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Welcome to the early Autumn edition of *Trust eSpeaking*. Inside we have what we hope are interesting and useful articles.

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

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Trusts and Avoidance of Rest Home Fees

All quite tricky

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The next issue of *Trust eSpeaking* will be published in September 2013.

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Trusts and Avoidance of Rest Home Fees

All quite tricky

It was very common in the 1990s for New Zealanders to set up discretionary family trusts in the hope that by putting assets in the name of a trust, they could qualify for rest home subsidies in the event that they were required to go into rest home care. This certainly worked for a number of years. Things have changed, however, and this article looks at a recent case that challenged that proposition.

Several years ago the rules were changed and it is now much more difficult to use discretionary family trusts to avoid liability for rest home fees. The Ministry of Social Development's interpretation of these rules was recently challenged in the High Court in *B v Chief Executive of the Ministry of Social Development*¹.

Background

Mr and Mrs B established the B Family Trust in 1987. They were the primary beneficiaries and their children and grandchildren were also beneficiaries. The trust purchased properties in Auckland, Kumeu and Sydney. Mr and Mrs B made loans to the trust. They were owed more than \$900,000.

That debt was forgiven by Mr and Mrs B each gifting \$27,000 to the trust each year from 1987-2004; that is, Mr and Mrs B gifted a total of \$54,000 each year from 1987-2004 and the debt was cleared.

In March 2009 Mrs B moved into a rest home and applied for a residential care subsidy. To decide whether she was eligible, the MSD conducted a financial means assessment to ascertain if her assets exceeded \$180,000 in 2009. The threshold as at 2009 was \$180,000 but it has since increased to \$213,297.

Under the new rules, gifts in excess of \$5,000 in each of the five years preceding the application for the subsidy (2004-2009) are taken into account. In the years before that (1987-2004) Mr and Mrs B were entitled to give \$27,000 each year. Gifts above those levels are treated as assets that you have retained in your own hands.

The MSD assessment

The Ministry decided that during the 2004-2009 gifting period a total of \$25,000 was allowed but, as Mr and Mrs B had gifted \$54,000 on 25 June 2004, their excess gifting was \$29,000 for this period. This amount was therefore included among Mrs B's assets for the purposes of her application. More significantly, the Ministry assessed that Mr and Mrs B's gifting between 1987-2004 totalled \$918,000 but the Ministry allowed only \$459,000 for this period so that the excess gifting for this period was \$459,000.

The Ministry assessed therefore that Mrs B had assets in excess of the threshold of \$180,000 and wasn't eligible for a rest home subsidy.

The Ministry's assessment was challenged in the High Court but the challenge was unsuccessful. The principal issue was whether when assessing one person's assets, account can be taken of gifts made by a couple rather than just by the individual applicant. In other words, was the Ministry correct in taking into account the gifts made by both Mr and Mrs B, rather than just Mrs B's gifting when calculating Mrs B's assets? The Ministry's interpretation was upheld and its decision was not disturbed.

It isn't clear whether there will be a further appeal from this decision. For the present, however, where a couple has both gifted to a trust and one of them applies for a rest home subsidy, the gifts of both parties will be taken into account in assessing the assets of the applicant. This may appear harsh because many of these arrangements were made long before the rules were changed.

On the other hand, many (including the government) take the view that if assets are available then they should be used to meet rest home fees and the State should not be liable to pay expensive rest home fees when funds are available. It is possible to transfer assets to a trust and to qualify for a subsidy. The rules, however, are very technical and the slightest slip can mean you don't qualify. Trusts established in the past are unlikely to meet the current requirements. ■

¹ [2012] NZHC 3165

Right to Decide About Funeral and Burial

Still some uncertainties

*Arguments over where the late Mr James Takamore should be buried have led to a long-running legal dispute. Now the Supreme Court has spoken, but its decision in **Takamore v Clarke**² leaves some questions unanswered.*

James Takamore and his partner, Denise Clarke, had lived in Christchurch for many years. They had two adult children. After Mr Takamore died suddenly, Ms Clarke arranged for him to be buried in Christchurch. His friends remember him saying he wanted to be buried in the lawn cemetery there. Before the funeral took place, Mr Takamore's family took the body away to the North Island for burial in accordance with Tuhoe custom. Ms Clarke and the two children objected and applied to the High Court.

The High Court agreed that the body should be returned to Ms Clarke for her to arrange burial in Christchurch. The judge emphasised that the family should normally agree on the funeral, and burial or cremation but if they couldn't agree, then Ms Clarke, as executor of the will, had the right to decide. The case was appealed to the Court of Appeal, which agreed with the High Court, but for slightly different reasons. The case then went to New Zealand's highest court.

To the highest court

The Supreme Court looked at the few New Zealand cases that have arisen over the years, and also cases from Australia and England. The five Supreme Court judges all agreed that, where possible, the family should agree about the funeral, and burial or cremation. Three of the judges agreed that the executor has the role of 'first decider' if the family cannot agree. The executor should of course take into account the views of the deceased, as well as cultural or religious practices of the deceased's family or whanau. If any of the family object to the executor's decision, they can apply to the High Court. If there is no executor, eg: if there is no will, the administrator of the estate (usually the main beneficiary) would be first decider.

The other two judges in the Supreme Court didn't agree that the case law gives any such power to an executor or administrator as 'first decider'. They thought that any dispute needs to go straight to the High Court. None of the judges discussed who should pay for this expensive litigation. The judges also emphasised the choices made by the deceased during his lifetime should be taken into account. Mr Takamore had moved to Christchurch with his partner and had not lived in accordance with his ancestral tikanga.

Reliance on common law

As Parliament has not made any law about any of this, the judges have been forced to rely on the common law, which we inherited from England in 1840. The judges, however, emphasised that English common law applies in New Zealand only to the extent it's relevant in our circumstances. If the deceased was Maori, then the common law must be adapted to the tikanga of the deceased. Rather than being locked into English law, as it was in 1840, the courts adapt the common law to present day circumstances in New Zealand.

The judges also had to consider exactly when Maori custom or tikanga should be part of the common law in New Zealand and should apply if the deceased was Maori. Some of the judges thought that Mr Takamore had abandoned his ancestral tikanga and it should not be imposed when he clearly did not want this. Other judges said that the common law could not incorporate customs which might lead to violence. Tuhoe custom can involve some family members taking away a body without consent – by force if necessary. A stand-off over the funeral is thought to enhance the mana of the deceased.

The Supreme Court accepted that tikanga was a relevant consideration. The three majority judges said the executor or administrator should take tikanga and other traditions into account where relevant and the High Court could intervene if asked to.

It seems clear the traditions that were important to the deceased – religion, social customs or tikanga – need to be taken into account. We still have, however, no clear ruling on when these factors will prevail and when executors can decide otherwise. ■

² [2012] NZSC 116

Law Commission's Key Proposals for New Trusts Legislation

Whilst the Law Commission is reviewing trust law, we've undertaken to keep you up-to-date with its recommendations; which is much easier than you having to read the 300+ pages of the Commission's report.

Core trust concepts

The Commission has recommended that new trust law will define the requirements for the creation of an express trust and a provision confirming no trust exists if the 'three certainties' are not present: the settlor's intention to create a trust, the beneficiary or beneficiaries, or permitted purpose, and the trust property.

Trustees' duties, restrictions on the use of exemption clauses and a default provision on the requirements of the duty to inform beneficiaries will be clearly set out.

Trustees

Further to our article in *Trust eSpeaking*/15 Spring 2012, the Commission makes the following recommendations:

- » Giving trustees the same powers in relation to trust property that a trustee would have if the property was owned by the trustee absolutely
- » Allowing trustees the power to determine what is income and capital for the purposes of distribution to allow them to invest assets without regard to whether the return is of an income or capital nature
- » Providing Public Trust with a role to carry out official administrative procedures and to provide advice, including to issue vesting certificates, confirm the removal of an incapacitated trustee and to oversee the retirement and replacement of sole trustees
- » Confirming that a trustee's indemnity cannot be limited or excluded by the trust deed
- » Requiring companies, when acting as trustees, to clearly describe their status in all communications and contracts
- » Making directors of companies acting as trustees directly liable for trust liabilities in some circumstances, and
- » Requiring directors of a corporate acting as a trustee to have the same obligation to the beneficiaries as they would have had they, and not the company, been the trustees.

Court powers and jurisdiction

The Commission has recommended:

- » Statutory restatement of the rule in *Saunders v Vautier*³ (where all the beneficiaries of a trust are adult and of sound mind can bring a trust to an end) regarding revocation and variation by beneficiaries, and the power of the court, following consideration of specified factors, to waive the requirement for consent of any person and approve a revocation, variation or re-settlement or any change to the scope or nature of the trustees powers
- » Extend the power of the court to review the exercise of a trustee's discretion to a decision made under a power in trusts legislation or a trust deed
- » Extend the District Court's jurisdiction under new trusts legislation to determine any proceedings where the amount claimed or the value of the property in issue is \$500,000 or less, subject to the right of any party to give notice objecting to the proceeding being determined in that court and to have the proceeding transferred to the High Court, and
- » Extend the Family Court's jurisdiction to make any orders and give any directions under new trusts legislation where the orders or directions are necessary to give effect to a determination of other proceedings properly before it.

General trust issues

On a more general note, the Commission has also proposed:

- » Replacing the Perpetuities Act 1964 and the rules against perpetuities and remoteness of vesting with a rule limiting the duration of non-charitable trusts to 150 years
- » The Official Assignee should have standing to challenge a trust regardless of whether the bankrupt could have done so prior to the bankruptcy, and
- » Amending s182 of the Family Proceedings Act 1980 (which gives the court power to vary a marriage settlement trust on dissolution of marriage) so it covers de facto relationships in addition to marriages and civil unions.

Space limits greater detail about these proposals but we intend to cover the more contentious proposals in more detail in future issues of *Trust eSpeaking*. If you would like to talk to us on any aspect of your trust or how these proposals may affect your trust, please don't hesitate to contact us. ■

³ (1841) 49 ER 282; 4 Bea v 115 (Ct of Chancery)