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TRUSTEES AND DEMENTIA

The role of trustee implicitly involves decision making – taking multiple sources of information into account, making a considered decision, understanding the implications of that decision, and being held accountable for it.

A trust deed will often require unanimous decision making. Where there are concerns that one trustee is or is becoming mentally incapable, it can become a significant hurdle for the other trustees.

The early symptoms of dementia can be easily missed in personal as well as professional relationships, and although dementia can occur at any age, it becomes more common later in life. A common case is the family trust with one or both parents as trustees together with one or more of their children, and one of the elderly parents begins to show signs of dementia.

This poses a problem for trustees who have a co-trustee who has lost capacity. Some trust deeds allow the settlor to appoint and remove trustees, and s 43 of the Trustee Act can be used to replace a trustee where this power is lacking. However, some co-trustees will need to apply to the Court under s 51 of the Act where the removal and replacement of the trustee becomes inexpedient, difficult or impracticable.

Even given the assistance of the court, the process is difficult. A trustee who lacks mental capacity cannot sign documentation to transfer the property held by the trust to the new and continuing trustees.

Where dementia is diagnosed early, legal documents can be put in place. This will generally include an Enduring Power of Attorney (EPOA) for

Property. An EPOA appoints someone to make decisions about your property and your finances if you are no longer able to. However, the practical difficulty from a trustee perspective is that there is no symmetry between the Protection of Personal and Property Rights Act 1988, the Trustee Act 1956 and the Land Information New Zealand (LINZ) rules regarding who can authorise the transfer of property.

An attorney appointed under an EPOA cannot sign trust documentation on behalf of the trustee, as the attorney is only authorised to act in relation to the person's personal property, not the property owned by the person as a trustee. Importantly Land On Line does not permit an attorney to sign land transfer documents of behalf of a trustee who has lost mental capacity.

The only way to remedy the situation is to apply to the High Court under s 52 of the Trustee Act to vest the trust property concerned in the new and continuing trustees. This is an expensive and sometimes lengthy exercise, particularly where the trust does not earn income and its only asset is a family home.

A proactive approach for trustees is to be aware and alert to signs of the onset of dementia. These can include advanced age, dependency, failing memory, changes to personality, lack of decisiveness, departure from previous arrangements, as well as physical, mental and emotional instability.

Where signs are recognised, it is important to act quickly to avoid facing greater problems down the track.

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TRUSTEE APPOINTMENT & RETIREMENT

“How to retire as a trustee”

The removal (and appointment) of trustees is most commonly dealt with in accordance with the terms of the trust deed or, where that does not assist, the Trustee Act 1956. However, in some circumstances the assistance of the Court will be required.

Accordingly, the first step is to check the trust deed. While it is true that a trustee cannot be compelled to remain a trustee, not all trust deeds allow a trustee to retire when they choose. Where the deed does provide for removal, it is important to follow the terms of the trust deed. Arrange for a deed of retirement to be prepared (or whatever document is required by the trust deed) and signed by all trustees.

The second step is to establish whether there will be any objection to the retirement. The retirement of a trustee can be expensive where the trust has property interests, all of which will have to be transferred from the retiring trustee to the new and continuing trustees. Co-trustees may object to the cost, or may object to a retirement because of concerns over liability. If agreement cannot be reached, under s 46 of the Trustee Act a trustee who wishes to retire can give notice of their intention to retire to their co-trustees, to the person with the power of appointment and removal of trustees, and pass the trust's accounts to the Registrar of the High Court, or can ask the Court to appoint a new trustee. These may be necessary steps as it is important to note that a trustee remains personally liable until their retirement.

Where the deed does not permit retirement, section 43 of the Trustee Act can assist. This requires the preparation and execution of a deed of retirement of trustee. The deed will need to be signed by the retiring, continuing and new trustees. Note that where the document is a deed, the signatures of all trustees must be witnessed – this is very important. Take care to ensure that there is always a sufficient number of trustees – check the trust deed to confirm this.

While most cases involving removal of trustees are against the trustee being removed, there are often instances where the application is brought by a trustee who wishes to retire. This may be due to inaction by other trustees, deadlock of the trust due to conflict, or the absence of a co-trustee. Section 51 of the Trustee Act gives the Court the power to remove a trustee where it is also appointing a new trustee, and where it is “inexpedient, difficult or impracticable to do so without the assistance of the Court.”

Where a trustee is appointed or removed with the assistance of the Court it may be necessary to also apply for vesting orders to be made transferring any trust property to the new trustee. This might also be required where a trustee has retired but has not or will not complete the associated formalities.

Once a trustee has retired, ensure the following administration is attended to promptly:



CHECKLIST

- ✓ Check the Companies Office records show correct transfers of shares
- ✓ Check certificates of title show correct proprietors
- ✓ Update signing authorities with banks or other institutions
- ✓ The retiring trustee must advise Inland Revenue of their retirement
- ✓ Where the trust is GST-registered, the retiring trustee must advise the Commissioner of Inland Revenue in writing of their retirement. Note that a trustee will be liable for GST until the IRD has been notified in writing
- ✓ The retiring trustee should advise the trust's beneficiaries, advisors, accountant, lawyer and any other related party.



Family Estate Planning

SIMPLE ASSET & ESTATE PLANNING

"Key documents and making sure they work together..."

Traditionally, an individual had two documents recording their wishes for the protection and distribution of their assets – a Will, to provide direction when its maker was dead, and a Power of Attorney, to provide direction when its maker was alive but lacked mental capacity.

Today, the key components of asset and estate planning often comprise the following four documents:

(1) Will

Any adult who has a child or who owns property should have a will. This can relieve financial strain on your family following your death and make sure your wishes are carried out. If you die without a will your property will be distributed by either the Administration Act – usually division in set proportions among your family; and/or the Relationship Property legislation.

It is important to note that your will is automatically revoked if you marry, re-marry, or enter into a civil union, unless the will is made in contemplation of that marriage or civil union. Note the same does not apply to de facto relationships.

Care should be taken to properly identify the will-maker's assets and how they are owned, especially where an associated trust is involved. A will purporting to dispose of assets that are not owned by the will-maker can and will result in claims being made against the estate that will incur time and money to resolve.

Where a will-maker is also the settlor of a trust, it is common for the settlor's will to link to the trust. However, care is required to consider whether this is in the best interests of the surviving spouse or partner.

(2) Trust and Memorandum of Wishes

A trust is a flexible device for the ownership and distribution of property, and is commonly used in New Zealand for a number of reasons.

Probably the most valid standalone reason for settling a trust is the protection of assets for the settlor's children and grandchildren. Nominating children as beneficiaries of a trust is the optimal way to allow them the benefit of their predecessor's wealth, without the risk of it being dissipated through spending or unwise decisions. However, there are other factors to be aware of when considering settling a trust later in life, the primary example being the current Residential Care Subsidy scheme, as settlement later in life may not always be as effective as ensuring a Residential Care Subsidy the settlor might think. Advice before settling a trust is strongly recommended where the primary consideration is entitlement to a Residential Care Subsidy.

A memorandum of wishes to accompany the trust is not a legal document, but is a way to provide guidance to trustees following

the death of the settlor. It is very important that it is reviewed over time and amended to address changing family circumstances.

(3) Contracting Out agreement for the purposes of the Property (Relationships) Act 1976

In the event of separation or death this Act divides all relationship property equally unless the Court decides that there are exceptional circumstances that should prevent this. Section 21 allows couples to contract out of the Act and make their own private agreement to determine the status, ownership and division of their property on separation or death. This is called a Contracting Out Agreement. It can be made at any stage of the relationship although it is advisable to do so before the relationship has lasted 3 years.

Many people are happy to divide their property equally, however an agreement might be useful for couples bringing significant assets into the relationship that they wish to keep separate, or for providing for children from previous relationships.

Section 61 of the Property (Relationships) Act provides that a surviving partner or spouse has the option following the death of their spouse or partner to elect to apply for a division of property under that Act, or to accept any testamentary bequest left under their will. Many contracting out agreements provide that the survivor will not elect Option A (to make an application under the Act) pursuant to the Act.

(4) Enduring Powers of Attorney

An Enduring Power of Attorney (EPA) is a document that allows you to appoint a person to take care of your welfare or your property. If you were to be incapacitated without an EPA and there is a need for someone to make decisions about your property or welfare it is necessary to apply for the appointment of a welfare guardian and / or property manager to the Family Court under the Protection of Personal and Property Rights Act 1988. This can be both time consuming and expensive and can become a further burden on family already coping with a stressful situation.

A Personal Care and Welfare EPA will only come into effect if you become mentally incapable, and will cover your health, living arrangements, and care decisions. A Property EPA can either be effective immediately, or only if you become mentally incapable, and covers your finances and assets. You can suspend or revoke your EPAs any time you choose provided that you still have mental capacity.

An EPA provides peace of mind as you know that people you trust will be the ones to make decisions about your life and your possessions, and that people close to you will not have to seek the assistance of the Court in caring for you.

As no-one can know what might happen in their future, current EPAs are a very important component of asset and estate planning.

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About NZ CA



NZ CA Limited was formed in May 2001 and currently has 28 independent Chartered Accounting firms in 35 locations throughout New Zealand. NZ CA has a 'nationwide' network spanning from Kaitia to Invercargill and has further potential to grow. Members of NZ CA share resources to provide the ultimate innovative and practical business advice tailored to their clients' requirements.

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