ENVOY

LEGAL EXECUTIVES NEW ZEALAND
RĀNGAI HĀPAI TURE O AOTEAROA

WINTER 2026

Courts step in when clients fail to follow instructions



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FROM THE PRESIDENT



It has been a particularly busy period for LENZ with membership renewals at the end of our membership year in June and the successful recruitment of Karen Smith to take LENZ forward.

Renewals
Each year the board meets with staff for a 'lessons learned' session to review our processes and to discuss potential improvements. Our goal is to make the renewal process as simple and efficient as possible for both the LENZ office and our members by using our website platform functionality to the optimum. This year, we sent out membership renewals earlier - this proved to be very effective. Many members took the opportunity to renew early, with some completing their renewals in May and early June. This resulted in a far more streamlined, stress-free experience for both members and staff. Members were encouraged to log into the website platform to download their forms and invoices. Once payment was reconciled, the 2026-27 membership certificate became available for download. A special thank you to Michelle and Yolandi for ensuring a smooth process, and for their support in assisting and guiding members.

Reminder on wellbeing webinars
Every second year, the Legal Executive Conference (provided by NZLS CLE) includes a wellbeing component. For those who attended last year's conference in September 2025, this would count as the wellness component in your CPD requirement for the year ending 2025-26.

In alternate years, when there is no conference, LENZ will provide a dedicated wellness webinar. We also encourage members to explore wellbeing webinars offered by NZLS or The Law Association, as these also contribute toward CPD requirements.

NZLS Property Law Conference
In early May, I attended the NZLS Property Law Conference in Ōtautahi Christchurch - at the invitation of NZLE/CLE. It was great to see many of our members engaging in person and taking the opportunity to network with presenters and fellow attendees. I feel that attendance greatly enhanced the strong working link between Registered Legal Executives and lawyers.

NZLS continues to be very supportive of LENZ, including their involvement in our biennial conference. We are very proud of the strong relationship we have maintained over many years.

Welcome Karen Smith
Finally, as mentioned in my opening paragraph, we are delighted to welcome Karen Smith as our new Association Manager. Karen has now joined us and is settling in wonderfully. We're really looking forward to sharing more about Karen in our Spring edition, where you'll be able to learn about her background, her values and passions, and the exciting direction we'll be taking together.



Carmen Franich - President


Stone Store - Kerikeri

Northland

Greetings from the 'Winterless North.'

As we move further into 2026, it's been great to see continued engagement across the branch, and we're looking forward to what promises to be another busy and rewarding period ahead. With a number of events coming up, there will be plenty of opportunities to connect, learn and share ideas.

Social events
The branch's social calendar is looking good for the year. Following the success of last year's Paint & Sip evening, we are bringing it back again this year. These events have proven to be a favourite, with attendees consistently enjoying the relaxed atmosphere and the opportunity to do something a little different.

We will, of course, also continue with our cocktail evenings and our much-loved annual traditions of the mid-winter long lunch in Kerikeri and the Christmas lunch.

Education
At the time of writing, planning is well underway for a webinar on capacity issues, to be held in June. This session will be offered free of charge to members.

Later in the year, the branch will host a seminar relating to trust law. We welcome any suggestions from members as to the particular topics or issues you would like to see covered.

Our first Brain Box session of the year was held in early May; it was a fantastic event. Interestingly, this Brain Box session drew a larger crowd than branch cocktail evenings — proof that good legal discussion can be just as appealing as a fancy cocktail!

It's been great to see how our Brain Box sessions have grown and developed over the years. What started as a small group — often with the committee stepping in to keep the conversation going — has turned into lively, well-attended sessions with members bringing along a wide range of interesting topics to discuss. Keep an eye out for details of the next one, and if you haven't been along before, it's well worth coming to check it out.

Contact us
We love to hear from members with ideas and suggestions. Feel free to contact us anytime at northland@legalexecutives.org.nz



Vicky Davis
Northland Branch President



Waikato River

Auckland Waikato

As we move into winter, I would like to share an update on what has been happening across our Auckland Waikato Branch and what members can look forward to in the months ahead.

Although our branch meeting scheduled for March was cancelled, we reconnected by Zoom in April and May. The next national meeting will be held in June.

Social
The branch held several enjoyable social events, including our Old Committee/New Committee lunch in May at Camarosa in Hamilton. Our Auckland members travelled down to Hamilton, and it was lovely to gather at this venue while welcoming our new committee members, Meg Shah and Donna Gifford. As many of our meetings are held by Zoom, it was especially nice to spend time together in person.

Also in May, we held a Margarita Masterclass at Mexico, with events taking place on the same evening in both Auckland and Hamilton. It was a very successful event, with Hamilton selling out and members unfortunately having to be turned away. During the evening, members learned how to make a range of margaritas while enjoying generous servings of delicious Mexican food.

We are now planning our next event. One idea is a movie night, where members will be able to choose the film to watch. My suggestions are Legally Blonde or Erin Brockovich, but we would love to hear any other ideas. As we do not often have the opportunity to meet in person, these events are a valuable way for branch members to connect, and we warmly welcome your suggestions and input.

Education
The branch has several seminar ideas underway. In the second half of the year, we are looking at holding sessions on health and wellbeing, with a particular focus on time management and coping with pressure.

As with our social events, if members have other topics they would like us to explore, we would be very pleased to hear from you.

Thank you to all our members for your continued support, enthusiasm and involvement in the Auckland Waikato Branch.

I hope the winter months go well for all our members, and everyone can enjoy the events and opportunities ahead.



Sarah Blaney
Auckland Waikato Branch President

Bay of Plenty Gisborne

At the time of writing we are just entering the winter months. The days have grown shorter and the temperature is dropping. The arrival of winter was quite sudden this year with the trees losing their leaves or changing colour almost overnight.

The war effect

The war in Iran has been a hot topic in the news for the past few months, especially the effect it is having on the cost of living – led by rising fuel prices. It was anticipated the war was going to be over in a matter of weeks; however no end appears to be in sight as I write this despite ongoing negotiations and on-again/off-again ceasefires. While most industries tried to hold prices as long as they could, the cost of fuel is now having a flow-on effect on all sectors. The property market, however, appears to be as strong as ever, even with interest rates starting to rise again. The looming election has done little to dampen the property market to date. Perhaps this will change as the election gets closer.

Both ANZ and ASB are predicting hikes in the OCR this year. People are savvier when it comes to refinancing or refixing their mortgages these days – particularly with the banks offering varied cashback amounts and even offering 'green loans' or 'renovation' loans at very low interest rates.

Branch social events

The branch's first social events of the year were held later than usual, but those who attended enjoyed catching up with colleagues.

The branch no longer has a social convenor in the Whakatāne or Taupō regions; we would very much welcome anyone who is interested in organising social events in those areas. You don't need to be a committee member to be the social convenor, so there are no meetings to attend. Please feel free to contact me for a no-obligation chat if you want to find out more.

Stay warm and safe over the winter months and, before you know it, spring will be just around the corner.



Cathy Punter
Bay of Plenty Gisborne Branch President



Rotovegas: Cathy Punter

Wellington Central Districts


Whanganui City

It has been a spectacularly busy few months in our office. At times, it feels as though there are not enough hours in the day or days in the week. I've found the wellbeing webinars really useful in learning how to manage pressure — learning to say no, setting boundaries and priorities, and finding your joy.

One way I find my joy is by sharing my favourite genre of music with my favourite people. Dancing makes my knees hurt and the volume can sometimes cause temporary hearing loss — that's true — but it's a small price to pay for spending a few hours thinking of nothing but music and mates.

I hope you are also able to find your joy and some peace amid the chaos of your workplace. It's important to check in with yourself and maintain a healthy work/life balance. Colleagues can be important sounding boards when dealing with stressful matters, but if you are finding stress levels a little high and would like to talk to an independent person, remember that LENZ provides a Kaiārahi service. Details can be found on the website and on page 17 of this edition of *Envoy*.

Branch update

The branch has now been deregistered as an incorporated society. However, nothing has changed at the coal face — we continue to meet regularly and discuss how best to serve the branch.

We are always open to ideas, so please feel free to contact any member of the committee.

If you are interested in joining the committee or lending a hand with events in your area, please don't hesitate to get in touch. Whether you can offer a little time or a lot, all support is sincerely appreciated, and it makes a real difference to what we can achieve.

Social events

Our new members' enthusiasm is contagious, and the number of social events are increasing. There was one recently held in Masterton and others are currently being organised in the Hutt Valley and Whanganui. Keep an eye out for your invitations.

If you have suggestions for activities or venues in your area, we would love to hear from you. These events are designed for you and are partially funded through your registration fees, enabling us to offer meal subsidies and keep costs as accessible as possible.



Stephanie Bishop
Wellington Central Districts Branch President

Nelson Marlborough

Despite the urge to hibernate, winter in Nelson is still really beautiful and we have some gorgeous crisp clear days that allow for some stunning local short (and longer) walks.

Meetings: local and national
Branch meetings continue monthly with alternating venues in Nelson City and Richmond. It is always lovely to catch up with the committee members face-to-face.

I attended the latest National Council meeting held in Auckland. It is always good to get a sense of where our profession is heading in 2026 and ensure our local branch's voice is included with our peers from across Aotearoa.

At the time of writing we are still firming up our midwinter Christmas get-togethers to be held in both Nelson and Blenheim. It is the perfect excuse to break out the festive jumpers, connect and share a laugh with colleagues. While we are strictly professional by day, sometimes the best networking happens over a glass of wine or similar in a social setting. We are proud to be growing our numbers of those who attend our social functions. There is a bit of work that goes into organising these events so it is very rewarding when they are well attended.

Professional development
On the professional development front, the branch has some exciting plans for later this year. We are always looking for fresh and interesting ideas so please do not be shy about contacting us.

Take time to pause
As we head into the depths of winter, I encourage you all to make time to pause and connect. Whether it is at one of our regular coffee meetings or just during a phone conversation with a legal executive from another firm. Let's keep supporting each other.

Contact us
Please feel free to contact us at nelsonmarlborough@legalexecutives.org.nz



Natalie Bell
Nelson Marlborough Branch President



View from Richmond Forest lookout - Natalie Bell

Canterbury Southern Districts



Dunedin Railway Station

The weather has certainly taken a turn for the colder in the deep south. While we still get the odd (some might say 'very odd') sunny day, the dark nights are rolling in earlier and earlier and the morning frosts are starting to bite.

My Saturday mornings are being spent on the rugby sidelines cheering on my nephews while trying to keep warm and dry, or working on projects as the President of the Rotary Club of Invercargill South. I have also recently been sworn in as a Justice of the Peace so I have been enjoying helping out people in this new role.

By the time *Envoy* is published another Gypsy Day (also now known as Moving Day) will have been and gone; I hope everyone has survived the stresses leading up to 1 June. Thank goodness it is only once a year I always think, so much work and time goes into this day!

My boss recently reminded me the other day the importance of going out for a walk in the fresh air to clear your head – and I don't say it too often - but he was quite right! Even just a walk around the block can make you see things in a different way.

Future webinars
Our branch committee is trying really hard to put together a webinar or two for the second half of the year. We appreciate the importance of not only providing ongoing education, but also the benefits of being able to catch up with our colleagues. So keep an eye out for details of what is coming up.

Upcoming mid-winter events
The committee is also pulling together details on mid-winter events both in Christchurch and around the regions. We hope to get good numbers to these and members can have a good catch up. Watch out for the invitation in your inbox.

Please feel free to get in touch if you have any queries/concerns/suggestions for seminar topics or social events, or if you need any assistance. On behalf of the Branch Committee, thank you for your ongoing support. Keep safe and warm everyone.



Andrea Murchland
Canterbury Southern Districts Branch President



New law to improve affected adult decision-making recommended by Law Commission

Registered Legal executives are very familiar with the Protection of Personal and Property Rights Act 1988 (PPPR Act), that deals with decision-making by adults whose capacity is affected. The law, however, is close to four decades old and much of its thinking is outdated. It also lacks any clear statement of purpose, which has contributed to confusion about its objectives.

Law Commission makes 175 recommendations

Accordingly, after five years' work, earlier this year the Law Commission released its report making 175 recommendations to better protect and promote the equality, dignity and autonomy of adults with affected decision-making, as well as proposing a completely new law to replace the current Act.

The Commission said that people's decision-making could be affected by dementia, brain injuries, learning disabilities, experiences of mental distress and other matters. If an adult's decision-making was affected, the law might treat their decisions differently. That was based on the concept of 'decision-making capacity.' The PPPR Act was the primary piece of legislation relating to adult decision-making capacity. It provided several decision-making arrangements for people who did not have capacity, including welfare guardians, property managers and Enduring Powers of Attorney.

However, there had been increased recognition that the current law did not adequately take into account Te Tiriti o Waitangi, te ao Māori or the multi-cultural nature of Aotearoa New Zealand. In addition, the country's population was changing, becoming older and more culturally diverse.

An earlier Minister of Justice had accordingly asked the Law Commission to review the law and make recommendations. The review was confined to the PPPR Act as it was not practicable to include laws with a specific focus – such as compulsory treatment for substance addiction, the conduct of litigation, entry into a contract, or emergency medical treatment – within a single review.

The Law Commission's work concluded that the current law did

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not adequately reflect the importance of decision-making support. Its approach to decision-making on behalf of a person did not always provide for the full and equal enjoyment of their rights. It stated that many of the PPPR Act provisions are confusing and inconsistent. 'To address these issues, foundational change is needed. The PPPR Act does not reflect contemporary understandings of disability and Aotearoa New Zealand's ratification of the United Nations Convention on the Rights of Persons with Disabilities (Disability Convention).'

New testing of decision-making capability

In its final report, the Commission said that the Act used various tests to assess whether a person was functionally able to make an autonomous decision for himself or herself. Those tests were often described as tests of decision-making capacity, although that phrase was not used in the Act.

'That a person lacks relevant decision-making capacity is a necessary but not always sufficient condition before a person's legal agency can be restricted (for example, by appointing a representative to make decisions on the person's behalf).

'A new Act should retain the concept of decision-making capacity. There is no alternative concept that we consider better identifies when a decision might need to be made on behalf of a person with affected decision making.'

However, although the concept should be retained, the Commission said there was much that could be done to improve how it was assessed. The agency said that the current law should be repealed and replaced by a new statute which would provide one simple and clear



legal test for decision-making capacity. Under that test, a person would be considered not to have decision-making capacity for a particular decision if they are unable to:

- Understand the information relevant to the decision
- Retain that information long enough to make the decision
- Use and weigh that information, or
- Communicate the decision.

The Commission said that its recommended test would require a person's decision-making capacity to be assessed in the light of the decision-making support available to them. This would help to ensure the assessment reflected the person's lived reality. The test would be relevant in a number of ways under a new Act, including the following:

- The appointment of formal supporters and the creation of EPAs
- Determining when formal supporters might not – and, in some cases, must not – act
- Determining when the Family Court could appoint a representative to make decisions on behalf of a person, and
- Determining when the Family Court, a court-appointed representative or an attorney under an EPA could make a decision on behalf of a person.

Three types of decision-making capacity assessment proposed

The report went on to say that varying degrees of formality were required when assessing decision-making capacity in different contexts. For that reason, a new law should provide for three types of decision-making capacity assessment. These should comprise:

1. Formal decision-making capacity assessments by professionals
2. Decision-making capacity determinations by the Family Court, and
3. Informal assessments, such as an assessment by a representative to decide whether a represented person had capacity to make a particular decision for himself or herself.

Where it was necessary for a decision to be made on behalf of a person, three key decision-making rules should apply. These were that:

1. The decision should be centred on the person's wishes and values and should respect their rights
2. The person should receive decision-making support for the decision and have the opportunity to participate in it, and
3. The decision should be based on relevant information.

Introduction of formal support role proposed

The Commission also proposed that a new role of formal supporter should be introduced, following the models in several other countries. A formal supporter would be a decision-making supporter with specific powers, who was subject to specific duties set out in legislation.

'Typically, those powers and duties extend beyond those the supporter would have if they were simply providing informal decision-making support.

'Establishing a formal support regime would help to meet Aotearoa New Zealand's obligation under the Disability Convention to take appropriate measures to provide access by disabled people to the support they may require in exercising their legal capacity.'

The report suggested that a formal supporter's role should be to provide decision-making support to a person for the decisions or classes of decisions specified in their appointment. A formal supporter should not be able to make or communicate any decisions on behalf of the supported person. That restriction was important to distinguish a formal supporter from a representative, and to minimise the risk of supported people being harmed by formal supporters misusing their powers. Subject to the terms of their appointment, a formal supporter should have the power to access information to which the supported person was entitled and that the formal supporter needed to fulfil the support role.

Some tweaks proposed for EPAs

The Commission said that people should continue to be able to create Enduring Powers of Attorney. The new legislation should detail how people could establish EPAs, with the donor specifying the classes of decisions to which the EPA related and when the attorney's power to make decisions should take effect.

When decisions concerned significant matters, attorneys should not be able to make the decision unless a formal decision-making capacity assessment conducted by a qualified professional or the Family Court had determined that the donor lacked the relevant decision-making capacity.

The Law Commission's recommendations will now be considered by the government, which must decide whether to adopt them or to reject them. ■

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Courts step in when clients fail to follow instructions

Taking instructions and drafting wills are key aspects of legal executives' work and require attention to detail and careful checking at each stage of the process. Where matters may go wrong, however, is when the draft will is sent to the clients and they fail to follow instructions to execute it properly and ensure its validity.

Such cases are relatively common and the High Court deals with them by seeking to implement the testators' wishes, even when the legal formalities have not been met. Detailed notes of instructions requested amendments and other information retained by legal executives and lawyers can ensure there is sufficient evidence for courts to be satisfied as to the testamentary intentions of the will-maker.

Oversight to sign wills

In *Re Estate of C Ngaira* [2025] NZHC 2280, Chrissie Ngaira executed a will in July 2016 appointing her husband as executor and bequeathing her entire estate to him.

In 2022, Ms Ngaira and her husband, Jason Cooper, instructed a lawyer at Sutcliffe Mason Law to prepare mutual wills. The documents were prepared and forwarded to the couple. However, the wills were not executed by either Ms Ngaira or her husband before she died in May 2025.

Ms Ngaira had been diagnosed with motor neuron disease around the time she and Mr Cooper had given instructions for the preparation of the draft wills. Mr Cooper said that this had prevented Ms Ngaira from attending the lawyers' offices to execute her will. Shortly after that time, the couple had moved from Auckland to Canterbury.

Mr Cooper said that he believed Ms Ngaira thought she had executed her new will: her medical condition had affected her ability to focus on tasks and this might have contributed to her failing to read properly the lawyer's email with the will signing instructions.

Mr Cooper said his wife had given no indication she was unhappy with the draft wills, and he considered the 2022 document to be Ms Ngaira's last will. He said that he also had not executed his own draft will, as he did not realise that this was required.

The estate comprised bank accounts and a mobility van, with a total value of $70,000.

Ms Ngaira's son applied to the High Court for an order under section 14 of the Wills Act 2007 that his mother's draft will be declared a valid will. There were limited differences between the 2016 executed will and the 2022 draft will. Ms Ngaira's son was appointed as her executor

in the latter will – as opposed to Mr Cooper – but the later document still bequeathed the entire estate to Mr Cooper.

Justice La Hood said that the court had power under section 14 to validate a document that appeared to be a will, but did not comply with the requirements in section 11. His Honour said that the 2022 document appeared to be a valid will but did not comply with section 11 because it had not been signed and witnessed as required.

Justice La Hood said the evidence was clear that Ms Ngaira and Mr Cooper had intended to finalise their draft wills, and that the failure to do so was an oversight. That oversight had likely been caused by a combination of Ms Ngaira's illness making it difficult for her to go to the lawyers' offices, as well as causing her to misunderstand the execution instructions; and the couple's move to Canterbury.

There were limited differences between the executed will and the later draft, and the circumstances favoured validation, despite the fact that three years had passed between the draft will being prepared and Ms Ngaira dying. An order was accordingly made declaring the draft will valid.

Failure to sign a slightly changed new will

Secondly, the case of *Re Estate of Lockington* [2025] NZHC 2177 involved Christina and Charles Lockington giving instructions to a lawyer in 2024 to prepare draft wills. The couple wished to appoint each other as executors instead of the New Zealand Guardian Trust Company Ltd, which had been named as the executor in Mr and Ms Lockington's earlier wills. Apart from that change, Ms Lockington's draft will was materially the same as her 1990 will, with the residue of her estate in both cases being bequeathed to her husband.

However, Ms Lockington had not executed the 2024 will by the time of her death. Mr Lockington applied to the High Court for an order under section 14 declaring the 2024 document his wife's valid will.

Justice McHerron said that the 2024 draft appeared to be a will. It did not comply with section 11 as it had not been validly signed and witnessed. However, the court was satisfied on the balance of probabilities that the 2024 document expressed Ms Lockington's testamentary intentions. It would accordingly be declared her valid will.

Testator becomes unwell

Thirdly, Kevin Purcell died in December 2024, leaving behind a will dated 2010 and a draft will prepared in 2020. Both documents in *Re Estate of K J Purcell* [2025] NZHC 2143 named Mr Purcell's brother, Bernard Purcell, as his executor. Bernard Purcell applied to the High Court for validation of the 2020 document.

Bernard Purcell gave evidence that he and his brother were very close and, in 2020, had met and discussed in detail the changes Kevin Purcell wanted to make to his will. Bernard Purcell noted those changes on a copy of his brother's 2010 will. Following the meeting, Bernard Purcell had given the 2010 will with the additions on it to his wife for typing.

The two brothers met subsequently and Bernard Purcell showed Kevin Purcell the new draft will. Kevin Purcell approved the draft, apart from wanting a minor change which he said he would sort out with his lawyer. Bernard Purcell left the document with his brother and assumed the matter had been finalised.

However, after Kevin Purcell became ill, his brother and his wife found the draft document and, subsequently, a handwritten note appearing to refer to the 2010 will. By that time, Kevin Purcell was too ill for his brother to speak to him about the documents.

Following Kevin Purcell's death, his brother applied to the High Court for validation of the 2020 document.

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Justice La Hood said that the 2020 draft appeared to be a will but did not comply with section 11 as it had not been properly signed and witnessed.

His Honour said that the handwritten note accompanying the 2010 will was incomplete and had some perplexing aspects. Those matters appeared inconsistent with the family dynamics.

Justice La Hood, relying on the clear evidence of Bernard Purcell and his wife as well as the general consistency between the 2010 will and the draft, concluded that the 2020 draft will expressed Kevin Purcell's testamentary intentions. The handwritten note appeared to reflect a mix-up caused by Kevin Purcell's poor health. The court noted that the 2020 document had been carefully prepared with the assistance of Bernard Purcell and his wife, and their evidence was supported by Bernard Purcell's contemporaneous diary entry.

The draft will was declared valid.

Wills Act and PPPR Act interface

In a fourth case, a more complicated fact situation demonstrates the interface between the Wills Act and the Protection of Personal Property Rights Act 1988. *Re Estate of Major Te Wheoro Herewini* [2026] NZHC 449, involved the deceased dying in March 2025, and leaving behind two prior executed wills. The first was dated October 2016 and left the residue of the deceased's estate to three of his children, stating also that another child had been provided for during the testator's lifetime and had accordingly been left out of the will.

The second will, dated February 2021, favoured one of the deceased's grandsons by leaving him the principal asset of a house in Taupiri, with the residue to the deceased's adult children. That will was challenged on the basis that the deceased did not have testamentary capacity because he was suffering from progressive dementia, as substantiated by a doctor's report referring to a formal memory test conducted in January 2021.

Accepting that position, the deceased's adult children all agreed that a new will ought to be executed on the same terms substantially as the October 2016 will. An order to that effect was sought in the Family Court.

The Family Court application was dealt with by consent and the court made an order that a draft will attached to the order could be executed by the Public Trustee under section 55 of the Protection of Personal and Property Rights Act. The draft document mirrored the terms of the 2016 will.

However, formal execution was not completed by the time the deceased died in March 2025. An application was accordingly made to the High Court under section 14 of the Wills Act for a declaration that the draft will was a valid document.

Justice O'Gorman said she was satisfied that the three gateway requirements of section 14 had been met. The document was a will in substance, consistent with the formally-executed 2016 will. Reversion to the terms of the earlier will was justified by the medical evidence of testamentary incapacity invalidating the 2021 will.

The court concluded that the document expressed the deceased's testamentary intentions in terms of section 14(2) of the Wills Act.

An order would be made declaring the document attached to the Family Court order the last will of the deceased.

Will created after testator's death declared valid

Finally, a case earlier this year demonstrates that a document created after a testator's death can be recognised as a valid will, provided that it meets the requirements of sections 11 and 14 of the Act.

In *Re Rogers* [2026] NZHC 623, the court was asked to declare one or other of two documents a valid will. In 2025, William Rogers had contacted Public Trust to book an appointment to update his existing will which had been made in 2010. Mr Rogers brought typed instructions to the meeting and explained that the main reason he was updating his will was because he wanted to change the gift of his home from his partner, Averil Miles, to his sister Ann. He also wanted to leave a $10,000 bequest to the Picton Men's Community Shed.

Public Trust created a document called a Matter Summary, after which there were emails and phone calls and amendments requested by Mr Rogers. He died before the draft document could be fully updated.

Following Mr Rogers' death, Public Trust prepared a new version of the draft will incorporating Mr Rogers' last instructions. Public Trust applied to the High Court for an order declaring either the 2025 document or the 2010 will Mr Rogers' valid will. Public Trust submitted that, although the final draft will had been created after Mr Rogers' death, that did not mean that it could not be validated.

Justice Dunningham said that the final draft met the requirements of section 14(1) of the Act. The only shortcoming was the fact that it had not been signed or witnessed. Her Honour said that she was also satisfied that the last draft represented Mr Rogers' final testamentary intentions. The document reflected Mr Rogers' initial instructions, as well as incorporating his amendments.

An order would be made declaring the 2025 document to be Mr Rogers' valid will. ■



$20 million development loss is object lesson in high stakes risks

Large-scale property development is a complex, lengthy and expensive undertaking. There are huge pitfalls to be navigated and many things can go wrong.

The High Court has ruled on a case described by the judge as an object lesson about all of those risks 'and more.' The events involved spanned 15 years and the case took 40 sitting days to hear, generating 2,822 pages of evidence. The judgment runs to more than 1,300 paragraphs over 315 pages.

The development was characterised by complicated legal and financial structures and convoluted strategies on the part of both main players. The end result was a $20 million loss.

Long-running complex litigation over 20 years

Green & McCahill Holdings Ltd v Williams & Ors [2025] NZHC 2581 involved the plaintiff, in 2005, giving the defendant an option to purchase its land. There were several renewals before the parties in 2011 entered into a development agreement and formed a limited partnership for up to 18 years. Finance was an issue and the plaintiff eventually agreed to provide some of its land as security for loans.

There were loans with a sophisticated mosaic of documents, followed by mezzanine loans, before the project collapsed and the land was sold in mortgagee sales to new companies formed by the defendant, for $20 million less than the amount owing under the loans. The plaintiff 'smelt a rat' and strongly suspected the defendant had acquired the land and ownership of the residual debt by subterfuge. Conversely, the defendant maintained that the plaintiff had deliberately 'tanked' the development and refused to co-operate, in the cynical assessment that there would be no buyers at a mortgagee sale and it would be able to redeem its own land at a discount.

Five key issues

The plaintiff sued the defendant. There were five key issues in the case:

1. Was the plaintiff induced to provide its land as security by misrepresentations made by the defendant?
2. Was the conduct of the defendant misleading or deceptive under the Fair Trading Act 1986?

Continued on page 16...

...Continued from page 15

3. Was the mortgagee sale process carried out in accordance with the mortgagee's statutory duties and in good faith?
4. Could the plaintiff enforce a personal guarantee against the defendant originally given to the senior lender as part of the first quadripartite arrangement?
5. As a counterclaim, could the company created by the defendant enforce the residual debt assigned to it against the plaintiff?

Justice Becroft noted that the parties were experienced and sophisticated in business, and used extremely complex contractual and corporate structures to manage their affairs and to delineate risk and liability.

The plaintiff had been advised by an 'armada' of financial and legal professionals, and the parties had been well aware of the risks in mortgaging land, and the fact that lenders and mortgagees would rank as higher priorities for repayments if the development turned sour.

The court held that the negligent misstatement claim did not succeed as the first element of the tort could not be established. There had been no false or misleading statements. Evidence had not shown there was no reasonable basis for statements about anticipated sales, and forecasts of financial success were reasonably based and honestly made. His Honour said it was likely that the other three elements of the tort could not be proved either.

Secondly, the court held that the defendant's conduct had not been misleading or deceptive under the Fair Trading Act 1986. There was no pattern of the defendant withholding information and no systematic and deliberate strategy to do so.



FAQs – JobLink

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'Where there are sophisticated commercial dealings between parties with similar skill, education and business acumen, who have contractually regulated their business relationship; and who have access to high-powered commercial and legal advice, real care should be taken in assessing the applicability of s 9 [of the Fair Trading Act].'

Section 9 provides that no person shall, in trade, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive. However, Justice Becroft stated that he had concluded that the defendant had acted honestly and genuinely.

Thirdly, His Honour found that the mortgagee had not breached any of its duties. The plaintiff had stubbornly persisted with its 2019/2020 strategy, on the basis of several assumptions that proved to be misconceived or unrealised. Its strategy had disastrously backfired.

Fourthly, the plaintiff appeared to have breached clauses of the quadripartite arrangement and accordingly did not come to the court with 'clean hands.' Had it not been for that, a just apportionment might have seen the defendant liable for the proportionate share of his guarantee. However, in the actual circumstances, the fourth cause of action would be dismissed.

Finally, Justice Becroft allowed the second defendant's counterclaim. The second defendant was a company established by the defendant to acquire the land mortgaged by the plaintiff. Judgment in the sum of $20.1 million was awarded to the second defendant against the plaintiff.

Risk must always be acknowledged

The case is not only an illustration of the importance of legal and financial advice, but also demonstrates that such advice does not remove risk when parties decide to engage in risky strategies in the hope of big rewards. ■



Legal Executives New Zealand
RĀNGAI HĀPAI TURE O AOTEAROA

Kaiārahi service



The term *kaiārahi* means 'someone who guides; leader, mentor, counsellor.'

LENZ has long acknowledged the importance of providing a support network for its members in both professional and personal capacities. We are pleased to have a national Kaiārahi service to supplement the ongoing informal support offered through our branches via their networking events and seminars.

Whilst our members can access the professional counselling service provided by the New Zealand Law Society, we also saw a need for LENZ to provide members with direct and personal support on every level.

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If you would like to talk with a kaiārahi, please look at the contact list in the members' section of our website, or contact the National Office.

PROPERTY AND CONVEYANCING UPDATE



Overseas Investment Act changes in force

Amendments to the Overseas Investment Act 2005 came into force on 6 March, with the updated law applying to all applications lodged after that date.

The government said that the goal of the changes was to better reflect the benefits international investment could bring to New Zealand's economy, while providing the appropriate regulatory tools to manage risks to New Zealand's national interest proportionately.

Toitū Te Whenua Land Information New Zealand said that the scope of what was screened had not changed, but how certain less-sensitive assets were dealt with had. The Act's purpose statement had been changed to acknowledge explicitly the role of overseas investments in increasing economic opportunity.

Overseas-based investors with an 'Active Investors Plus,' Investor 1 or Investor 2 residency visa could now buy or build homes worth $5 million or more. The 'national interest,' benefit to New Zealand and investor tests, had been consolidated into a single test for all assets other than farmland, fishing quota and residential land.

Toitū Te Whenua said that Land Information New Zealand had implemented three new consent pathways under the national interest test. These are:

1. Primary consent pathway for significant business assets and sensitive land
2. Production forestry pathway for sensitive land used for production forestry, and
3. A$5 million plus house pathway for qualifying investor visa holders.

Second private Building Consent Authority approved

The launch of New Zealand's second private Building Consent Authority would add competition and capacity to the building consent system, said Building and Construction Minister, the Hon Chris Penk.

The Minister said that easing the paperwork burden and cutting red tape out of the building consent system were key parts of the government's efforts to make it easier and more affordable to build homes and infrastructure.

Mr Penk said that Farsight was the second stand-alone private Building Consent Authority to be given the green light. It would handle all key building control tasks for its client Summerset, including processing and approving consent, inspecting work during construction, issuing code compliance certificates and take enforcement action if required.

“Summerset is one of New Zealand's largest residential builders and having its own BCA will bring greater consistency and certainty in how the Building Code is applied across its developments nationwide, helping speed up the delivery of much-needed retirement homes for Kiwis.

“By covering a substantial number of building projects, Farsight will also take pressure off council Building Consent Authorities that would otherwise have undertaken the work, allowing them to focus on other projects, which over time can lead to faster approvals across the wider system.”

Legislation introducing mandatory home warranties due soon

The government is expected to introduce legislation in the near future requiring home warranties for all new residential buildings three storeys and under, and for renovations costing $100,000 or more, covering a one-year defect period and a 10-year structural warranty.

Announcing the proposal last year, Building and Construction Minister the Hon Chris Penk said that the benefits of a home warranty scheme for those planning

to build a house or carry out major renovations were significant.

For around half a percent of the total build cost, homeowners would be protected against defects after the build was finished.

“Home warranty schemes are already widely available across New Zealand, and the sector has assured me it can scale to meet new demand, allowing consumers to shop around to find coverage best suited to their build.”

The change will be introduced in a Building Amendment Bill, that will also require professional indemnity insurance for building designers. Mr Penk said this would mean that they would be financially able to stand by their work, giving building owners confidence.

The government also plans to strengthen disciplinary penalties for Licensed Building Practitioners, by increasing the maximum fine from $10,000 to $20,000 and the maximum suspension period from 12 to 24 months. The changes will apply to architects, engineers and those carrying out design and build contracts, but not to developers, head contractors and subcontractors.

“I've heard from tradies that the poor work of a few cowboys can unfairly damage the industry's reputation. Disciplinary penalties were long overdue for an update and strengthening them supports skilled professionals by holding to account those who cut corners,” said Mr Penk.

The Minister said that, once the building law amendments were passed, there would be a one-year implementation period before the new requirements took effect. The increased disciplinary penalties would be progressed through a separate bill, with the changes expected to take effect this year.

New Landonline digital certificate downloader – DC loader v4

Toitū Te Whenua said that Landonline was now using a web-based digital certificate downloader, DC loader v 4. The website accordingly looked different from how it had appeared in the past.

Toitū Te Whenua said that DC loader v4 could be used on any operating system, for example Windows or macOS, as it ran entirely through users' web browsers. This meant that there was no need to download software to download the DC. The link to DC loader v4 and full details of how to download DCs were available on Landonline's website. ■

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Capacity is also an important issue in property transactions



Stock photo

Registered Legal Executives drafting wills and witnessing their execution are alert to the importance of ensuring that will-drafters have capacity to prepare wills. Capacity, however, is also an important consideration in other aspects of legal executives' work, such as property transactions and contracts.

It is particularly crucial to ensure that clients have mental capacity, and are not being bullied or subjected to undue influence when gifts or assistance are being provided between family members. This was illustrated by a recent judgment in which a woman whose intelligence was in the lowest one per cent of the population provided a large sum of money to her daughter without understanding the implications of the transfer.

'Laced with personal tragedy,' says court

The case of *MacKay v Blair* [2026] NZCA 58 involved facts described by the Court of Appeal as 'laced with personal tragedy' on the part of both main parties. Takoto MacKay was born in 1948 and, after suffering abuse in her childhood, left school at 14 without learning to read and write properly. Due to her poor literacy and numeracy, Ms MacKay had a weak understanding of financial matters and was dependent on others. Her first husband was abusive to her, resulting in her suffering from post-traumatic stress disorder. She had three children with her first husband, including her youngest child, Mere Blair. Ms MacKay later married Mr MacKay and, after his death in April 2017, she had assets worth about $940,000.

Ms MacKay had significant grief reactions after her second husband's death; a psychiatrist later said she was clinically depressed and emotionally vulnerable. Her daughter, Mere Blair suggested she could buy a property so she, Ms MacKay and Ms Blair's children could live together. Ms Blair and her children moved in with Ms MacKay, and Ms MacKay gave Ms Blair access to her bank accounts so her daughter could help her to manage her finances.

Prior to Mr MacKay's death, the trio had discussed the MacKays helping Ms Blair to buy a house. In August 2017, Ms Blair found a house she wanted to buy and sought legal advice about financial assistance from her mother.

Ms Blair then prepared a letter stating that Ms MacKay would gift Ms Blair $300,000. Ms MacKay signed the

letter and attached her term deposit statement. Ms MacKay, Ms Blair and a mortgage broker (Ms Olds), met to complete loan application documents. Ms MacKay's name was originally included alongside Ms Blair's but was later crossed out.

Ms MacKay confirmed with 'sound mind'

The day after the meeting, Ms MacKay visited her long-term general practitioner and asked for a letter confirming to the bank that she was making a gift and that she had the capacity to do so. Dr White provided a letter stating that Ms MacKay was of sound mind and able to make decisions about legal matters.

In October 2017, Ms MacKay advanced Ms Blair $346,000. Shortly after, Ms MacKay's son Nathan, who lived in Australia, returned to New Zealand and emailed Ms Blair suggesting that their mother was not in the right frame of mind to deal with financial matters and that the house purchase should be deferred.

Relationship breakdown in 2019

However, Ms Blair proceeded with the purchase and Ms MacKay lived between that property and her other home. In 2019 the relationship between Ms MacKay and her daughter broke down and Ms MacKay eventually asked for repayment of her money.

Ms MacKay lodged a caveat over her daughter's property and sought an order for sale and division of the proceeds in proportion to the contributions made to the purchase – namely, 54.4% to Ms MacKay and 45.6% to Ms Blair.

Litigation guardian appointed for Ms MacKay

The proceedings began in September 2021 and a litigation guardian was appointed for Ms MacKay in August 2022. By August 2023, Ms MacKay's financial position had declined considerably and her assets were worth approximately $346,000.

The High Court dismissed Ms MacKay's claim, holding that the payment she had made to her daughter was an unconditional gift to assist Ms Blair with her property purchase. The judge also rejected Ms MacKay's claims that she did not have the requisite capacity to make the advance to Ms Blair; that she was unduly influenced by Ms Blair when she made the advance; and that the advance was an unconscionable bargain. The High Court awarded Ms Blair increased costs as the court considered Ms MacKay's claim lacked merit and she had contributed to the time and expense of the proceeding by acting unreasonably.

Appeal to the Court of Appeal

Ms MacKay appealed to the Court of Appeal; its decision was delivered by Justice Collins, who said there appeared to be no evidence to support the High Court's conclusion that Ms MacKay had the capacity to protect her interests and to make an informed choice regarding the property arrangements, or to evaluate the various options available for legal ownership of the property.

Further, the Court of Appeal concluded that there was no evidence that Ms MacKay understood that, if the relationship between her and her daughter failed, Ms MacKay would not be able to live in the house, require Ms Blair to repay the money or require Ms Blair to look after her later in her life.

Their Honours said that there was a tenable evidential foundation for the argument that Ms MacKay lacked the capacity to make the payment to Ms Blair because she did not understand its consequences. Had the High Court applied the proper test, it would have been understood that the onus of proving Ms MacKay's capacity had switched to Ms Blair.



Stock photo

That oversight, together with the High Court's failure to give any weight to a neuropsychological assessment conducted by a registered clinical psychologist and neuropsychologist, led the Court of Appeal to conclude that the appeal should be allowed. The neuro-psychological report had concluded that Ms MacKay had a reading age of seven; her functional academics were very poor; she was unable to spell her formal Christian name; she could not name any seasons; and her spelling, maths computation and sentence comprehension were all in the impaired range. Her overall intelligence was in the lowest one per cent of the population. ■

CASES UPDATE



Property

Dispute over electronic signature on property purchase document

Ola Homes Ltd v Huong Tuyet Tieu [2025] NZDC 18049 involved the defendant, Huong Tuyet Tieu, reputedly entering into an agreement to buy from Ola Homes Ltd, for $1.12 million, a townhouse to be built in Mt Wellington, Auckland. Settlement was set for a specified number of days after the code of compliance and title issued but, although that occurred in November 2022, the defendant did not settle.

Ola Homes Ltd sold the property in March 2023 for a lower price of $875,000, and sued the defendant for damages of $214,530 plus interest. The defendant initially claimed that the property had been misrepresented to her and, subsequently, asserted that no sale and purchase agreement had been entered into.

The defendant had initially signed an offer with a price of $1.12 million but a higher counteroffer was made, extinguishing the original offer. Later documents were forwarded with the price recorded as the sum originally offered by the defendant and one clause added, but it appeared that she signed the original offer.

The exchange of signatures was done electronically and the defendant paid the deposit. The real estate agent gave evidence that he had shown the defendant how to cut and paste her DocuSign initials onto the additional clause and that she had done that on the later agreement. The defendant's evidence was that she had not signed or initialled the new clause at any time. The plaintiff's evidence was that the agent had cut and pasted her initials onto the new clause.

Judge Davenport held that that plaintiff had not established that the electronic initials added to the document had been inserted by the defendant. There was insufficient reliable evidence to establish that the electronic initials were linked only to the defendant and were not under the control of any other person.

"It is my view that it is most likely that [the agent] cut and pasted her signature believing that he was taking care of loose ends on the agreement.

"Accordingly, the method of signature is not reliable as it is not exclusively linked to the signatory, nor was it under the control of the signatory at the time it was executed. The plaintiff has failed to prove on other grounds that the signature was fact in the circumstances. Therefore, I find that no valid contract for sale and purchase was formed on the basis that the requirements for signing set out in the [Property Law Act 2007] and the [Contract and Commercial Law Act 2017] were not complied with."

Judge Davenport accordingly held that the plaintiff had not succeeded in its claim. As there was no valid agreement for sale and purchase, the plaintiff must also return the deposit to the defendant.

Cancellation of lease and order for possession granted after failure to pay rent and arrears

In *BNS Co Ltd and BNS Group Ltd v Pamber (Watts) Ltd* [2026] NZHC 489, Pamber (Watts) Ltd and BNS in May 2023 entered into a commercial hospitality lease for premises at Orewa. In June 2025, BNS stopped paying rent and monthly operating expenses for both premises.

In August that year, Pamber issued notices to cancel the leases under sections 245 and 246 of the

Property Law Act 2007 for unpaid rent, unpaid operating expenses and a change of the shareholding of BNS without notification to Pamber, in breach of clause 33.3 of the leases. The notices gave BNS 10 working days to remedy the breaches and pay Pamber's legal costs and interest.

BNS filed an application for relief against cancellation of the leases, claiming that it had been unable to continue paying rent and operating expenses as they became due. Pamber subsequently proposed a 'clean start' approach whereby BNS would bring its unpaid rental and operating expenses up to date by 10 September. BNS then sought to withdraw its application for relief against cancellation of the leases.

However, the debt was not paid and BNS moved to continue its application. Pamber filed an application under section 251 of the Act for possession orders and cancellation of the leases. By the time of the hearing, the Commissioner of Inland Revenue had filed liquidation proceedings against BNS. However, BNS argued that it was not insolvent, that its two cafes were profitable and that there was a high degree of certainty that the arrears would be paid.

Justice Gardiner said that the cancellation of leases was governed by sections 243 to 264 of the Act. A lessor who wished to cancel a lease could either apply for a court order, or re-enter the land peaceably.

Her Honour noted that, if an application was made to the court, the court had a discretion as to whether or not to order cancellation of the lease. It could also order the lessee to pay rent up to the date of cancellation or to pay reasonable compensation for the breach, or could impose other conditions on the lessee.

Justice Gardiner held that Pamber had made out its application for cancellation of the leases and for possession orders. Pamber had served valid notices and BNS had been given a reasonable opportunity to remedy the breaches.

The court was not persuaded to grant BNS relief from cancellation as BNS had not paid the rental arrears and costs, so there was no presumptive right to relief against cancellation. There was no certainty that the debt would be paid, let alone a high degree of certainty. BNS had been promising to pay the arrears since August 2025 but had not done so. The companies were insolvent and the court was unable to reconcile the indebtedness with management accounts purporting to show profitable businesses. It was not disputed that the unaudited accounts had been prepared by BNS' director.

The court made orders under section 251 for possession and cancellation of the leases and for payments of the amounts owing. BNS' application for relief under section 215 was declined.

When neighbourhood disputes go from bad to worse

The case of *382 Columbo Street Ltd v Frame and Mirror Ltd* [2026] NZHC 438 involved neighbouring businesses in Christchurch. The plaintiff, 382 Columbo Street Ltd, was the registered proprietor of land which had a legal easement granting rights of way over parts of property owned by the defendants, Frame and Mirror Ltd and Hitesh Ravji. The defendants had prevented the plaintiffs from using the right of way and had also parked vehicles and placed containers on the plaintiff's land without consent.

The plaintiff successfully applied to the High Court for an order granting interim injunctive relief and for a permanent injunction restraining the first defendant from obstructing the right of way. Those orders were granted, respectively, in September and October 2025. The interim order expressly required the defendants to remove all vehicles, containers, storage sheds and other obstructions from the right of way within 14 hours of service of the order.

However, the only change in the defendants' conduct was that the director of the first defendant stopped parking his motor vehicle across the right of way. The area was still obstructed by containers, storage sheds and other objects.

The plaintiff accordingly applied to the court for a declaration that the first defendant was in contempt of court for breach of the orders. Justice Osborne noted that email correspondence received by the plaintiff from the director of the defendant strongly suggested that he had no intention of complying with the court orders. He said he planned to take legal proceedings against the directors of the plaintiffs and threatened action against them.

His Honour concluded that the first defendant's breach of the orders was deliberate and contumacious. The terms of the court's orders were clear and unambiguous and, under section 16(3)(b) of the Contempt of Court Act 2019, the court was satisfied that the orders were clearly binding on the first defendant; that he had knowledge and proper notice of them; and that he had, without reasonable cause, knowingly failed to comply with them.

In addition to the declaration, the plaintiff also sought leave to issue a writ of sequestration against all real and personal property of the first defendant pursuant to Rule 17.87 of the High Court Rules 2016. Justice Osborne said that he was in a position to issue a sequestration order as he was satisfied that the

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requirements of section 16(3)(b) of the Contempt of Court Act had been met.

However, His Honour said that he would at that time refrain from issuing a writ of sequestration because of the very significant consequences that would immediately flow for the first defendant if all its property was immediately sequestered. The court's expectation was that, immediately upon service of the contempt declaration, the first defendant would comply with the previous court orders and ensure that the right of way was clear.

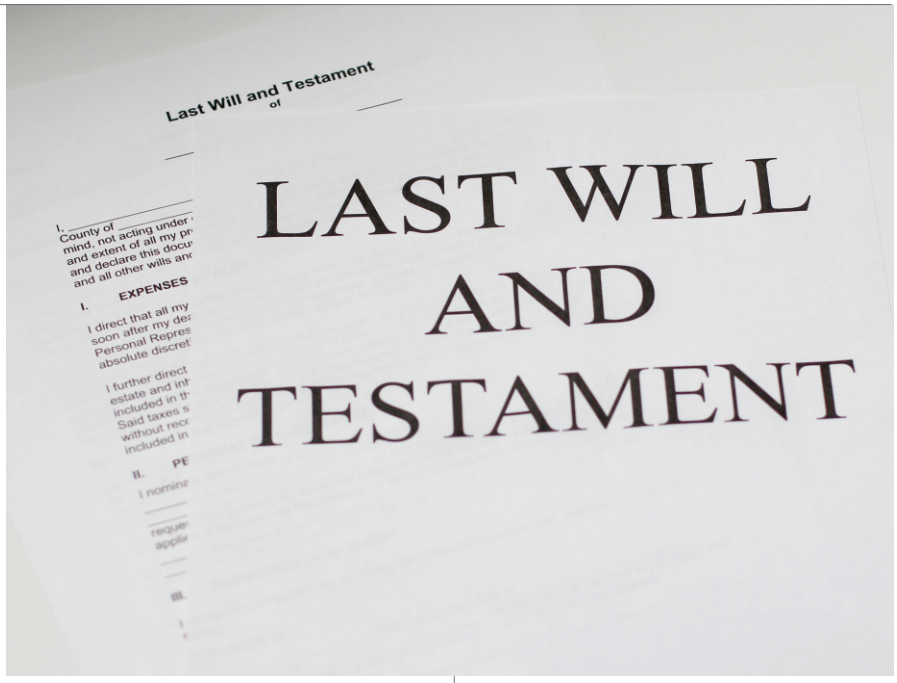
Justice Osborne adjourned the plaintiff's application part heard to a teleconference on the following day, for consideration of the plaintiff's applications for leave to issue a write of sequestration or for the imposition of a fine, to be reviewed in the light of any progress achieved in the intervening period.

Trusts

Trust variation granted to reflect changed circumstances

In *Re Arcus* [2026] NZHC 581, in 2000 Peter and Louise Arcus established a trust for their benefit and for the benefit of their two children and their grandchildren. Mr and Mrs Arcus and their lawyer were the initial trustees. However, Mr Arcus died in 2007 and then the lawyer died in 2018, leaving Mrs Arcus as the sole trustee.

In 2018, one of the couple's sons and a professional trustee company were appointed as additional trustees. The three trustees wished to vary the terms of the trust deed. This was because the trust had been established only for 50 years and its assets would have to be distributed within less than 25 years. The son who was a trustee deposed that he



and the other trustees considered it would be preferable for the trust to endure for longer than that. It had been successful and had accrued a significant body of assets and investments. An extension of its lifespan to 125 years would allow the trustees to use the trust 'to its full potential to generate wealth for future generations.'

Under section 122 of the Trusts Act 2019, the terms of the trust could be varied with the unanimous consent of all the beneficiaries. However, as there were minor grandchild beneficiaries, the court was required to approve the variation.

Justice Boldt noted that the trustees and all of the adult beneficiaries supported the application. The proposed new trust deed was a modern and comprehensive document containing considerably more detail than the 2000 deed. His Honour said he was satisfied that the new deed would not disadvantage any of the minor – or unborn – beneficiaries.

"Indeed, their position will be protected and enhanced by the variations the trustees propose. Their status as the presumptive final beneficiaries is fixed and cannot be altered. I am also satisfied that it would not be in the long term interests of the grandchildren to force the Trust to wind up in 2050, when some of them may still be young, in circumstances where the Trust is designed to provide them with financial security throughout their lives."

Pursuant to section 124(1) of the Act, the court approved the proposed variation to the trust deed.

Wills

Court rules on case of missing beneficiary

In *Re Estate of Christopher Vaughan Cheesman* [2025] NZHC 2199, Christopher Cheesman died intestate in 2017 with no immediate family. Under intestacy rules, his estate fell to be distributed among his maternal and paternal cousins – or, if they had died before him, their children and more distant issue.

The value of Mr Cheesman's estate was approximately $1.5 million. The estate was distributed except for a

share due to Mr Cheesman's cousin, Lance Cooke. Mr Cooke could not be located and was not believed to have had any children. His share of the estate was worth $376,337.

The estate's administrators applied under section 136 of the Trusts Act 2019 for orders authorising them to distribute Mr Cheesman's estate as if Mr Cooke had died before Mr Cheesman.

Section 136 provides that a court can make an order authorising trustees to distribute trust property as if a potential beneficiary had died before a date or an event specified – in this case, the death of Mr Cheesman.

Justice Anderson said that the court could make an order under section 136(1) only if reasonable measures had been taken to bring to the notice of the potential beneficiary his or her potential beneficial interest; at least 60 days had passed since the last of those measures was taken; and no relevant potential beneficiary had come to the attention of the trustees.

Her Honour said that section 136 had replaced section 76 of the Trustee Act 1956, which had been considerably more prescriptive about what steps must be taken to find potential beneficiaries.

"The key issue under s 136(2) is whether the trustees have taken reasonable measures to bring the interest of the beneficiary to their attention. What constitutes 'reasonable measures' is a factual issue. An aspect of the factual context, as to what are reasonable measures, is the size of the estate or share in question."

Justice Anderson said that Mr Cooke's father had in 1983 applied for leave to swear to his son's death after the son had disappeared at Christmas 1975. That application was declined and Mr Cooke had briefly reappeared in 1983, but had not been heard from since then. Advertisements had been placed in newspapers three times in Auckland and Sydney; the Births, Deaths and Marriages registry had been checked; and a private investigation firm had been hired.

Her Honour said that she was satisfied that the steps taken by the administrators were "reasonable measures," commensurate with the size of the estate, to locate Mr Cooke. At least 60 days had passed since the last of the measures was taken and Mr Cooke had not come to the attention of the trustees.

Accordingly, it was appropriate that an order under section 136 be made. ■

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Court dismisses wife's claim

Andrew Johnstone of APEARS, Sydney, Australia





A recent Victorian Supreme Court decision on family provision claims under the Administration and Probate Act 1958 (Vic).

Wielicki v Millar[1] was decided in the Supreme Court of Victoria in 2026. The case concerned a family provision claim — a statutory application by an eligible person to the court seeking additional provision from a deceased person's estate on the basis that the will does not make adequate provision for their proper maintenance and support.

Under Victorian law, to succeed a claimant must show both:

1. The deceased owed a moral duty to make provision for them, and
2. The estate, as distributed under the will, fails to make adequate provision for their proper maintenance and support.

The central legal issue in this case was whether the deceased's widow could demonstrate financial need to satisfy the second part of this test, or whether other forms of need (such as contributions, sacrifice or moral entitlement) could suffice in the absence of financial hardship.

Background

The deceased was survived by his second wife (the plaintiff) and a daughter from a previous relationship. Executed in 2006, the deceased's final will left his estate (approximately A$1.9 million gross before liabilities) to a testamentary trust for the benefit of his daughter. He made no provision in his will for his wife.

[1] *Wielicki v Millar* [2026] VSC 12

During their long marriage, the wife acted as the deceased's primary carer as his health deteriorated. She significantly reduced her work hours over many years — in some periods ceasing paid work — to provide care, attend to appointments and support his daily needs. There was no dispute that this conduct demonstrated a strong moral duty on the part of the deceased to provide for her proper maintenance and support.


Supreme Court of Victoria

Evidence showed, however, that the wife was financially secure. She owned substantial assets (including multiple investment properties), had significant savings, earned a high income as a medical practitioner and maintained independent income streams.

Procedural issue and decision

The executor (the daughter) applied for summary judgment — a procedural step that seeks dismissal of a case prior to full trial where the claim has no real prospect of success. The argument was that, although moral duty had been established, the wife could not demonstrate financial need or any inability to adequately provide for her own proper maintenance and support, which was an essential threshold for the court's jurisdiction to grant family provision orders.

Justice Irving granted summary judgment and dismissed the claim. The court held that 'need' includes some element of financial need. Even though the statutory concept of need is broadly informed by all relevant circumstances, the court reaffirmed that it cannot intervene merely on moral or relational grounds if the claimant can adequately support themselves without assistance from the estate. Without evidence that the wife was unable to provide for her own proper maintenance and support, the statutory threshold was not met.

The court emphasised that it is not the role of the judiciary to rewrite a will to achieve equitable outcomes or to reward personal sacrifices; the jurisdiction exists only to remedy genuine financial inadequacy.

Key legal principles

The decision in *Wielicki v Millar* underscores several important precedents in Victorian family provision law:

- An eligible person must satisfy both elements of the statutory test: moral duty and inadequate provision for proper maintenance and support
- Financial need remains a critical threshold for family provision claims, even where moral duty and relational factors are strong
- The court will not redistribute estate assets simply to achieve fairness or reward caregivers; jurisdiction is confined to genuine financial necessity, and
- Summary judgment may be appropriate where need is clearly absent, avoiding protracted litigation and preserving estate value.

This case is significant for estate practitioners and litigants as it clarifies that moral claims, caregiving contributions or sacrifices, without accompanying financial need, are insufficient to succeed in a family provision claim in Victoria. ■

Regards from Australia,
Andrew Johnstone
APEARS

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