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ISSUE **43** | Spring **2026**

Welcome to the Spring 2026 edition of *Trust eSpeaking*. We hope you find these articles thought-provoking, interesting and useful.

To find out more about any of the topics covered in this edition, or about trusts and/or wills in general, please don't hesitate to contact us. Our details are on the top right.

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When a DIY will goes wrong

Seemingly small mistake brings significant consequences

Most people would never expect a Do It Yourself will, bought from a stationery shop, to end up in court. Yet that is exactly what happened in a recent case that shows how a seemingly small mistake in a will can have significant consequences after the will-maker dies.

This case also illustrates that what appears to be a saving at the outset can become a much greater expense later. While having a will professionally prepared involves an upfront cost, unclear drafting can result in litigation, delays in administering an estate and legal costs that far exceed the cost of obtaining legal advice.

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Law Commission recommendations

The Law Commission recently reviewed the Protection of Personal and Property Rights Act 1988.

This legislation governs how decisions are made for adults who lack capacity and can no longer make some decisions for themselves.

The Commission has made a number of recommendations for reform, particularly regarding property managers and welfare guardians who are appointed by the court to make decisions for people who cannot make decisions themselves.

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But they cannot ring fence assets derived from fraud

On 26 March 2021, John Bracken was convicted of New Zealand's largest GST fraud having fraudulently obtained $17,311,262.29 in GST refunds over a period of four years.

In February, the Commissioner of Police applied to the High Court to recover assets unlawfully obtained from Mr Bracken's criminal activities.

The most valuable assets acquired from Mr Bracken's criminal activities, however, were held by the Bracken Family Trust and not himself personally. We discuss how the court managed to acquire the funds, although Mr Bracken thought he had ensured those funds were ring fenced.

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When a DIY will goes wrong

Seemingly small mistake brings significant consequences

Most people would never expect a Do It Yourself will, bought from a stationery shop to end up before a High Court judge. Yet that is exactly what happened in *Oga v Bourne*,[1] a recent case that shows how a seemingly small mistake in a will can have significant consequences after the will-maker dies.

The DIY will

Joan Bourne completed a shop-bought DIY will kit in 2017 with the assistance of her daughter. Joan wanted her estate to be divided equally among seven of her eight surviving children. She deliberately excluded one son, who had previously indicated that he did not wish to inherit from her estate.

Like many people using a DIY will kit, Joan and her family encountered legal terminology they did not fully understand. They believed the 'bequests and legacies' section was where they should list the people who were to inherit the estate. They therefore wrote the names of the seven intended beneficiaries in that section; however, they left blank the section dealing with the 'residue' of the estate because they did not understand what it meant and it didn't make sense to them to list everyone's names twice.

Unfortunately, this seemingly minor mistake created a significant legal problem.

In legal terms, a 'bequest' usually refers to a specific gift, while the 'residue' is everything left in an estate after debts, funeral expenses, administration costs and any specific gifts have been dealt with. As Joan had listed only the beneficiaries' names without specifying any gifts, and had left the residue clause blank, the will did not effectively dispose of her estate.

High Court application

After Joan died in 2022, her executors could not get probate of the will, so they had to apply to the High Court under the Wills Act 2007. They asked the court either to interpret the will or to correct it so that it reflected Joan's true intentions.

Joan's family members and the witnesses who were present when she signed the will all gave evidence that she intended her estate to be shared equally among seven of her eight children. Even the excluded son confirmed that he did not expect to inherit and supported the application.

The court found that simply interpreting the wording of the will would not solve the problem because putting the names in the wrong section made the clauses effectively meaningless. However, the court was satisfied from the evidence that Joan's actual intentions were clear, and the will failed to give effect to them. Using its powers under the Wills Act 2007,[2] the court corrected the will by replacing the defective clauses with one directing that the residue of Joan's estate be shared equally among the seven intended beneficiaries.

Why was this case unusual?

It is important to understand that the court does not have a general power to correct wills simply because a mistake has been made. Before correcting a will, the court must be satisfied that there was a clerical error, or that the will did not give effect to the will-maker's instructions (where the will was prepared by someone else). In this case, the applicants argued that the will did not give effect to Joan's instructions. The court may then correct the will to carry out the will-maker's intentions. This requires reliable evidence of what they intended. In many cases, particularly where family members disagree or no one can clearly explain what the deceased intended, that evidence may not exist. In those circumstances, an incorrectly prepared will may not be capable of being fixed.

While in this case the outcome ultimately reflected Joan's wishes, it came only after court proceedings, significant legal costs and considerable delay. More importantly, this result was unusual. The court was able to correct the will because there was compelling evidence of what Joan had intended. Multiple witnesses gave consistent accounts of Joan's intentions, every interested family member agreed, and even the excluded son supported the application.

Lessons

The decision highlights several important lessons for anyone wanting to make a will. Legal documents often contain technical terms that have specific legal meanings, even though the words themselves may seem familiar. A misunderstanding of terms such as 'bequest' or 'residue' can have significant consequences.

While DIY will kits can produce legally valid wills, they rely on the person completing them to understand how the document works. A simple mistake may not become apparent until after the will-maker has died – when it is all too late.

1 *Oga v Bourne* [2025] NZHC 3685.
2 Section 31.

This case also illustrates that what appears to be a saving at the outset can become a much greater expense later. While having a will professionally prepared involves an upfront cost, unclear drafting can result in litigation, delays in administering an estate and legal costs that far exceed the cost of obtaining legal advice.

More importantly, disputes over a will can place additional emotional strain on grieving families at a time when certainty and clarity are needed most.

For most people, making a will is one of the most important legal decisions they will ever make. While DIY will kits remain an accessible option for many people, *Oga v Bourne* is a timely reminder that preparing a will is not simply about filling in a form.

Spending a little more time – or obtaining professional advice where needed – may save your loved ones from costly litigation, unnecessary uncertainty and additional stress after you are gone. +

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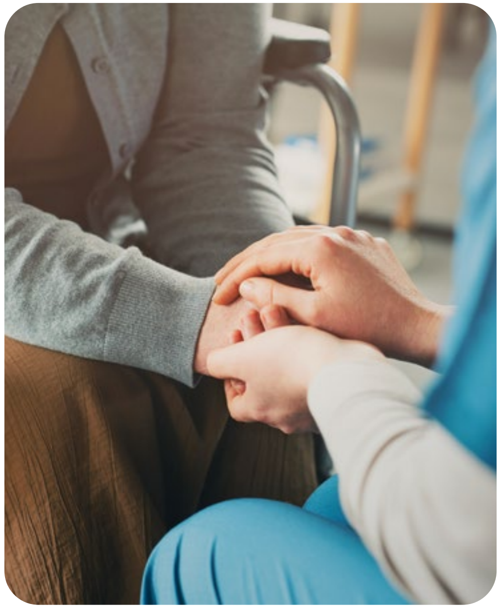
Review of adult decision-making capacity law



Law Commission recommendations

The Law Commission recently reviewed the Protection of Personal and Property Rights Act 1988 (PPPR Act). This legislation governs how decisions are made for adults who lack capacity and can no longer make some decisions for themselves.

The PPPR Act applies widely; it includes adults who have declining capacity due to dementia, lack capacity due to intellectual disabilities or have a temporary loss of capacity (for example) due to injuries.

The Commission has made a number of recommendations for reform, particularly regarding property managers and welfare guardians who are appointed by the court to make decisions for people who cannot make decisions themselves.

Overall approach

The Commission recommends repealing the PPPR Act and replacing it with new legislation. The biggest shift is away from asking what is in a person's 'best interests' (often considered paternalistic), and towards asking what the person's own wishes, values and rights are, and how those can be respected.

Court-appointed decision-makers would be expected to support the person's participation in decisions wherever possible; they would only step in to decide for them where genuinely necessary.

Changes to the roles of property managers and welfare guardians

The Commission also recommends renaming 'property managers' to 'property representatives' and 'welfare guardians' to 'welfare representatives.' The change reflects a shift in emphasis: these representatives would not simply make decisions they think are best, but would instead be required to represent the person's wishes and values as far as possible.

Representatives would have clearer statutory duties. They would be required to act honestly, in good faith and with reasonable care, understand the person's circumstances, support the person to participate in decisions, communicate in a way the person can understand, respect the person's rights, and make decisions centered on the person's wishes and values.

The scope of appointments might become more limited than they are currently. Representatives would only make decisions that the person lacks capacity to make and only where someone else genuinely needs to make those decisions. If a person retains capacity for some decisions, they would continue making those decisions themselves.

Property representatives would continue to have financial reporting obligations, and the existing financial limits on decisions they can make without court approval would be modified.

Welfare representatives could also be made subject to reporting requirements where appropriate. Representatives would also be expected to notify the court if significant changes occur that affect their suitability or the ongoing need for the appointment.

The court would have greater flexibility to tailor appointments. It could appoint multiple representatives, divide responsibilities, impose reporting obligations, require consultation between representatives and include safeguards where conflicts of interest exist.

Where a representative is also a spouse or partner, conflicts of interest would not prevent appointment, but specific conditions might be imposed from the outset to ensure conflicts of interest are handled appropriately.

Reasons for the proposed changes

Currently, many court-appointed representatives are family members with no legal training. The Law Commission found that the current duties are scattered between the PPPR Act and case law, making the roles difficult to understand. It recommends a single, clear list of statutory duties, and clearer obligations for representatives, so they are better equipped to understand their role and responsibilities.

The current law is also viewed as not sufficiently focussed on the person for whom decisions are being made. Property managers and welfare guardians are not always aware that they need to consider the person's rights, wishes and values, rather than just making the decision they think is best.

Conclusion

Overall, the recommendations focus on encouraging people to participate in decisions which affect them and make as many decisions as they reasonably can make, but supporting them where needed. Where representatives are appointed, their role is to be as limited as possible and proportional to the lack of capacity in question.

If these changes become law, representatives will have clearer obligations, and will be accountable for respecting the rights, wishes and values of the person for whom they are making decisions.

The recommendations have not yet been considered by Parliament and may still evolve before any new laws are passed. It is, however, worth being aware that the roles and obligations of property managers and welfare guardians are likely to change in the coming years. +

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Trusts can protect assets

But they cannot ring fence assets derived from fraud

On 26 March 2021, John Bracken was convicted of New Zealand's largest GST fraud having fraudulently obtained $17,311,262.29 in GST refunds over a period of four years.

On 23 February 2026, the Commissioner of Police applied to the High Court for a profit forfeiture order over property in which Mr Bracken had an 'interest.' In other words, the Commissioner sought to recover assets unlawfully obtained from Mr Bracken's criminal activities.

The most valuable assets acquired from Mr Bracken's criminal activities, however, were held by the Bracken Family Trust and not himself personally.

Despite this, under the Criminal Proceeds (Recovery) Act 2009 (CPRA), the court determined that the trust must forfeit $13 million of its own assets in response to Mr Bracken's offending as he had an 'interest' in the trust property.

Criminals may not profit from their actions

For the court to make a profit forfeiture order, it had to be satisfied that Mr Bracken had 'unlawfully benefited from significant criminal activity' and that he had 'interests' in property.

It was quite clear that Mr Bracken had unlawfully benefitted from a significant criminal activity, so the question turned to whether he had an 'interest' in the trust's property.

Discretionary beneficiaries cannot usually be said to have an 'interest' in trust property, because the property is legally owned and controlled by the trustees, not the beneficiaries. Discretionary beneficiaries do not have a legal right to the trust's property, only a hope that the trustees might decide to distribute something to them, or that they will receive what is left when the trust comes to an end.

The Bracken Family Trust was unusual though, because Mr & Mrs Bracken had reserved a lot of power to themselves: they were settlors, trustees, discretionary beneficiaries, final beneficiaries and, as 'Principal Family Members', had the power to remove beneficiaries, and appoint and remove trustees.

Moreover, under the CPRA, an 'interest' in relation to property is much broader than simply owning something. It includes not only a legal or equitable interest in property, but also a right, power or privilege connected with the property.

In addition, the court can treat having 'effective control over property' as an 'interest in property.' As a part of this analysis, the court can have regard to 'any trust that has a relationship to the property.'

The court determined Mr Bracken had both:

1. An 'interest' in the trust property both because he was a final beneficiary of the trust and due to his powers as a 'Principal Family Member,' and
2. Effective control over the trust property, which was also due to his powers as a 'Principal Family Member' and that he was a trustee.

After much complex legal argument, the profit forfeiture order was granted with a maximum recoverable amount of $16,019,231.16, around $13 million of this was trust-owned property. The trust could retain the family farm (valued at $3.780 million), as this would allow the innocent beneficiaries to continue to benefit from this generational family asset. All the other remaining trust property was to be forfeited.

Trusts cannot shield ill-gotten gains

This case shows that while well-drafted trusts remain valuable and legitimate estate planning tools, they cannot be used as a shield for assets that have been acquired through crime – particularly in cases where the perpetrator has retained so much power over the trust assets that such power is tantamount to property (or an 'interest').

The court's decision was said to be a strict statutory interpretation exercise, and there are clearly legitimate policy (and societal) reasons behind the CPRA having such a strong stance. It remains to be seen, however, whether a case involving a trust over which a criminal has few or no powers would result in the same outcome.

This case shows an intriguing relationship between statutory intervention and orthodox trust principles – giving us much to ponder. +