

This newsletter is produced by Brookfields' Trusts and Management Services Team. The articles will keep you up to date on recent developments and information in the fields of trusts management and asset planning, and also Court cases. Should you have any queries on the content of any of these articles, please contact a member of the team (details over).

## THE IMPORTANCE OF GOOD HOUSEKEEPING

In a case decided before the Taxation Review Authority late last year, the sloppy record keeping of trustees was criticised.

This case involved a trading trust which was carrying on the business of a bakery.

The net profit of the trust was distributed annually as beneficiary income to the family's four dependent children.

These payments were recorded in the "children's current accounts" and this money was drawn upon by the parents to pay their own expenditure and for the everyday expenses of the children. This included cash drawings, food, groceries, house repairs and home loan repayments, insurance and expenditure on a credit card. No moneys were actually paid to the children but credited against moneys paid on account by the parents.

There were no trustee resolutions relating to the making of the income

allocation. There were no records kept of how the maintenance payments to the parents were justified. The Authority considered the bookkeeping, accounting and trustee procedures were 'rough' and in many cases non-existent. The Authority considered that some of the drawings made by the parents from the trust bank account provided for the necessities of life for the children which the parents were obliged to maintain and sustain for their children in any case. It was not proper that the trust account was being used for this purpose. The Authority held that the purported debits to the children's accounts and consequential credits to loan accounts by the parents were artificial and must be ineffective under trust law.

The trust's bank account was used by the parents as if it was their own account. The Authority observed that this was a breach of trust. (Note, where a breach of trust has occurred and there is a loss to the trust fund, a trustee may be personally liable to make good the loss).

If you are a trustee care must be taken to ensure that payments from the trust are for a proper purpose of the trust, that accurate record keeping is maintained and that trustee resolutions are completed for each transaction, particularly in terms of major decisions such as the making of a distribution from the trust fund.

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## DEALING WITH OFFSHORE ASSETS IN AN ESTATE

Many people who live in New Zealand now have assets held offshore. Consideration should be given as to how these assets will be dealt with upon death. Without care the estate administration can become unnecessarily complicated and costly.

The worldwide assets of a person can be dealt with in one will. This can result in the legal jurisdiction of the will being in one country and the assets being located in a different country. The law of the country where the asset is located will apply to any transfer of these assets.

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Probate is the confirmation of an executor's authority to deal with the estate as granted by the Court in the jurisdiction of the will. Where assets are located in a different jurisdiction it is necessary for the probate to be resealed in the jurisdiction where the assets are situated.

This works well in jurisdictions where there is no inheritance tax/estate duty such as in New Zealand and Australia. However where there is tax/duty to be paid there can be delays in dealing with the transfer of the offshore assets. Where substantial assets are held offshore in a country which does have inheritance tax/estate duty it may be preferable to have a separate will in that jurisdiction to cover those particular assets. If you are currently living in New Zealand and own assets here as well as off-shore you may want to consider having a separate New Zealand will to deal with your New Zealand assets only. This will help minimise any delay in dealing with those assets.

However, if your home country has inheritance tax/estate duty the New Zealand will would not exclude your New Zealand assets from assessment for such duty.

If you have substantial assets offshore, before making decisions

as to what is appropriate in your circumstances you should seek advice both here in New Zealand and in the country where the assets are situated.

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## **DO I HAVE TO PROVIDE FOR MY CHILDREN UNDER MY WILL?**

This is a question often raised when wills are being drafted. The simple answer is no, you have complete freedom to leave your assets as you wish. But, and this is a very big but, if you fail to provide anything for a child or children they could claim against your estate under the Family Protection Act 1955.

The Court, in assessing any claim under this Act considers whether there has been a breach of the moral duty to provide for those to whom you owe such a duty. This is judged by the standards of a wise and just person making a will. If the Court considers proper provision has not been made for the maintenance and support of a claimant, the will can be amended to the extent required to remedy the moral breach.

Obviously the standard will be different for an adult child as against a dependent child and for a financially secure child as against one in poor circumstances or health.

You do not have to make equal provision for your children under your will, but if there is a reason for the unequal distribution it is often a good idea to state this in the will.

You should seek legal advice before you draft a will. If you have any queries please contact either Howard, Alison or Dianne.

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## **Talk to our team for advice on any of these matters.**

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