

TRUST Talk

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TRUSTEES & POWERS OF ATTORNEY

As trustees age there is a risk that their mental capacity can diminish. This has implications for the administration of trusts. In what circumstances can powers of attorney (enduring and ordinary) be used to carry out trustee duties?

If a person who is a trustee gives an ordinary power of attorney this can include the delegation of their trustee powers. In normal circumstances the attorney can exercise the trustee powers when the trustee is absent from New Zealand or temporarily physically incapacitated. However if the trustee loses their ability to make their own decisions (such as through illness or accident), then the ordinary power of attorney becomes invalid.

An enduring power of attorney in respect of property can't be used by the attorney to exercise any trustee powers if the trustee has lost mental capacity. This is because that enduring power of attorney only relates to the property that the person giving the enduring power of attorney owns personally.

As the trustees of many trusts settled in New Zealand age, dealing with incapacity requires serious consideration. Trustees who develop dementia cannot execute the role of trustee once they are no longer competent to manage their own affairs and must be removed as a trustee.

Powers of attorney will not prevent the practical difficulties that arise when trust property is legally owned by a trustee that loses mental capacity. Land Information NZ will not register a transfer authority over a property where an attorney would be acting for an incapacitated person in his or her trustee capacity. This means a court order vesting the legal ownership of the property to the continuing and any new trustees will be necessary.

It is therefore very important that trustees consider the capacity of their co-trustees from time to time with a view to trustees retiring before issues of capacity arise.



Update on the Review of the Law of Trusts

The Government has considered the Law Commission's Report, *Review of the Law of Trusts: A Trusts Act for New Zealand*, which was presented to the House of Representatives on 11 September 2013. The Government's has agreed with the Law Commission's recommendation for a new Trusts Act to replace the current Trustee Act (the first of 51 recommendations). However, the Government has advised that further analysis of the regulatory impact of the recommendations is required. The Government has directed the Ministry of Justice to analyse the Law Commission's recommendations

and report back. Once this work is completed, the Government will form a final view on all of the Law Commission's recommendations. Because of the significant number of substantive recommendations, it is estimated that this report will take some time.



What to do if the children want to see trust documents?



Beneficiaries' rights to trust information are not well appreciated by trustees. What should trustees show beneficiaries and what to do if there are reasons not to?

Beneficiaries are entitled to receive information to enable them to ensure that the trustees are acting in accordance with the terms of the trust deed.

However, these rights will always be subject to the discretion of the Court, which must balance the rights of a beneficiary seeking information against the interests of all the beneficiaries, and in some circumstances, the wider family.

As children beneficiaries get older and grow into adulthood, increasingly they are asking parents about family trusts. Accordingly, trustees need to know what information they must supply and what to do if they are unsure.

A beneficiary is generally entitled to ask a trustee for information about a trust including:

- the deed of trust and any deeds of variation (i.e. the documents that set out the terms of the trust and any subsequent changes)
- the trust's financial accounts
- full details of the trust's assets and liabilities
- contact details for the trustee and any former trustees
- any documents relating to the appointment or removal of trustees
- details of all distributions of capital and income and who the distributions were made to (e.g. payments to beneficiaries)

If the trust the beneficiary is enquiring about has already come to an end or been resettled onto another trust the beneficiary is entitled to ask for any documents that relate to the winding up or resettlement of the trust.

Beneficiaries are not generally entitled to see information relating to the trustees' decision making processes as this information is the trustees' information, not the trust's information. Information that trustees do not have to give to beneficiaries includes:

- The trustee's reasons to vary, partially distribute and resettle a trust
- The trustee's reason to change existing policy in regard to distributions to any beneficiaries
- details of advice given by the settlor to the trustees including a memorandum or letter of wishes.

"When in doubt, trustees can apply to the High Court for guidance"

Trust & Relationship Breakups

What steps can be taken to avoid trustee deadlock when the relationship of settlor/trustees comes to an end?

Where a relationship breaks down and the spouses or partners are also trustees of a family trust that they have settled, matters can quickly deteriorate if not sensibly managed. If the trustees reach deadlock, the matter is often best resolved by the removal of one or more trustees and the appointment of a new trustee or trustees who can more objectively assess the interests of all of the beneficiaries. A common issue when a relationship ends is for trust property to be treated as an extension of the relationship property. However this is not the case consideration must be given to all of the beneficiaries, not just the settlors.



While deadlock cannot always be avoided, matters can often be assisted by:

- seeking early legal advice regarding the interface between trust property and relationship property and how the needs of the competing beneficiaries can be best met
- sensible consideration of whether the independent trustee (if there is one) can assist the trustees to resolve matters; if there is a risk of sides being taken consider whether the "independent" trustee should be replaced with one or more neutral trustees
- a frank assessment of whether the trustees are able to continue to act as trustees clear agreement as to who will meet the costs that will arise on account of the trust.



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