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## Welcome to the Spring issue of *Trust eSpeaking*. We hope you find the articles both interesting and helpful.

### If you would like to talk further about any information in this newsletter or about trusts in general, then please don't hesitate to contact us.

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## Trustees' Duties

### Today and the Law Commission's recommendations for the future

*It's well known that the Law Commission is reviewing New Zealand's trust law. One set of proposals concerns the duties of trustees. This article looks at what trustees' duties are today and gives a brief rundown on the Commission's seven options for the future…* *CONTINUE READING*

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### Highlighted in a recent case

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# Being a Trustee

## The duty to act selflessly

*If you are both trustee and a beneficiary of a family trust, it's important for you to know when you are allowed to act selfishly (for your own benefit) and when you must act selflessly (for the benefit of others).*

Most of the benefits of having a trust are only possible because you no longer own the assets that you have put into your trust. Risks, such as a future claim by business creditors or an eventual claim against your estate after your death, can be avoided if the assets are held in trust for you but don't belong to you. Most people don't like to feel that everything has been taken out of their hands and that their control is lost. So usually the settlor, who set up the trust, will also be named as one of the trustees.

## Self-interest and self-dealing

The problem is that being both a trustee and a beneficiary can lead some people into thinking and acting as if they still own the trust assets. It's important to understand that trustees are expected to act in the best interests of the beneficiaries overall, not just your own interests.

There are two important rules which apply to trustees. They are called the 'self-interest rule' and the 'self-dealing rule'. Both these rules are said to be examples of a wider principle 'that a man must not put himself in a position where duty and interest conflict or where his duty to one conflicts with his duty to another'[1]. The *self-dealing* rule applies where a trustee decides to sell a trust asset to himself or herself, or enters into some transaction involving both the trust and the trustee personally. Unless the trust deed specifically permits these types of arrangements, any beneficiary can apply to have the transaction cancelled.

The *self-interest* rule relates to situations where the trustees have reached a decision and some, or all of them, benefit by this. One common example is where a husband and wife are trustees of a family trust with a family friend, and they sign a resolution to pay out money to the couple for personal expenditure. If any of the beneficiaries object, they could ask the court to declare the decision invalid.

## *Scott v Scott*

An example of how this can cause problems is *Scott v Scott*[2]. L wanted to take over the family farm. His mother owned 50% of the farm. The other 50% was held on trust under his father's will. L was one of the trustees. He arranged to buy out the 50% share from the estate. Later his sisters – who would share the trust fund on their mother's death – claimed L had gained an unfair advantage. The value of the farm increased enormously while the money held in the trust lost value due to inflation. The court cancelled the sale eight years after it had taken place.

It's preferable for the trust deed to say specifically that the trustees are able to make decisions in their own interest. Often trust deeds will say that the decision will be acceptable provided at least one of the trustees doesn't benefit from the decision in question. Other trust deeds may say the decision will be acceptable provided the trustee who benefits does not take part in the decision. It is important to understand clearly what the trust deed requires in every case. If you get it wrong the decision may not be valid and your trust could end up in a mess.

## Important questions for trustees

So before trustees make decisions they need to ask themselves some questions:

- Will we benefit from this decision?
- Does the trust deed allow us as trustees to benefit personally?
- If it does allow us to benefit personally, what steps are required by the trust deed? Can we join in the decision even though we benefit personally or do we have to leave the room and let the other trustee/s decide? ■

1 *Re Thompson's Settlement* [1985] 2 All ER 720 at page 726.
2 *Scott v Scott.*, High Court Tauranga CIV 2004-470-0094 and 0957 Stevens J 15 September 2008

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# Trustees' Duties

## Today and the Law Commission's recommendations for the future

*It's well known that the Law Commission is reviewing New Zealand's trust law. One set of proposals concerns the duties of trustees. This article looks at what trustees' duties are today and gives a brief rundown on the Commission's seven options for the future.*

A trustee's duties have been set out in *Armitage v Nurse*[3]: 'To act honestly and in good faith for the benefit of the beneficiaries'.

Unless there is a trustee who is obliged to act honestly and in what the trustee believes to be the best interests of the beneficiaries there will be no trust. Andrew Butler[4] sets out a list of duties which has become known as the 'Butler list' of default duties:

- To make acquaintance with the trust's terms
- To adhere to the trust's terms
- To maintain impartiality between beneficiaries
- To act in the beneficiaries' best interests
- Not to profit from trusteeship
- To act gratuitously
- To invest
- Not to delegate
- To be active
- To act unanimously
- To pay correct beneficiaries, and
- To keep proper accounts and give information as required.

Most of these duties can be modified to some extent by the trust deed. The trust deed cannot, however, override all trustee duties.

The Commission is proposing to set out a list of these duties in future trust legislation, but probably with more modern wording.

## Looking ahead

The Law Commission has to decide whether the minimum standard set out in *Armitage v Nurse* is sufficiently high and to what extent trust deeds should exclude, or restrict, a trustee's liability if they fail to carry out properly the duties imposed on the trustee by law or by the trust deed.

The Law Commission is considering seven options.

**OPTION 1: STATUS QUO – NO REGULATION OF EXEMPTION CLAUSES**

Overseas trends and the Commission's own view is it may not be satisfactory to leave matters as they are.

The balance appears to be too much in favour of the settlor and trustee, and a greater measure of accountability to beneficiaries is needed.

**OPTION 2: NO PROHIBITION BUT A BENEFICIARY CAN APPLY TO THE COURT FOR RELIEF**

This option would leave any exclusion clause in an instrument to take effect according to its terms, but a beneficiary would have the right to apply to the court to exclude its operation.

There is the issue of the cost of applying to the court and possible uncertainty.

**OPTION 3: NO PROHIBITION BUT DUTY OF PAID TRUSTEE TO INFORM SETTLOR**

The Law Commission for England and Wales recommended against changes to the law but, where a clause in a trust deed exonerates a paid trustee for liability for negligence, that trustee must take steps to inform the settlor of the meaning and effect of the provision.

**OPTION 4: PARTIAL PROHIBITION: TRUSTEE EXCUSED IF THEY EXERCISE REASONABLE SKILL AND CARE**

This option would be to prohibit clauses where they absolve trustees who are individuals from liability for acts or omissions in bad faith, or without reasonable skill and care.

As long as a trustee acts in good faith, and with reasonable skill and care, the trustees will not be subject to liability.

The likelihood of trustees having to go to court (at great expense) to absolve themselves of liability is likely to be a very unattractive option and will discourage individuals from becoming trustees.

The Commission believes professional trustees should be treated differently. See Option 6.

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3 *Armitage v Nurse:* [1998] Ch 241
4 Butler, A S (Ed), Equity and Trusts in New Zealand, 2nd ed, Brookers 2009

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# Will Makers do have a Responsibility to Support their Families

## Highlighted in a recent case

*Theoretically, a person is entitled to do whatever he or she wishes when they make their Will. One of the constraints on this, however, is a duty under the Family Protection Act 1955 to provide for the maintenance and support of certain relatives. This recent Court of Appeal decision[5] involves such a claim by children of the deceased.*

Irma Murray died in 2009 leaving an estate worth approximately $3.7 million. Under Mrs Murray's Will, small gifts were made to her three children (Nathan, Melissa and John) but virtually all of her estate went to the Wakem children who were her nieces and nephew. Nathan, Melissa and John challenged the Will claiming that their mother had not provided for their proper maintenance and support.

The evidence established that Nathan was well off financially, Melissa was in reasonable financial circumstances but not rich, and John (who lives in Australia) wasn't at all well off. In the High Court there were a number of key findings:

- » The contest over Mrs Murray's substantial estate was between her children and three of her nieces and nephews. The court concluded that the duty to provide for the proper maintenance and support of one's children takes priority over any duty to nieces and nephews.
- » A significant asset of Mrs Murray's estate was an interest in a farm, and her son Nathan had made very significant contributions to the preservation and improvement of that farm.
- » The nieces and nephews claimed that their mother, Wanda who was the sister of Mrs Murrays late husband Donald, had contributed to the asset by being generous to Donald in relation to the estate of their father. The court didn't accept any concept of inherited moral duty.
- » In this case, there were no legitimate reasons for Mrs Murray largely excluding her family under her Will. The evidence indicated that the fact that Nathan and Melissa were adopted children may have been a factor in Mrs Murray's considerations. The court didn't accept this justified failure to make adequate provision for them.
- » The High Court awarded payments of $600,000 to Nathan, $700,000 to Melissa and A$350,000 to John who lives in Australia.

The case was appealed but the Court of Appeal dismissed the appeal with one change which was to increase the payment to John from A$350,000 to A$500,000.

Over the last 10 years or so, the courts have taken a conservative approach to changing Wills under the Family Protection Act but this case tends to indicate that where there is a significant estate, the courts will be more generous. In the end, the three children received together approximately 50% of the estate. The court was also critical of parties to the proceedings who filed affidavits containing allegations of a personal character which did little to advance the real issues. This was reflected in cost awards that were made.

Litigation in the High Court and on appeal to the Court of Appeal is slow and very expensive. This case illustrates the constraints on a person's freedom to leave their property to whoever they want to and the importance of getting sound legal advice before signing your Will. ■

5 *Fisher & Others v Kirby & Others* [2012] NZCA 310

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**OPTION 5: REQUIREMENT FOR REASONABLENESS**

A trustee could only take advantage of an exemption clause that was reasonable.

Until the legislation is tested by the courts uncertainty is created for trustees and beneficiaries, and may lead to litigation to determine its scope and operation.

The Commission is interested in this option.

**OPTION 6: DUAL STANDARD**

Lay trustees would continue to be able to rely on exemption clauses that limited their liability for all conduct short of dishonesty.

Professional trustees would not be able to rely on exemption clauses to the extent they absolve them for failure to exercise reasonable skill and care.

The Commission is interested in this option.

**OPTION 7: TOTAL PROHIBITION**

It would be possible to prohibit all exclusion clauses in trust deeds for both individual and professional trustees.

The Commission does not favour this option.

Life as a trustee is never going to be straightforward or without risk. If you have any concerns about your role as trustee, please be in touch with us. ■

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