Court decision¹ demonstrates the risks of ignoring the strict duties which are imposed. Although this is an actual case the names have been changed for privacy reasons.

Arnold was getting on a bit. His wife had died, one of his two sons had died also and Arnold was no longer able to live alone. Arnold had signed an EPA appointing his surviving son, Bert, as his property attorney. The High Court judge who heard this case explained what happened next:

After the death of his wife an elderly man goes to live with his son and daughter-in-law. All his assets in the world come to a little under \$330,000. When he goes into a rest home 30 months later, he has just \$11,500. When he dies,

another three years later, just \$1,400. The son has spent his father's money. With, he says, his father's blessing. But the administrator of the father's estate says the expenditure is tainted with undue influence and must be repaid.

The judge decided that Bert had abused his position of trust. He had misused his authority under the EPA and taken advantage of his ability to control Arnold's finances when Arnold was elderly and living with Bert. Bert had used this situation to his financial advantage.

This case came to court because Arnold's other son had died leaving a son of his own. This grandson asked for an independent trustee to be appointed for the estate in place of Bert. The grandson's concern was that, because his grandfather's estate had nearly all disappeared, he would not be receiving the half share of the estate which was to come to him under his grandfather's will. A claim was filed in the High Court on behalf of the new administrator of Arnold's estate.

Bert's reply was that his father wanted him to use the money in this way. Arnold was grateful for Bert's care and wanted him to have the money. The judge decided that Bert had exerted undue influence and had abused the trust placed in him. Bert was ordered to reimburse his father's estate.

¹ *Public Trust v V* [2015] NZHC 1928

IN THIS ISSUE >>

- 1 Protecting the elderly: Using an enduring power of attorney
- 3 Easements: You want to do what on my land?
- 4 *Ni Hao*: Doing business with Chinese investors
- 5 Drinking and driving – don't do it
- 6 Postscript

Strict duties for EPA attorneys

This case is a good illustration of what can go wrong when people, who are looking after property or funds for someone else, assume that they can simply use the money as they think fit.

The law imposes strict duties on people who are managing money or property for someone else. These are called 'fiduciary duties', that is, duties of trust and good faith.

People in these situations – EPA attorneys, trustees and executors – must act selflessly and not in their own interests. People who are acting in a fiduciary role are only allowed to make a profit or be paid for their efforts if this is specifically authorised.

Attorneys appointed under an EPA aren't obliged to send out annual accounts – or even to keep any financial records at all – unless the EPA sets out some specific requirements. Nevertheless attorneys should think carefully about what financial records they keep. It's often very easy for an unhappy family member to make allegations of misuse of money. Refuting these allegations is difficult without proper records.

The law imposes strict duties on people who are managing money or property for someone else. These are called 'fiduciary duties', that is, duties of trust and good faith.

Sadly, where one family member is appointed under an EPA, others in the family may feel left out and suspicions may start to form. This is a particular problem where some family live a distance away, perhaps overseas. It's easy to assume the person who is on the spot will be able to take advantage of the situation. That is how unfounded accusations can arise.

These types of family disputes can be bitter and unpleasant. It's important to try to avoid unnecessary suspicions wherever possible. The best answer is to keep other members of the family fully informed if an elderly person relies on you to manage their finances or property.

Exploitation of elderly people

Misuse of EPAs and other positions of trust are examples of a wider problem of elder abuse in our community. As our population ages and people live longer, the possibility of mistreatment of elderly people increases. This is a real concern. Sometimes the abuse may be physical but, more often, we see examples of financial abuse or exploitation.

One of the most common ways elderly people can be manipulated is in relation to their wills. Sadly as people age they may form unfair opinions about their family and others close to them. An elderly person who previously always wanted

to treat all of her children equally may suddenly decide to favour one or two over the others.

People are free to make their will as they wish and there's no obligation to be logical or fair. However, where a will is obviously the result of excessive pressure being applied to an elderly person then the court can declare the will invalid because of 'undue influence'. Because of these risks, lawyers will usually insist on seeing elderly people alone when they interview them. Family members need to understand that it's in their best interests that elderly parents are left free to discuss their will with their lawyer in private. Having a family member present 'to explain things' may simply mean that the will is later ruled to be invalid.

Similar problems can arise with EPAs. If there has been undue influence then the EPA may not be valid. In recent years Parliament has moved to tighten up the process for signing EPAs. It's now necessary to have an independent witness in most cases.

Unfortunately imposing extra requirements about witnessing EPAs has simply created increased cost rather than solving the problem. Often, as in the case mentioned at the start of this article, the problem arises later down the track. When parents are no longer able to make decisions for themselves they are very vulnerable to financial exploitation. For family members who are in difficult financial circumstances it can be very tempting to help themselves to some of their parents' money.

Strict legal duties apply

In law there are quite clear duties imposed on a person who is given authority to act under an EPA (an attorney). He or she must act only in the best interests of the person who gave the power of attorney (the donor).

In the case mentioned at the start of this article the judge explained the duties as follows:

The attorney must act with absolute openness and fairness to the donor, exercise reasonable care (including acting with reasonable prudence in managing the donor's financial affairs), keep personal and fiduciary property separate, and avoid conflict of interest and duty to the donor.

The judge also went on to comment that, even if there had been no EPA, Bert would have owed similar duties to Arnold simply because Arnold was elderly and vulnerable, and Bert had assumed the responsibility for his care and finances. Bert was in a position of trust because of this and high standards are expected in these circumstances.

The unfortunate thing is that the only way to enforce these obligations is by way of very expensive court proceedings. Arnold's grandson has incurred thousands of dollars in legal fees and Bert fought the case strongly. At most the grandson can expect to recover about half to two-thirds in costs from Bert. Sadly justice can be slow and expensive. ✱



Easements

You want to do what on my land?

A property owner's home is their castle. There are many ways, however, in which the rule of your domain can be reined in. Here, we discuss easements and what the implications are for you as a landowner granting an easement over your property.

An easement is the grant to another person of the right to use your land. Such right of use is usually granted to an adjoining property owner and is limited to a certain area, and the purpose for which it can be used is rigorously defined.

Common examples of easements include the grant of access over your land, being a 'right of way', and the right to bring water over your land or drain it away, being the 'right to convey' or 'right to drain water'. Other common easements create rights to cross over your land for things such as electricity, telecommunication cables, and gas or sewage pipes.

As your land is your kingdom, the granting of an easement over your land to another must be recorded in writing, and is registered on both your and their land titles. When you purchase property, as part of the legal process, we will review any easements on your land and discuss with you their effect on your property.

An easement is in perpetuity

It's important to understand that an easement is granted in perpetuity or, in other words, forever. Once registered on the title to your land, the easement runs with and binds each successive owner to your land.

It's common to find easements that date back over a century and which are still used daily for the purpose for which they have been granted.

Another common form of easement is for the right to use your land by someone other than an adjoining property owner, such as a local council, power or other utility company. This is an 'easement in gross' and still binds and runs with your property in perpetuity.

Issues around easements

Issues that arise with easements are what rights of use are – or aren't – given to the respective parties, be it the affected owner's land called the 'servient tenement', or the 'dominant tenement' which is the landowner or party who holds the benefit. These rights are contained in the written definition of the easement which is registered on the land.

Commonly, requests for new easements are made by power companies seeking the right to run power lines over or under rural land. These easements allow for power lines and supporting infrastructure to be installed and maintained, and are frequently of no direct benefit to the affected landowner.

If you're considering granting such an easement, it's essential to understand what is being lost and if anything is being given or compensated for that loss. It's also crucial to understand what rights are being given for the use of the land. In some electricity company easements, there's the right for the company to upgrade the proposed power lines, at some future date, to heavy grade commercial supply lines if they desire. This is effectively creating a future-proofed supply corridor for the electricity company over the future landowner's property. Any rights for the use of the land once granted, remain unchecked, binding the land forever.

An easement is a binding commercial contract which, once entered, is enforceable against the current and future property owners. When being asked to grant an easement, it's important that you seek advice to fully understand the implications and effects it will have on you and your land, now and in the future. ✨

Ni Hao: Doing business with Chinese investors

We've all seen the headlines about growing Chinese investment around the world and New Zealand is certainly no exception. Although you may already have been in business for years and have a great deal of experience, if you want to be truly successful with a Chinese counterparty then there are some key cultural differences which you should take on board. With that in mind we have set out some points to be aware of when you're dealing with Chinese investors.

Key cultural differences

Many Asian cultures emphasise indirect communication, particularly if there is a problem. This can be frustrating for Westerners who would prefer just to 'get it on the table' and discuss. An email worded to state, '... we value the fact that we are equal partners ...' may be phrased that way because they are not feeling like an equal partner and are hoping the situation will improve. That subtlety may well be completely lost on the Western recipient who may be later surprised to find out that all is not as it seemed.

You can deal with a situation such as this by spending time asking questions of the other side and seeking to really understand what they are thinking. If you get a response which seems indirect then that's a signal that you should follow up with other questions.

Clear communication

This cultural difference also flows into the next point which is that a good relationship should be worked on before closing a business deal. You may have an agreement and have already popped the cork. While having a signature on the page is important, you also need to work hard to understand each other and to ensure that there's clear communication. If the potential business justifies it, a trip to China to meet with people on their home turf will go a long way towards establishing that trust.

We often see people stumble as they forget that it is important to speak more slowly and more clearly than you may do when speaking with your friends at home.

Our Kiwi accent can throw foreigners as, for better or worse, most people from overseas grew up watching American TV and movies. Imagine if you were learning Chinese how



hard it would be if people spoke quickly: that may alter your perspective.

As well, we tend to litter our speech with slang expressions which totally mystify foreigners. Keep your speech simple and straightforward without being too stilted. However, don't throw the baby out with the bathwater (as it were!) on this one; a unique way of expressing a concept may make everyone laugh and lighten the mood.

Is it necessary to start studying Chinese? Not really, but if you can say 'hello' at least, it shows that you have made an effort to learn some phrases. (Hello is *ni hao*.) No one will expect you to be fluent in Chinese and, even if you were, they may prefer to speak in English.

While Chinese language skills are not essential, having some understanding of China will also make you a more sensitive business partner and earn you respect. If you presume that a Beijing investor is similar as someone from Southern China, this will reveal your ignorance pretty quickly. Someone from Southern China may be a Cantonese speaker as that language is more common there. Having said that, asking open questions about where your business partner is from will be a good way to understand their background and they will very likely be happy to tell you more.

A little geography

Referring to 'Asia' when working with a Chinese investor, for example, is not appropriate. Asia is a vast region brimming with diverse histories and cultural backgrounds. Taking some time to research your counterparty and their origins will definitely pay dividends.

All of this boils down to the fact that if you're working with a Chinese investor, clear communication is vital and assumptions can lead to misunderstandings developing.

It's important to speak and write as clearly as you can and listen closely to the messages you are receiving. If these simple steps are followed, then you will likely find a lot more success in your dealings with Chinese investors. *

Drinking and driving – don't do it

Drink driving is one of the key causes of road accidents in New Zealand. With an increasing death toll on our roads, catching drink drivers is a priority for the police. No one wants the police on their doorstep with the dreadful news that a loved one won't be ever coming home.

The drink driving laws are set out in the Land Transport Act 1998.

It's an offence to drive if your breath alcohol limit exceeds 250 micrograms of alcohol per litre of breath or your blood alcohol limit exceeds 50 milligrams of alcohol per 100 millilitres of blood.

New Zealand has a zero alcohol limit for drivers under the age of 20.

It's an infringement offence if your breath alcohol level is between 250 mcg and 400 mcg or if your blood alcohol level is between 50 mg and 80 mg. For these levels you would be fined and suspended from driving.

If the roadside breath test shows more than 250 mcg you must go with a police officer for an evidential test. You may have the choice of a blood test. There are various legal procedural requirements around this process.

If it's a first or second offence you'll **generally** get a conviction, a fine and a mandatory disqualification from driving for a minimum of six months. If it's your third or subsequent offence, you're likely to get a higher fine and mandatory disqualification for a minimum of a year. Recidivist drink drivers, those who keep reoffending, may find themselves off to prison.

The court has the discretion to not impose the mandatory disqualification if there are special reasons relating to the offence. An example may be a life-threatening situation when someone is driving a seriously ill person to the hospital.

Even if you're not actually driving

The police have successfully prosecuted people sitting in their cars but not actually driving. When it's not clear-cut as to whether someone has been driving or not, inferences may be drawn from the facts. In one case, a driver was found asleep in the driver's seat at 4:00am. The headlights were on and the keys were in the ignition. His breath reading was 1,121 mcg of alcohol. The High Court held that an inference could be drawn and the driver's conviction was upheld.²

Last year, a conviction for driving with excess breath alcohol (third or subsequent) was overturned on an appeal.³ Mr Perry was sitting in the driver's seat of his car that was parked 10–15 minutes from home. He said he was in his car waiting for his partner to collect him. The Court of Appeal overturned his conviction on the basis his explanation was acceptable as a reasonable possibility.

Practical advice

The best advice when it comes to drink driving isn't legal, it's practical. Be aware of the limits and always exercise caution when you're driving after drinking alcohol. The cost of a taxi fare or staying over with friends should always be the preferred option, or simply don't drink at all when you're out.

*One more glass of wine is never worth the risk. **

NZ LAW Limited is an association of independent legal practices with member firms located throughout New Zealand. There are 59 member firms practising in over 70 locations.

NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills, information and ideas whilst maintaining client confidentiality.

Members of NZ LAW Limited

Allen Needham & Co Ltd – Morrinsville
Argyle Welsh Finnigan – Ashburton
Bartrop Graham – Feilding
Berry & Co – Oamaru, Queenstown & Invercargill
Boyle Mathieson – Henderson
Breaden McCardle – Paraparaumu
Corcoran French – Christchurch & Kaiapoi
Cruickshank Pryde – Invercargill, Queenstown & Gore
Cullinane Steele – Levin
Daniel Overton & Goulding – Onehunga & Pukekohe
DG Law Limited – Panmure
Dorrington Poole – Dannevirke
Downie Stewart – Dunedin & Balclutha
Dowthwaite Law – Rotorua
Duncan King Law – Epsom, Auckland
Edmonds Judd – Te Awamutu & Otorohanga
Edmonds Marshall – Matamata
AJ Gallagher – Napier
Gawith Burrigge – Masterton & Martinborough
Gifford Devine – Hastings, Havelock North & Waipawa
Gillespie Young Watson – Lower Hutt & Upper Hutt
Greg Kelly Law Ltd – Wellington
Hannan & Seddon – Greymouth
Horsley Christie – Wanganui
Innes Dean-Tararua Law – Palmerston North & Pahiatua
Jackson Reeves – Tauranga
James & Wells Intellectual Property – Hamilton, Auckland, Tauranga & Christchurch
Johnston Lawrence Limited – Wellington
Kaimai Law Bethlehem – Bethlehem
Knapps Lawyers – Nelson, Richmond & Motueka
Koning Webster – Mt Maunganui
Lamb Bain Laubscher – Te Kuiti
Law North Limited – Kerikeri
Le Pine & Co – Taupo, Turangi & Putaruru
Lowndes Jordan – Auckland
Mactodd – Queenstown & Wanaka
Malley & Co – Christchurch & Hornby
Mike Lucas Law Firm – Manurewa
Norris Ward McKinnon – Hamilton
David O'Neill, Barrister – Hamilton
Osborne Attewell Clews – Whakatane
Parry Field Lawyers – Riccarton, Christchurch & Hokitika
Wayne Peters Lawyers – Whangarei
Purnell Jenkinson Oliver – Thames & Whitianga
Rennie Cox – Auckland & Whitianga
Chris Rejthar & Associates – Tauranga
RMY Legal – New Plymouth
RSM Law Limited – Timaru
Sandford & Partners – Rotorua
Sheddan Pritchard Law Ltd – Gore
Simpson Western – Takapuna, North Harbour & Silverdale
Sumpter Moore – Balclutha & Milton
Thomson Wilson – Whangarei
Till Henderson – New Plymouth & Stratford
Wain & Naysmith Limited – Blenheim
Walker MacGeorge & Co – Waimate
Welsh McCarthy – Hawera
Wilkinson Rodgers – Dunedin
Woodward Chrisp – Gisborne

² *Danaher v Police* HC Auckland CRI-2007-404-97, 3 September 2007

³ *Perry v Police* [2015] NZHC 2810

Postscript

Proposed business tax changes

In April, the government announced a package of proposals to simplify business tax, many of which will benefit small and medium-sized businesses. Some of the key tax proposals include:

- » A new pay-as-you-go option for paying provisional tax for small businesses with less than \$5 million annual turnover. This will give small businesses an alternative to the current system which requires three annual provisional tax payments. To take advantage of the proposal, businesses will need to use a cloud-based accounting system, such as Xero, linked to the Inland Revenue.
- » Changes to the 'use-of-money interest' rules that govern the interest paid to taxpayers for overpayment of tax and interest charged for underpayment. The practical effect is that the changes will eliminate or reduce use-of-money interest for most taxpayers.
- » Contractors will be able to elect their own withholding tax rate to better reflect their circumstances and reduce the impact of provisional tax.
- » Certain penalties will be removed, including the current 1% monthly penalty for new debt. However, immediate penalties and interest charges for late payments will still apply.

New legislation is likely to be introduced later in 2016 and most of the proposals have a planned implementation date of 1 April 2017. *

Smoke alarms and insulation now required for rental properties

Landlords are now required to have smoke alarms and insulation with the passing of the Residential Tenancies Amendment Act 2016 in late May.

From 1 July 2016 all tenanted properties will be required to have smoke alarms, and insulation will be compulsory in social housing from 1 July 2019.

The government says these new provisions will cover the 120,000 rental properties which do not yet have smoke alarms and the 180,000 that are uninsulated. The new legislation also covers the enforcement of existing regulations around heating, dampness, electrical safety, plumbing, sanitation and ventilation. *

Health & safety conference in September

If you're a regular reader of *Fineprint*, you will know we are strong advocates of the new Health and Safety at Work Act 2015 which came into force on 4 April this year.

The Health and Safety Association of New Zealand (HASANZ) is holding its first conference from 7–9 September 2016 at Te Papa, Wellington. It wants to encourage industry professionals and businesses to join forces, collaborate and build the competence and reputation of workplace health and safety professionals in New Zealand. HASANZ is the umbrella organisation representing workplace health and safety professions in New Zealand. To find out more, go to www.hasanz.org.nz *



DIRECTORS

Peter Attewell
Stephen Clews

ASSOCIATES

Tiffany Wren
Carolyn Cooper

OAC Limited trading as

**OSBORNE
ATTEWELL CLEWS**

Top Floor
Concordia House
17 Pyne Street
Whakatane 3120

PO Box 641, DX JA31503
Whakatane 3158

T: 07 307 0570
F: 07 307 1052

E: lawyers@oac.co.nz

www.oac.co.nz