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TRUST eSpeaking

GAWITH BURRIDGE 4 Church Street, PO Box 454, Masterton 5840, Ph: 06 370-0000, Fax: 06-378 2847
24 Jellicoe Street, Martinborough, Ph: 06-306 9291 | E-mail: legal@gawith.co.nz | www.gawith.co.nz

With the days now longer and a little warmth in the air, we publish the Spring edition of *Trust eSpeaking*. We hope you find the articles in this e-newsletter both interesting and useful.

To talk further about any of these articles, or about trusts in general, please don't hesitate to contact us – our contact details are above.

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The next issue of Trust eSpeaking will be published early in 2016

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NZLAW



AN ASSOCIATION
OF INDEPENDENT
LEGAL PRACTICES

Should you change your trustees? Always good to review

If you set up your trust some years ago, it may be time to consider whether the trustees you appointed are still right for the role. Does a trustee wish to retire? Should you consider changing the trustees of your trust?

Most trusts can last for up to 80 years. If the purpose of the trust is for long-term asset protection (as is the case with many New Zealand trusts) then you should consider appointing people who are willing and able to act as trustee for the long-term. This will assist in the administrative continuity of your trust.

Why change the trustees of a trust?

There are a number of reasons why you may wish to change the trustees of your trust:

1. Your trustees may be getting older. The trust could be in real difficulty if a trustee has a stroke, is in hospital long-term or dies. Sometimes dementia, or some other form of medical situation, can creep up on a trustee. By the time anyone realises there's a problem, it may be too late for the trustee to resign as the ability could be lost to understand and sign legal documents.
2. A trustee may be showing signs of, or already have, dementia and may not be able to contribute to the administration of the trust. Most trusts require trustees' decisions to be made unanimously. It's not possible to get a unanimous decision when one of your trustees has lost mental capacity.
3. The trustees appointed when you set up your trust may no longer be appropriate. You may have appointed someone as trustee who now lives overseas, which can make administration of the trust logistically difficult, although not impossible. Maybe you appointed a family member or an in-law as a trustee and, due to family circumstances, this is no longer desirable.
4. You may have appointed an accountant or lawyer as your independent trustee. They may be looking to retire from all trusteeships as they wind down their careers. Possibly the trustee is a previous advisor, who you have no relationship with now. You may be looking for the assistance of a professional independent trustee.
5. Perhaps now you have adult children who are among the beneficiaries of the trust. Possibly it's time for one or more of them to take an active role in the trust administration, particularly if the trust is to continue after your death.

How to change trustees

To change trustees, most trust deeds require a formal deed of retirement and the appointment of new trustees to be signed by the exiting, continuing and new trustees. Sometimes a signature is needed from the person who is given the power to appoint new trustees under the trust deed. If the trust deed is silent on how trustees can be changed, there are some limited powers in s43 of the Trustee Act 1956 to replace a trustee. Trustees can also retire if they no longer wish to continue.

What if your trust owns property?

If your trust owns property, the title to that property (and possibly your mortgage) will also need to show the change in trustees and ownership. Again all the exiting, continuing and new trustees will need to sign the paperwork. There will be some bank and legal fees.

If the title to the property is not updated, this is likely to cause complications later when you come to sell or refinance the property. If a trustee has moved and is hard to locate, has lost mental capacity and cannot sign documents or has died, this will often hold up the sale of properties. In some cases, the trustees have been penalised under the Agreement for Sale and Purchase because of delays or not being able to sign over the title. It's always important to ensure that the property title is updated at the time the change in trustees occurs.

If your trust owns other assets such as shares or bank accounts, there will also be forms that need to be signed to transfer the ownership of the assets into the new trustees' names.

It's important to note that it takes time to complete this change of ownership process, it's not a five minute job.

Changing trustees can take some time but, despite the procedures we've mentioned above, we can help make the change process easier. Before you take any action to change your trustees, get in touch with us and we can help you plan the process. ■

Worthy causes

Will your charitable donations reach the right people?

Many people consider leaving money to charity by their Will. This can be their whole estate, or just a specific amount or part of an estate. Many family trust deeds include, in the list of potential beneficiaries, either specific charities or charities generally. Many of us also are in the habit of making donations to charities each year. There are also websites where particular causes or people in need are highlighted.

Before you give money to a worthy cause you want to be sure that the money will help the right people. A recent example was where money was donated for a particular child but it was claimed it had been used mainly by the child's father for his own benefit. Is there anyone who is checking up on this sort of thing? Of course the parents of a child who is particularly ill are likely to have incurred major expenses and it may be fair enough that they receive some of the money so that they can support the child. It's difficult to be sure in individual cases without knowing a lot more.

Before deciding to make a donation or to include a charity in your Will, it's a good idea to make some enquiries. One way of checking where your money is likely to go is to look at the list of registered charities. Click **here** to read the Charities Services' list of registered charities,

Charities don't have to register but most of the main charities are registered.¹ Registered charities have to file a return each year so you can have some reassurance that the money has been spent in the way that was intended. It's worth checking whether a charity is registered and has published an annual return on the Services' website. You can then have some assurance that the money has been used properly.

By contrast, there are few controls over pop-up sites and campaigns to help individual cases of need. No doubt most are well intentioned but you have no way of knowing for sure.

When charities go bad

Despite the best intentions of the founders of a charity, there's always the risk that the wrong people might get to be trustees later on. In the case of a small non-profit charity which is not registered, there's less chance that this will come to light. For registered charities there is a greater chance that someone will eventually spot the problems. If someone has a complaint about misuse of charitable funds the Attorney-General has the ability to intervene. The Crown Law Office can bring a case on behalf of the Attorney-General against a defaulting trustee of a charity.

Philanthropic trust funds

Several of the statutory trustee companies² have long-term charitable trust funds. These are invested and the interest and other income each year is paid out for various charitable purposes. These purposes are usually set out in the Will or trust deed which established the charitable trust. There are a number of these trusts and some of them receive requests each year for community activities which they are able to support.

At least one trustee company has set up an umbrella arrangement so that individual donors can set up a medium-size trust within the umbrella arrangement. This can help keep down costs of ongoing investment and administration.

Most people, however, prefer to establish their own stand-alone trust with their own name on it. Such trusts can last for decades or can be set up as a perpetual trust (ie: one that can potentially last forever). Creating such a trust in your Will for the benefit of further generations may be a nice way for you to be remembered, as well as to support a cause close to your heart.

May be it's time for you to update your Will? ■

¹ Registered charities get an exemption from income tax.

² Public Trust, Trustees Executors and Perpetual Guardian.

Trusts Update

IRD numbers required for trusts to buy and sell residential property from 1 October 2015

This could cause a problem for any trust if the sale or purchase is due to settle after that date. Even if settlement is due before 1 October, there is a risk unexpected delays could mean that settlement is not completed until after that date and the trustees could be caught by the new rules. Trustees need to be prepared and get an IRD number well in advance. This could cause a problem for any trust if the sale or purchase is due to settle after that date, or if there is a risk that settlement might be delayed or postponed until after 1 October 2015. Trustees need to be prepared and get an IRD number well in advance.

The proposed changes are to the Land Transfer Act under the Bill which will apply from 1 October 2015³, although the Bill is still being considered by Parliament at present. The Bill deals with the method and rules for the collection of information. There may be changes before the legislation is finally passed.

A second Bill deals with the proposed tax rules.⁴ At the time of writing, this is still going through Parliament and there is not much time left for the legislation to be in place.

Although your trust should be exempt from paying capital gains tax on a sale (if it has owned the property for more than two years, or if it is your main home) we will still need to complete a tax statement to report the sale or purchase transaction to the IRD *before we can sign and certify* so that the transaction and settlement can be completed. Therefore, if your trust buys or sells a property with a settlement date after 1 October 2015 your trust must have an IRD number.

It doesn't matter when the agreement was signed, (for example if your trust bought an apartment off the plans two years ago, or a section where the subdivision has taken a couple of years for the title issue) but if settlement occurs on or after 1 October 2015 you need to provide an IRD number.

If someone is buying or selling as trustee, 'the information must relate to the trustee in that capacity.' In other words, it must be the IRD number for the actual trust. It could take the IRD up to 10 working days to issue an IRD number for your trust once it receives an application.

Where two or more trusts are buying the property in a partnership the IRD number and information must relate to the partnership. This may require individual trusts to obtain an IRD number and then these trusts applying for a trusts partnership IRD number. Inland Revenue, from recent experience, may take up to 20 working days to issue an IRD number in these circumstances. You therefore need to be prepared before signing any Agreements for Sale or Purchase agreements.

If you would like us to obtain the IRD number for you, please contact us.

Companies acting as corporate trustees: 28 October is a critical date

As from 28 October 2015 a company must have at least one director who either: lives in New Zealand, or lives in Australia and is a director of a company incorporated in Australia.

Failure to comply with this requirement (s10, Companies Act 1993) means the Registrar 'must' remove a company from the New Zealand companies register (s318(1)(aaa), Companies Act 1993). If the above circumstances apply to you, you must contact us urgently.

Complying trusts

Help is here for a settlor who leaves New Zealand. In New Zealand we have a settlor-based tax regime. In broad terms if a trust has a New Zealand tax resident settlor for any part of an income year the trust is taxed on its worldwide income.

Previously, if a settlor migrated and was no longer a New Zealand tax resident, it was likely the trust would become a non-complying trust. Non-complying trusts are taxed at 45% on some distributions and these can include realised capital gains and accumulated tax paid retained earnings. Section HC33 of the Income Tax Act 2007 now allows a trust to remain a complying trust after the settlor becomes a non-resident. The change has been back-dated to take effect from the beginning of the 2009 income year.

This is an extremely complex area of law so if you think it applies to you, please contact us for further advice. ■

³ Taxation (Land Information and Offshore Persons Information) Bill.

⁴ Taxation (Bright-Line Test for Residential Land) Bill.