

TRUST LAW

Does an enduring power of attorney authorise an attorney to act on a trustee's behalf?

By Anthony Grant, *Trusts & Estates Litigator*

As dementia strikes more and more people, there is a temptation for the holder of an enduring power of attorney (EPA) to use it to remove an incapacitated trustee and to take actions on the incapacitated trustee's behalf.

But can an EPA be used in this way? That was the question that was asked in *Godfrey v McCormick* [2017] NZHC 420.

The trustees of a family trust were a husband, his wife and their solicitor. The wife developed dementia and the husband purported to use an EPA that his wife had given him to remove her as a trustee.

The remaining two trustees then sought an order for the trust's property to vest in them both.

Nation J held (at para [7]) that, for the wife to lose her status as a trustee, "she must have validly retired as a trustee" and he held that she had not validly retired (at para [8]):

"An EPA does not give the attorney the power to act for the donor in relation to the donor's obligations, rights and powers as a trustee."

He said the powers granted by an EPA are governed by Part 9 of the *Protection of Personal Property Rights Act 1988* (PPPR Act or PPPRA). The PPPR Act authorises an attorney to deal with the donor's "property".

Although the definition of "property" in the PPPR Act does not refer to "property held on trust", Nation J held (at para [9]) that "property the donor holds on trust is not included in 'his or her property' and as such, trustee powers are not exercisable by a donee of an EPA."

He said that LINZ accepts this position and that it "has recently made it clear that [it] will not accept documents executing the transfer of trust property when they are signed by an attorney on behalf of a trustee who has lost capacity" (para [12]).

He continued at para [13]:

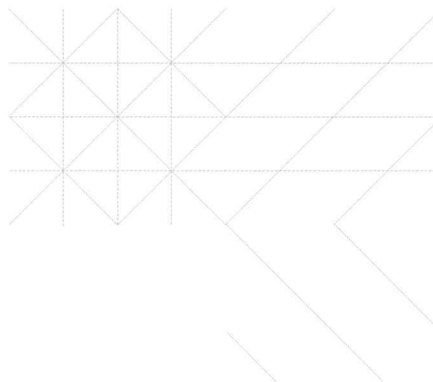
"My view is that the Act is best understood as precluding trustee powers from the scope of EPAs. If trustee powers were included, the Act would function as an exception to the well-established duty of a trustee not to delegate their powers as trustee. If Parliament had intended the Act to operate in such a way, it is reasonable to expect that they would have made it clear."

In short, "the PPPRA must be read as not extending to an attorney the power to act for a



Anthony Grant

« The choice of trustee is of great significance to a settlor. A settlor who chooses A to be his/her trustee does not intend that X – being the holder of an EPA for A – can take over that role. »



trustee in relation to trust property" (para [20]).

The decision is correct. The choice of trustee is of great significance to a settlor. A settlor who chooses A to be his/her trustee does not intend that X – being the holder of an EPA for A – can

take over that role.

From a practical perspective, this means that in the increasingly common situation where a trustee lacks sufficient mental capacity to act in that role, there must be an application to the court to remove that person as a trustee.

Many trustees will be concerned by the cost and inconvenience of having to make such an application.

It is to be hoped that with the increased recognition of the need for specialisation in the High Court, quick and inexpensive procedures can be found for dealing with such applications.

Before he retired not so long ago, Justice Alan McKenzie had carved out an enviable reputation for prompt and inexpensive dealings with probate and trustee applications.

In the *Godfrey v McCormick* case, Justice Nation's decision was made "on the papers" without the need for any oral argument or contention.

With all the developments that are taking place with the law of trusts, there is an increasing need for the creation of simple and inexpensive procedures for obtaining orders from the High Court, and the judges who are given responsibility for this work will hopefully assist to achieve this objective.

Gina Rinehart – an update

In my last article (*LawNews* Issue 7, 17 March 2017), I referred to the ruling that Gina Rinehart could not claim privilege for any of the legal advice that she had received as a trustee in the litigation that she has with some of her children.

Justice Rein has very recently held that Gina Rinehart's daughter Bianca would be "justified" in commencing proceedings against her mother.

The elder children claim that Gina Rinehart's flagship company, Hancock Prospecting, failed to pay them dividends of approximately A\$500m, of which the trustee would have received about A\$120m.

They also allege that Mrs Rinehart breached her fiduciary duties when she was a trustee of one of the trusts by failing to ensure that dividends were paid to the trust.

On a more ominous note, two of Mrs Rinehart's long-time executives are alleged to have been complicit in some of the alleged breaches and it looks as though strangers to the trust will be sued for huge damages.

All of which goes to show that trusts that are poorly managed (if that should prove to be the case with the trust concerned) may give rise to years of litigation, family dissension, and distress. ❌