DG LAW

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Welcome to the Spring edition of *Trust eSpeaking*. We hope you find the articles in this e-newsletter are both interesting and useful.

If you would like to talk further about any of the topics covered in *Trust eSpeaking*, or about trusts in general, please don't hesitate to contact us – our details are above.

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Messy, expensive and time-consuming

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The next issue of Trust eSpeaking *will be published in February 2015.*

NZLAW
AN ASSOCIATION OF INDEPENDENT LEGAL PRACTICES

Dying without a Will?

Messy, expensive and time-consuming

Most people know that it's important to have a Will and to keep it up to date. But what happens if you die without a Will? You might assume everything will go to your spouse or partner but that's not usually the case. In fact, dying without a Will can mean a messy division of your estate between your spouse/partner and children.

There can be many reasons why some people die without a Will (the legal term is 'intestate'). Possibly they tried to draw up their own Will and failed to get it signed correctly. They may have meant to make a Will but never got around to it. Sometimes a person had a valid Will but is unaware that their Will was automatically revoked on marriage. It's important to talk about your Will with your lawyer after events such as marriage, divorce or separation.

If you don't leave a valid Will then the law has to make some rough and ready allocations of who should get what. The law doesn't take into account your individual circumstances or the needs of your dependents.

So who gets what?

The Administration Act 1969 sets out who is to benefit if you die without a valid Will.

If you leave a spouse or partner but no parents, children or other descendants: The spouse or partner receives the whole estate.

If you leave a spouse or partner and children or other descendants: The spouse or partner will receive the personal chattels plus $155,000 (with interest) and one third of anything that is left. The children receive the remaining two thirds. If any of them have died, their children receive their share and so on for each generation.

If you leave a spouse or partner and parents but no children or other descendants: The spouse or partner is entitled to the personal chattels plus $155,000 (with interest) and two thirds of anything that is left. The parents receive the remaining third.

If you leave children or other descendants but no spouse or partner: The children receive the whole estate equally and if any of them have died, their children receive their share and so on for each generation.

If all else fails: The next in line (in order of priority) are: any surviving parent or parents; brothers and sisters (if any have died then their descendants); grandparents; uncles and aunts and their descendants.[1]

If you have none of the above: Everything passes to the State. Dependents and anyone who might reasonably expect to have benefited may apply to the New Zealand Treasury which may pay out some of the estate to them.

Points to note

» The spouse or partner who may benefit would include a civil union partner and any de facto partner or same sex partner. If there's more than one spouse or partner, they must share this entitlement equally.

» Personal chattels are defined to include almost anything that can be moved. These could be, for example, vehicles, boats, horses and equipment for them, as well as furniture and personal items such as clothing and jewellery.

» The figure of $155,000 is current at the time of writing. It has increased steadily over the years and is likely to be increased with inflation in future. Interest is payable on this amount from the date of death until the date when it is actually paid out. The rate of interest is currently 5% pa but this is updated from time to time.

» If there's a Will but it only deals with part of the estate, then the rules outlined above will apply to the part of the estate not covered by the Will.

Make sure you have a Will

If you die without a Will, the process to sort it all out is usually slower and more expensive to get the necessary High Court order for an intestate estate (called Letters of Administration) than it is to get probate of a standard Will. Special searches have to be made to make sure there are no children born out of wedlock and so on.

Just as with a Will, it's possible for someone who feels they have been left out unfairly to bring a claim against the estate under the Family Protection Act 1955, Property (Relationships) Act 1976 and similar laws. ■

1 Section 77 of the Administration Act 1969 sets out the details.

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Common Intention Constructive Trusts

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What is a common intention constructive trust?

A traditional constructive trust is created where there has been no direct or indirect declaration of trust, but that it would be unfair for a legal owner to have full beneficial ownership. A common intention constructive trust is based on the assertion that the parties had a common intention for assets to be held for their equal benefit, regardless of the legal ownership of those assets.

Sally Ridge and Adam Parore case[2]

Following the separation of Sally Ridge and Adam Parore, the division of property between them was made difficult as the majority of the assets were held in two family trusts. Both Sally Ridge and Adam Parore and their four children were beneficiaries of each trust. Sally and Adam were also trustees of each trust.

The parties' assets were restructured so that the family home was owned by Sally Ridge's trust and the business assets held by Adam Parore's trust. This structure was set up in early 2007 to protect their family home from any trading liabilities of the couple. The evidence showed that it was the intention of the parties that Adam's trust would fund the parties' lifestyle and allow the income and assets of both trusts to be shared equally between the parties.

It's not clear whether Sally Ridge received independent legal advice in relation to the restructure, but it is clear that she was kept well informed, as she attended meetings with, and received email correspondence from, the lawyer instructed to put the restructure in place. Sally was, however, not particularly interested in the details of the restructure and relied on Adam to ensure the arrangements were appropriate.

In mid-2008, Adam's trust purchased a company called Small Business Accounting (SBA). SBA was successful and allowed Adam's trust to fund the parties' living expenses.

Sally Ridge and Adam Parore separated in 2010. Sally claimed that the parties had a common intention that SBA would be held equally for the benefit of the parties and therefore Adam's trust was holding half of the shares in SBA on a common intention constructive trust for her trust.

While few, if any, cases of a common intention constructive trust have been recognised in New Zealand, the Australian and English authorities are clear that such trusts are founded on 'proof of a subjective common intention, clearly and unequivocally established by words or conduct.'

One problem that Sally faced was that in each of her pleadings before the court, the parties to the alleged common intention kept changing. At one point Sally claimed Adam's trust was holding the shares for the parties personally; at a later point it was that Adam's trust was holding the shares for the benefit of the two trusts.

The court found that Sally's claim was contradicted by the evidence:

» The 2007 restructure was completed to clearly separate the family home and business assets. There was never a suggestion that the trustees of Adam's trust would hold assets for the beneficiaries of Sally's trust, and

» The concept of equal sharing was achieved by the trustees of each trust exercising their discretions to benefit Sally and Adam as equal beneficiaries of each trust, not by sharing ownership of the assets between the two trusts.

As Sally couldn't show a clear and unequivocal intention that half of the shares in SBA were held by Adam's trust for her own trust, the court declined to find in her favour.

This case illustrates the importance of properly recording your intentions if those intentions aren't consistent with the formal documents or structures that have been to set up to own your trust's assets. ■

2 *Ridge and Ridge v Parore and Lloyd* [2014] NZHC 318 [28 February 2014]

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Importance of an 'Independent' Trustee

Reduces risk

The law requires all trustees to act independently and impartially. The term 'independent trustee' is used to describe a trustee who does not benefit from the assets of the trust. Often the settlors of a trust (the people who established the trust) will also be trustees and beneficiaries. But it can also be worthwhile having another trustee to help ensure the trust is run correctly and does the job it was set up to do.

Although there's no requirement at law for a trust to have an independent trustee, an independent trustee can play a vital role in demonstrating the trust is a genuine trust and make sure trust administration is properly carried out and decisions are recorded. Without an independent trustee, the purpose of the establishment of the trust can be defeated and the trust can be open to attack from various parties, such as creditors.

An independent trustee should have professional expertise and skills that will assist the other trustees with decision-making and administering the trust. A lawyer, accountant or other professional can have valuable knowledge and experience to avoid risks and help with managing the trust assets and ensuring the trust is properly administered. A trust which is poorly run and managed can lead to arguments that the trust assets are being treated by the settlors as their own property. This leaves the trust open to attack. Ensuring that the trust is properly run can help shield the trust assets from external claims.

Avoid a 'sham' trust

Without an independent third party, a trust is at risk of being a 'sham'. This may mean, for example, that:

» A claim can be made by a former spouse or partner that the assets are relationship property rather than trust assets because the trust is a sham and therefore does not exist, or

» A claim can be made by creditors that the assets belong to you and therefore must be used to pay off your liabilities.

If the settlors are the only trustees, there's the risk that the settlors are seen as treating the trust assets as their own personal property and that, in effect, the trust doesn't exist. The protective value of the trust is then lost and the trust assets are open to claims by the settlors' personal creditors.

Brings impartiality

The independent trustee can play an important role in ensuring that all of the beneficiaries of the trust are treated impartially and fairly. This is of particular importance in family situations where competing interests and family tensions can place trustees under strain. An independent trustee should be able to bring a robust and detached perspective to decision-making and support the other trustees in making the right decisions.

Another advantage of having an independent or third trustee is that the record keeping of the trust can be improved. Most professional trustees will insist that major decisions are recorded in writing and that, where necessary, legal, financial or accounting advice is obtained.

It's important, however, that the independent trustee carries out his or her duties carefully and conscientiously. Trusteeship is not a passive role. All trustees must take part in important decisions and should be actively involved in the trust administration. If problems arise with the trust, it's never an answer to say a trustee was 'passive' or included simply for the sake of appearances.

So, while there will be fees associated with having a professional trustee, the right independent trustee can be an 'insurance policy' against attacks on the trust by disgruntled family members or outside parties and can help ensure that the purposes for establishing the trust are not defeated. ■