Trust eSpeaking

ISSUE 27
Spring 2018

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Welcome to the spring edition of *Trust eSpeaking*; we hope you find the articles both interesting and useful.

If you would like to find out more about any of the topics covered in this e-newsletter, or about trusts in general, please don't hesitate to contact us – our details are at the right.

Do I still need a trust?

It's good practice to review its purpose

If you have a family trust set up a number of years ago, it's good practice to review it to ensure it is still 'fit for purpose'. Leading on from that is the question that is often asked of us, "Should I bring my trust to an end?"

Trusts are still very useful arrangements, and there is usually a good reason why you established a trust in the first place. If that reason no longer exists, however, then it may be sensible to think about alternative arrangements.

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How do I bring my trust to an end?

The process

After reading our article on reviewing your trust to ascertain whether it's still 'fit for purpose', you may want to find out more on the process of bringing your trust to an end.

We explore the two ways that trusts can be brought to an end – bringing forward the date of distribution (the trust's expiry date) and distributing all the trust assets to beneficiaries.

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Validating imperfect wills

What can be done?

For wills to be valid they must comply with a number of legal formalities; they must be in writing and there must be two witnesses who must attest to the will-maker signing the will in their presence.

However, sometimes people create their own wills that do not comply with these formalities and these wills can be invalid. Since 2007 the High Court has had the power to validate imperfect wills – this article discusses how this can be done.

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The next issue of *Trust eSpeaking* will be published in **Autumn 2019.**

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Do I still need a trust?

It's good practice to review its purpose

If you have a family trust set up a number of years ago, it's good practice to review it to ensure it is still 'fit for purpose'. Leading on from that is the question that is often asked of us, "Should I bring my trust to an end?"

Trusts are still very useful arrangements, and there is usually a good reason why you established a trust in the first place. If that reason no longer exists, however, then it may be sensible to think about alternative arrangements.

Common reasons why you might consider bringing your trust to an end are:

- The trust may prevent you qualifying for a subsidy if you need to go into care
- If the trust was set up by your parents and they have now died, you and your siblings may have different needs
- You may no longer have concerns about business creditors, and
- Protecting assets from a relationship property claim may no longer be a concern.

Even if your trust is no longer required for its original purposes, there may be other reasons to retain it. A trust may, for example, avoid disputes over your estate after you have died.

Long-term residential care

The asset testing rules continue to be enforced fairly strictly by Work and Income (MSD). There are strict limits on how much you can gift, to a trust or anyone else, throughout your lifetime. Talk with us if you have concerns about your previous gifting arrangements.

In some cases, people who are about to go into care may find they will not qualify for a subsidy because of the amounts they put in their trust in the past. If the trust assets are all put back into their own name, as settlors, they may eventually qualify for a subsidy. We can talk with MSD, on your behalf, about a possible 'unwinding' of your trust.

Once mum and dad have died

Most trust deeds have a clause allowing the trust to continue for up to 80 years. This is the maximum currently allowed by law. In reality, once the settlors have both died, their children may not wish to continue with the trust. The settlors' children may each prefer to do different things with their share of the trust. Some may be living overseas where tax laws are much tougher on trusts.

When the parents have both died, it may be a good time to distribute all of the trust fund to the members of the family or to put each child's share into a new trust. If most of the family wealth is held in a trust, the children often wish to receive their

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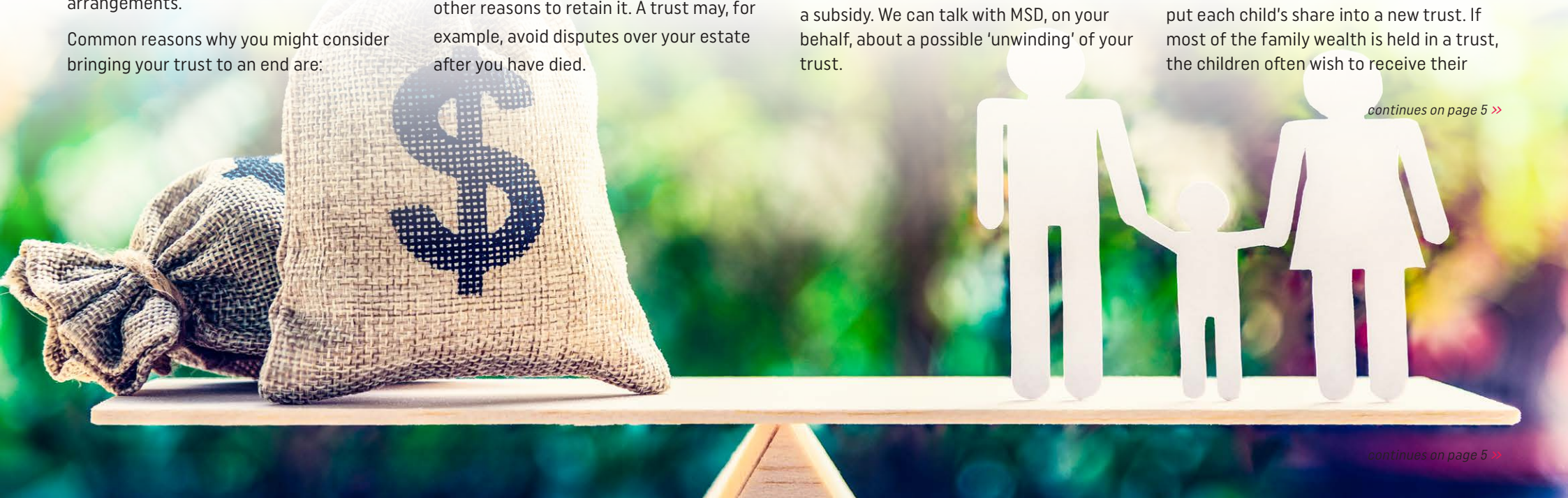

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How do I bring my trust to an end?

The process

It has been estimated that there are between 300,000-500,000 trusts in this country. Trusts have been established for many different reasons, including estate planning, creditor protection, to ensure access to rest home subsidies, tax benefits or for protection from relationship property claims.

When the reason for a having a trust is no longer valid (there's more on this on our article *Do I still need a trust?* **here**), it is important to bring it to an end in the most appropriate way bearing in mind the powers in the trust deed and the needs of all the beneficiaries.

This article explores the two most common ways that trusts can be brought to an end – bringing forward the date of distribution (the trust's expiry date) and distributing all the trust assets to beneficiaries.

Bringing forward the distribution date

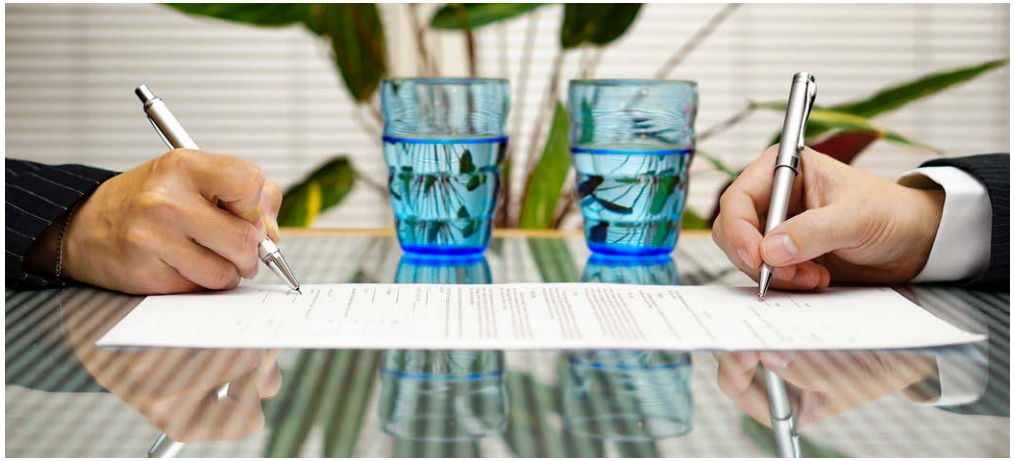
Trusts are not allowed to last forever. The 'perpetuity' rules currently state that a trust can either last for 80 years, or for 'a life in being plus 21 years'. Given that you cannot predict how long someone will live, most New Zealand trusts are set to last for 80 years at the most. This is called the 'perpetuity period'. The date at the end of the perpetuity period is called the 'distribution date'.

Modern New Zealand discretionary trust deeds will also usually contain a clause that says the distribution date is the date 80 years from the date the trust was established or such earlier date as the trustees decide.

The normal New Zealand discretionary trust sets out the discretionary beneficiaries (usually the parents, children, grandchildren, and sometimes charities and wider family members) and the final beneficiaries who will receive the trust fund when it comes to an end on the distribution date (usually, children or grandchildren if children have died).

If you decide to bring a trust to an end by bringing forward the distribution date, this will usually have the effect that the trust fund will be distributed to the final beneficiaries.

If you are a trustee who is also a settlor, however, and you want to bring the trust to an end in order to put the assets back into your personal name, then simply bringing forward the date of distribution will not work. It may have the unintended consequence that your children come into an early inheritance!



Distributing the trust assets

When people say they have 'a trust', they usually think of the trust deed that sets out the terms of the trust. However, a trust is not a document. A trust is actually a relationship that needs to comply with three certainties:

1. Certainty of intention: a clear intention to create a trust (usually recorded in a trust deed)
2. Certainty of objects: who is going to benefit from the trust, and
3. Certainty of subject matter: what property is owned by the trust.

If you take any one of these three things away, there is no trust.

The easiest way to bring a trust to an end is to distribute all the assets in the trust – without any assets there is no trust. Care needs to be taken to ensure that the trust assets are distributed to the correct beneficiaries. For example, there may be clauses in the trust deed specifying who can receive capital distributions from the trust. It's therefore important to check the trust deed before deciding on any course of action.

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Validating imperfect wills

What can be done?

For wills to be valid they must comply with a number of legal formalities; they must be in writing and there must be two witnesses who must attest to the will-maker signing the will in their presence.

However, some people create their own wills that do not comply with these formalities and these wills could be invalid. Sometimes people will express what they want to happen to their property after their death in an electronic document, such as a text message.

Since 2007 the High Court has had power to validate these documents so that they have the effect of being a valid will, even though they do not comply with the legal requirements of the Wills Act 2007.

When a person dies, you will usually find their will and contact their lawyer. Usually their will is perfectly in order, but sometimes it's found that the will isn't legally compliant. What can be done?

Two-step process

There is a two-step process when it comes to validating non-compliant wills. Firstly, there must be a document in existence which appears to be a will but does not comply with the formal requirements. Secondly, if there is such a document in existence, the court will then consider whether the document expresses that person's 'testamentary intentions', or what they wanted to happen to their property after they die.

A number of 'documents' have been validated as wills. Electronically stored documents can meet the requirement that a 'document' be in existence. In a 2014 case[1], a draft will stored on a computer was validated. An email expressing what was to happen to a person's property after their death was validated as a will in a 2015 case[2].

While New Zealand courts have not yet validated a text message as a final will, the Queensland Supreme Court[3] has validated an unsent draft text message as a final will.

As a will must be 'a document' to be validated, oral instructions for a will cannot be validated by the High Court. However, if a person's wishes have been recorded in writing then a document would exist which could be validated. In a 2012 case[4], instructions were given over the phone to a lawyer. The lawyer took notes, but did not prepare the draft will before the person died. The lawyer's notes were validated as the deceased's final will.

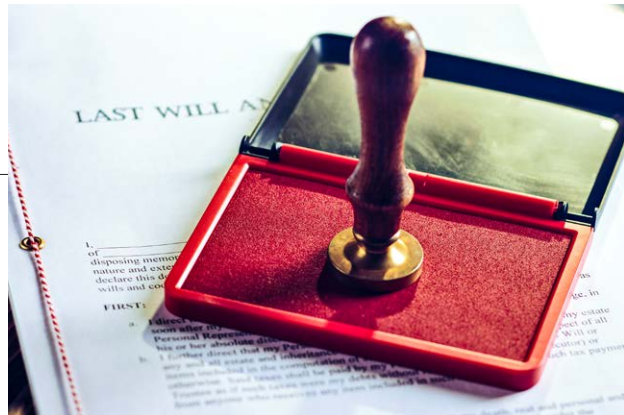
In a case this year[5], an audio recording of the deceased's will instructions did not qualify as a 'document', however, the written notes taken of his oral instructions were a document which the court could, and did, validate. The court also said that in the modern world, with "widespread use of smartphones and other personal devices", it is increasingly likely that people having important conversations will record their oral instructions. It was suggested that while a recording itself might not qualify as a 'document' which could be validated as a will, a transcript of such a recording might be validated.

Validating a will can be expensive

While going to court to get a non-compliant will validated can be expensive and time-consuming, informal documents which express a deceased person's wishes can be validated to dispose of their property after their death in the manner that they wanted.

It is highly likely that in future, an increasing number of electronic documents such as, for example, Facebook posts, might be validated as wills.

Even though the High Court can validate imperfect wills, we would recommend that you ensure your will is correctly drawn up and that you sign it in front of two witnesses. This will help save not only time and money, but also make life much easier for the family you have left behind.



1 *Blackwell v Hollings* [2014] NZHC 667
2 *Pinker v Pinker* [2015] NZHC 660
3 *Nichol v Nichol* [2017] QSC 220
4 *Re Estate of Feron* [2012] NZHC 44
5 *Pfaender v Gregory* [2018] NZHC 161

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Do I still need a trust?

inheritances when both parents have died rather than leave assets in a trust.

Asset protection trusts

Trusts are often set up by people who are about to start a new business. They do not want the family home or lifestyle assets to be at risk of future claims by business creditors. A trust can provide effective protection if set up at the right time. Once the settlors have retired from business, there may no longer be the same need to ring fence their assets. This may be a good time to review possible termination of the trust.

The same is true of trusts set up to avoid possible future relationship property claims. If these are no longer a concern then the trust may no longer be needed.

Estate disputes

If the trust assets are transferred back into your name, they will form part of your estate when you die. You will need to deal with them in your will, but there are a number of ways in which a will may be disputed. If the assets are left in a trust, then claims about validity of the will (as well as claims under the Family Protection Act 1955 and similar laws) cannot be made against the trust.

So you need to think carefully before deciding the trust no longer serves any useful purpose.

Our advice is get advice

Trust documents should not be filed away and forgotten about. Things change and you need to reconsider whether your trust still meets its original purpose – or it could be useful for some other reason.

There are a number of factors to weigh up and it is important that you talk to us before deciding how to proceed with your trust.

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How do I bring my trust to an end?

A note of caution – check your wills

Whichever way you decide to bring a trust to an end, it is important to check all your estate planning documents. When establishing a trust, it's common practice to sign new wills, leaving the whole of your personal estate to the trustees of the trust, as well as forgiving any debts the trustees may owe.

There can be complications if your wills are not reviewed at the same time your trust is brought to an end. You should always seek specialist advice about whether to move the distribution date forward or to distribute to nominated beneficiaries.

Bringing a trust to an end is a major decision for all involved. One size doesn't fit all, so it may be useful for us to talk about the process, and its implications, that suit your particular personal situation.