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TRUST eSpeaking

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

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

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Protecting Your Digital Assets

Ten years ago the idea of protecting your digital assets after your death, or if you lost mental capacity, would have been regarded as absurd. Many of us now regard this as critical. However, there's very little guidance available on how best to ensure these assets are identified and dealt with in these situations. Protection of digital assets does not fit neatly into traditional asset planning concepts or inheritance plans.

First let's define the key assets in this digital arena.

» 'Digital assets' are emails, texts, images, data, social networking, health care records, usernames, passwords, insurance records, loyalty points, etc

» 'Digital devices' include laptops, mobile phones, desktops, tablets, smartphones, servers and so on, and

» 'Digital accounts' include email accounts for social networks, social media, file sharing, domain registration, web hosting, etc.

A digital estate

'Digital estate' is sometimes used as the umbrella term to encompass digital assets, digital devices and other digital accounts.[1]

Important reasons to protect or make provision for your digital estate are that it may have financial or sentimental value; there could be security or financial threats; and if incorrectly managed, liability may result.

One of the key decisions is who should manage and have control over your digital estate when you die or if you lose mental capacity. Another important decision you'll have to make is who will receive or benefit from your digital estate. For example, can you transfer or gift your airpoints and, if so, who should you give them to?

It would be a normal presumption that your surviving spouse or children should take over control of your digital assets, as they would the rest of your estate. However, if they have limited technological skills, it may be that there are other people who are best suited to take over this particular role.

Decisions may also be required as to which digital accounts are to be closed, digital devices cleared of content and whether printouts of certain digital information should be provided to specified people.

Once appointed the attorney or estate executor may need the skills, or at least may need to employ others with the necessary skills, to:

» Manage financial arrangements that are conducted online

» Pay debts or outgoings relating to digital accounts

» Decide the form in which digital assets should be given to the beneficiaries

» Decide who owns your digital accounts

» Specify who should have access to your digital accounts, and

» Ascertain whether digital accounts should be closed, transferred or sold.

In practical terms, it may be best to include in Enduring Power of Attorney documents the ability for the care and welfare attorney to access medical or dental records and for the property attorney to access digital accounts. Similarly executors named in Wills may need to access digital accounts, change passwords and manage financial affairs in the digital arena.

A letter of wishes may also be desirable in some cases. It can be helpful for trustees, or for a property attorney, to be guided by a non-binding statement of your wishes regarding your digital estate. It would be wise also for an inventory of your digital estate to be provided to the executor or attorney and to be held in a secure place.

Dealing with digital assets is an area that will only increase in importance over coming years. It's important therefore for us all to start thinking about these issues sooner rather than later. While there's no legislation in New Zealand dealing with protecting digital assets when you die, some states in America do have specific legislation in this area.[2] ■

1 See for example "Digital life after death" by K. Martin and P. Womall, STEP Journal, Volume 22 issue 10.

2 Delaware has adopted a Digital Assets and Digital Accounts Act.

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Duties of an Attorney under an Enduring Power of Attorney

Often people agree to accept the appointment as an attorney under an Enduring Power of Attorney (EPA) without really understanding what's involved and what will be expected of them.

An attorney under an EPA is similar to a trustee or an executor. The person giving you power of attorney is placing trust in you to do the right thing. The law expects you to act selflessly in the interests of the person whose property or welfare you are looking after.

It's important to understand the terms used. An EPA is a document giving someone power to act on behalf of someone else or to make decisions on behalf of that person. The person who is given that power is called the 'attorney'.[3] An *enduring* power of attorney continues to have effect even if the person who gave the power of attorney (the donor) is no longer mentally competent to know what's happening.

There are two types of EPA. An EPA for *property* usually applies to everything that is owned by the person giving power of attorney, but it can be more limited. An EPA for *personal care and welfare* relates to the day-to-day care and wellbeing of the donor.

Before you agree to act as an attorney and to sign the EPA, you should read the EPA form carefully, particularly the notes. If you have any questions, check with the lawyer who prepared the EPA. The EPA form will often contain a number of specific requirements. For example, the attorney may need to consult with a named person or several people, or give information to certain people. In some cases the attorney may only be allowed to start acting once a doctor has certified that the donor is no longer mentally competent. The EPA may even say which doctor – or which type of doctor – must provide the certificate.

Property attorney

The primary duty of a property attorney is to preserve and protect the donor's assets. If the donor can still make some decisions or deal with some assets the attorney should help the donor to do so.

It's not the role of the attorney to give away assets[4] unless the donor has specifically authorised this (for example, by including a suitable clause in the EPA). Attorneys must not use their position for their own benefit unless the donor has approved this. Attorneys may use the donor's money to refund out-of-pocket expenses the attorney has incurred.

Unlike a property manager appointed by the court, an EPA attorney has no obligation to prepare annual accounts in any specific format. Nevertheless it's best if attorneys keep proper accounts in case they are later challenged. It's also advisable to keep family members fully informed. Even if the EPA doesn't specifically require these things, it's wise to avoid the sort of suspicion that can arise if family members feel they have been left in the dark.

Personal care and welfare attorney

The primary role of the personal care and welfare attorney is to ensure that the donor is being well cared for and is in suitable accommodation. Personal care and welfare attorneys will usually keep in close contact with the staff of the home or other place where the donor is living. There have, in the past, been documented cases of elder abuse by family members and others. It's important that personal care and welfare attorneys are on the lookout for anything like this.

The personal care and welfare attorney doesn't have any power to make decisions about marriage, divorce, civil union or adoption – or to refuse normal medical care or procedures to save life or prevent serious damage to the donor's health.[5] It's important to understand that an EPA for personal care and welfare is not an 'advance directive' or 'living Will'. Directions not to resuscitate – or not to go to great lengths to prolong life – do not belong in an EPA.

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3 This is not the same as an American attorney' who is what we would call a lawyer.

4 *Robson v Robson* [2014] NZFC 9518.

5 Section 18 Protection of Personal and Property Rights Act 1988.

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The US Foreign Account Tax Compliance Act (FATCA) has been in force in New Zealand since June 2014. FATCA is a complex piece of legislation established to prevent tax evasion by requiring foreign financial institutions to register and report to the IRS in relation to any accounts held on behalf of US citizens.

All New Zealand entities considered to be 'foreign financial institutions' under the FATCA regime should have been registered on the IRS website by 31 December 2014.

Failing to register may result in significant penalties and therefore it's important that any financial institution registers as soon as possible.

Does this affect your trust?

Many New Zealand trusts may be considered 'foreign financial institutions' under FATCA even if they don't have any US beneficiaries or trustees, or US assets associated with the trust. Trusts which could be considered 'financial institutions' are those with a corporate trustee holding income earning assets and those which have engaged a financial institution to manage trust assets.

Once registered with the IRS, a trust is compliant with the FATCA registration regime. If the trust doesn't hold any US assets or has no US beneficiaries or trustees, it's likely that would be the end of the trust's obligations to the IRS.

However, should the trust have US beneficiaries or US assets, specific accounts need to be reported to the New Zealand IRD at the end of reporting periods.

Trustee companies in a useful position

Conveniently, a trustee company may register with the IRS as a single entity itself and then as a sponsoring entity. Once a trustee company has been registered as a sponsoring entity and obtained a GIIN (Global Intermediary Identification Number), each trust of which the trustee company is a trustee will automatically become a 'Trustee Documented Trust' and will not need to register with the IRS individually.

The effect is that trusts with a corporate trustee that is registered as a sponsoring entity with the IRS are in a safer position under the FATCA regime than trusts without a corporate trustee. The registration requirement is already met and it's then only the reporting requirements that require consideration.

It's important that any corporate trustee considers registering with the IRS as a foreign financial institution as a sponsoring entity as soon as possible.

Once registered, an exercise as to whether any reporting needs to be made to New Zealand's IRD would need to be done, particularly for any trust holding US assets or with US beneficiaries or trustees.

It's important that you look into whether your trust should be registered under the FATCA regime – sooner rather than later to avoid any penalties. Please don't hesitate to contact us to discuss what steps you should take. ■

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Acting prudently and selflessly

The overriding requirement of all EPA attorneys is to act in the best interests of the donor of the EPA. For example, a property attorney should look for a prudent way to deal with this person's money, bearing in mind that it's not the attorney's own money. Often the best question to ask yourself is what would the donor want in these circumstances?

Attorneys also are expected to help the donor develop whatever capacity he or she may have to make decisions.

Being an EPA attorney doesn't need to be a difficult task. When in doubt you're entitled to ask advice from lawyers and health professionals as appropriate. But it's always wise to be organised, to keep careful records and to communicate regularly so that everyone interested in the donor's welfare understands what has been done and why. ■

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