TRUSTS & ESTATES LAW

A new constraint on testamentary freedom

By Anthony Grant

Today's column deals with two recent developments in trusts and estates law, and comment on an interesting snippet from the California courts.

Should a person be required by law to leave assets to family members?
There are three broad approaches to this subject.

Several civil law jurisdictions and some Muslim countries have "forced heirship" regimes, where assets must be left in designated proportions to different categories of dependants.

A second regime allows complete freedom of testation.

A third regime says various categories of relatives can ask a court to make orders for financial provision. New Zealand's legislators went down that path with the Family Protection Act 1955.

A parent in New Zealand who wishes to cut relatives out of an inheritance can try to avoid this regime by settling assets on trusts or by giving them away during his or her lifetime, a development that has been facilitated by the abolition of gift duty.

The High Court has now held that when assets are settled on a trust, the trustees can be required to make them available to a limited number of claimants.

The case recording this development is *A, B & C v D & E Limited* [2019] NZHC 992, 31 May 2019, a decision of Johnston AJ.

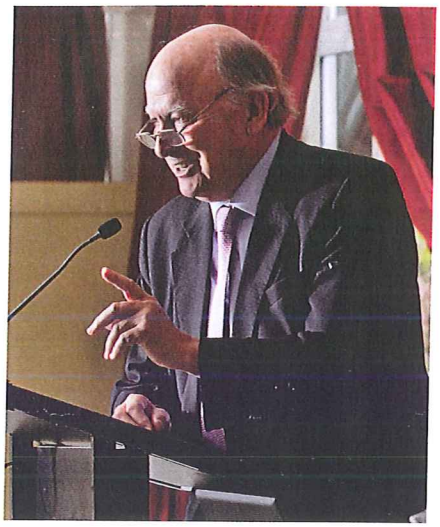
He has held that parents owe a fiduciary duty to their children and the disposal of the assets to a trust may be a breach of that obligation.

The existence of a fiduciary duty to children during their childhood is said to be clear, and it seems if minors have deliberately been left with nothing because of settlements on trusts, they may have good claims against the trustees.

If the children are no longer minors, but were abused by a parent with a consequence that the abuse "has had a deleterious effect on the children in later life", then the trustees may have a fiduciary obligation "to provide for [the children's] economic interests" during their adulthood.

What of solicitors who facilitate the alienation of parental wealth into trusts or via gifts? In the *A, B & C* case it was argued the lawyers who created the trust were personally liable to the disadvantaged children on the grounds of "knowing assistance".

This claim failed on the grounds that the lawyers had not been aware of the abuse the children had suffered and they could not therefore have "knowingly assisted" the alienation of the parental property.



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But had the lawyers been aware of the traumatic family background, they could have been personally liable to compensate the children for the loss they suffered through the alienation of the parental property into the trust.

Trustees resisting removal may have to pay indemnity costs
Applications to remove trustees are common.

With the popularity of having solicitors and accountants as trustees, such applications often involve them.

The costs have not generally been much of a deterrent to defendants but that has now changed. The Court of Appeal has required a solicitor to pay indemnity costs for a successful application to remove him.

From the way the Court of Appeal's judgment is written, it appears a requirement to pay indemnity costs may now be the new normal.

Indemnity costs are rare in the High Court but if they are to become the standard costs award for trustees who are removed, it is likely to make trustees more willing to resign, rather than run the risk that they will be personally liable for an award of indemnity costs.

The case is *Jones v O'Keeffe* [2019] NZCA 222, 13 June 2019. The solicitor-trustee was directed to reimburse the trust for the costs the plaintiff had incurred on an actual and reasonable solicitor/client basis.

Sanctions for delays in delivering judgments
The next topic does not involve trusts and estates but is concerned with an aspect of a well-functioning legal system.

I write about it because all lawyers have an interest in this.

Some years ago I wrote an article critical of the fact that some judgments were being delayed for up to two years. Although no one these days would think it strange to criticise such delays, I was publicly rebuked by both the Chief High Court Judge and the Council of the Bar Association for doing so. (I terminated my membership of the association in response.) I am reminded of Oliver Wendell Holmes' statement, "The vindication of the obvious is sometimes more important that the elucidation of the obscure."

Times have changed and the courts now regularly publish statistics on the timeliness of judicial decisions.

The usual method of requiring judges to produce timely decisions is, presumably, persuasion. I assume there is a stronger sanction: that a judge who is known to be tardy with decisions cannot expect to be considered for judicial promotion.

In California, the sanction for delay is extreme. There, Superior Court judges who fail to deliver judgments within 90 days have their salaries cut off.

In a recent case, a judge who stood to lose his salary for failing to comply with the 90-day deadline claimed in affidavits that he was up-to-date with his case work when he wasn't. In one case, a judgment had been delayed for more than 14 months.

It speaks poorly of a legal system when the State has to resort to withholding salaries to try to get judges to comply with the rules that govern them.

But legislators in California obviously think sanctions of this severity are needed if judges are to provide judgments on time.

Anthony Grant is a barrister specialising in trusts and estates