



Estate and Taxation Planning Council New Zealand Inc

September 2003

Dear Member

The impact of death and divorce under discretionary family trusts

The second breakfast seminar for the year was held at Romfords on 24 June. Guest speakers were Greg Kelly of Gillespie Young and Watson, Lower Hutt and our own longstanding executive member Hugh McGuinness of Simpson Grierson. Both Greg and Hugh had the day previously presented seminars at the annual Legal Executives Conference on similar topics. A panel discussion was facilitated by another executive member, Catherine Atchison of Martelli McKegg Wells & Cormack who also contributed to the panel discussion.

The breakfast was once again well supported with 45 attendees. Greg presented his views on the topic by presenting case studies, which demonstrated the difficulties trustees faced with death or divorce of principal beneficiaries of a family trust. This is becoming a major issue in light of the changes under the Property (Relationships) Act 1976.

Issues which he highlighted were:

1. **Eligibility** – that trustees should clearly specify in the trust deed who is eligible to be classed as a discretionary beneficiary. Trustees are likely to face difficulties in deciding whether a “partner” is an eligible beneficiary and whether the definition “partner” would be as defined under the Property Relationships Act or by some other method of identification.
2. **Letters or Memorandums of Intent** – Although not binding they are increasingly important and provide a background for the trustees (in the settlor’s absence) to enable them to properly discharge their trustee function, particularly with distributions to beneficiaries. Some memorandums are being incorporated within the trust deed itself to give greater effect. Often they are not updated and become irrelevant, so need regular review. The courts are unlikely to challenge trustees’ decisions if based on up to date information, but increasingly court action will see memoranda being produced as evidence or letters of intent.
3. **Joint Powers of Appointment** – these cause difficulty because of bad drafting and indecision as to how the appointment should be exercised. Some joint power of appointments are drafted so that if one partner dies the other partner cannot appoint a new trustee by themselves thereby avoiding the possibility of the surviving partner controlling the trust for their benefit. Other joint appointments are structured to give the surviving appointor sole power of appointment of additional trustees.
4. **Appointment by an Event** – To prevent trust funds being hijacked by surviving partner the trust deed could provide that on the death of the settlor, one of the children is appointed a trustee. Although this may cause friction or tension, the settlor’s wishes are carried out and potential disputes may be resolved early on.
5. **Payment of Trust Funds** – Caution is needed when distributing funds. In cases of divorce and death the trustees may bring forward the vesting date or alternatively resettlement. Points to remember on resettlement are:
 - a) Check the perpetuity dates;
 - b) Check both the new and old trust deeds to ensure that the trustees are carrying out similar wishes to the original settlors, and the class of new beneficiary is not too diverse.

6. **Trustee Risks** –Trustees run the risk of being sued by unhappy beneficiaries. Professional trustees who have dual roles such as, being the family trust solicitor or accountant as well as being the trustee, may find themselves in a conflict situation and run the risk of being sued in their professional capacity. Greg believed trustee actions may increasingly be put under the microscope and he referred us to the case of *Hansen v Young* a decision of Justice Wild in October of last year. This case raises issues of cover under professional indemnity policies.

Hugh McGuinness very kindly stepped in for Geoff Harrison who was unable to attend and covered legislative provisions which may be available to practitioners to get access to trust funds following the dissolution of a relationship. Remedies discussed included:

Section 182 Family Proceedings Act 1980 which is available to divorcing couples only where there has been an anti or post nuptial settlement on the trust. There are limitations with the section but it has been interpreted widely by the court in the past and this is expected to continue.

Section 44 Property (Relationships) Act 1976 which has essentially two remedies:

Section 44(b) gives an option to the court to order trustees or respondent spouse, to disclose the asset position of the trust especially with relation to the distribution of relationship property to the trust.

Section 44(c) can be used if it can be shown that the distribution of property to a trust has “the effect of defeating the claim or rights of one of the partners to the relationship” in that instance, the court can order payments of money by one spouse to another or order transfer of property, or order trustees to pay some or all of the income of the trust.

There are limitations to these remedies but the courts are increasingly willing to look at ways of accessing trust asset if in the control of one of the parties of the relationship.

The panel discussion that followed emphasised that practitioners need to be aware of creative solutions. Estate planning must be done with the Property Relationships Act in mind. There was a lively discussion with valuable comments coming from the floor. Some of the problems raised by members gave weight to Greg’s comment that the area of trust law will in future be fraught with unique difficulties but notwithstanding that, it is an exciting area in which to practice.

Future Events

Next Seminar

14 October 2003

“Independent Trustee Hero or Villain”

Speakers are:-

Mark Cassidy – Guardian Trust

Richard Taylor - Taylor Grant Tesiram

Robert Knox - BDO Spicers, Auckland

Venue - Romfords 7am for 7.15 start to be followed by the AGM.

Christmas Dinner Speaker – Donal Curtin of Economics NZ Ltd

3 December 2003

5.15pm

Venue - Auckland Club, Shortland Street, with drinks and finger food

Steps

The Society of Trust and Estate Practitioners ("STEP") has held a successful inaugural seminar on 10 September 2003 at The Northern Club. The guest speaker was Bill Patterson on Beneficiaries Rights. Membership has now reached 50 and is steadily increasing and the executive is currently finalising the seminar programme for 2004. The next seminar will be held at The Northern Club on 26 November 2003 at 4pm. The guest speaker will be Iain Craig of BDO Spicers. Members of the Estate and Tax Planning Council are welcome.

Executive

Marcus Bosch executive member has recently moved to Australia with his fiancé for a two-year secondment. We wish him well, both with his new career and future marriage.