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Welcome to the first issue of *Trust eSpeaking* for 2017. We hope the year has started well for you.

Please enjoy reading this e-newsletter, we trust that you will find these articles both interesting and useful.

To talk further about any of these articles, or about trusts in general, please don't hesitate to contact us – our contact details are above.

Trusts Bill

Some key proposals

In late 2013, the Law Commission completed a report recommending that a new Trusts Act replace the Trustee Act 1956. The public consultation phase began last December with the release of the exposure draft Bill. It is intended that the new legislation will be the primary source of trust law in New Zealand. We outline some key proposals.

PAGE 2 »

Will Your Business Survive if You Don't?

Planning is key

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PAGE 3 »

Looking after your inheritance

Keep it protected

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PAGE 5 »

The next issue of *Trust eSpeaking* will be published in the Spring.

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return to front page

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Definition

Most trusts in New Zealand are established with a written trust deed or other document such as a Will. These are known as 'express trusts.' The Bill only applies to express trusts. Characteristics of express trusts are defined in the Bill as:

- A fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose
- The trustee is required to hold or deal with the trust property in a way that it is identifiably separate from the trustee's own property
- The trustee has a duty to hold or deal with the trust property in accordance with the terms of the trust and the duties imposed on the trustee by law, and
- The trustee is accountable in respect of the way the trustee carries out those duties.

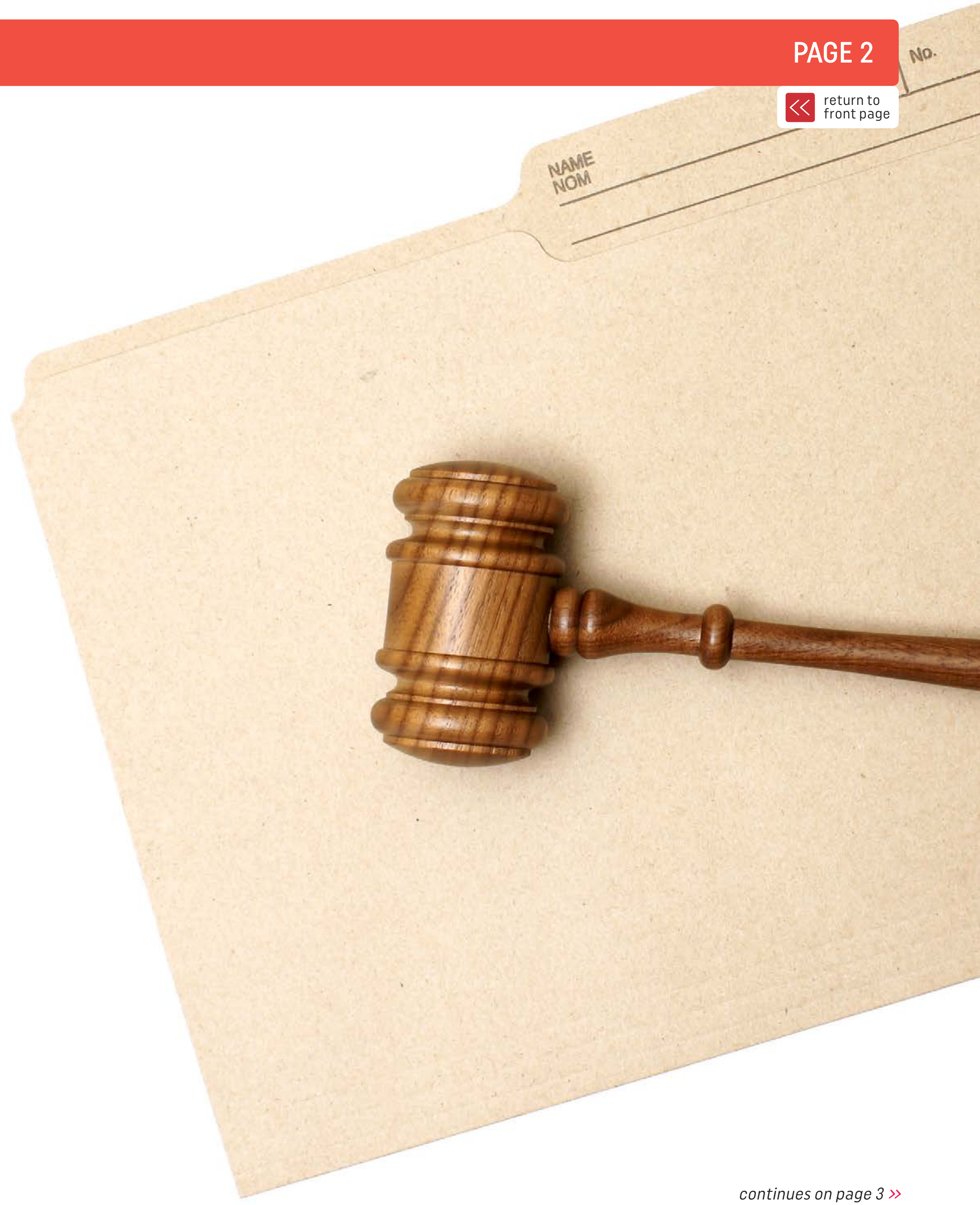
These characteristics already exist in New Zealand's case law, but they will also now be contained within the proposed Trusts Act.

It may be helpful for trustees to be reminded that trust property should be dealt with separately from their own property, and only in accordance with the trust deed and for the benefit of the trust's beneficiaries.

Trustee duties

Trustees will have a number of mandatory duties; these cannot be excluded or modified by a trust deed. These mandatory duties are to:

- Know the terms of the trust
- Act in accordance with the terms of the trust



continues on page 3 »

return to front page

- Act honestly and in good faith
- Hold trust property
- Act for the benefit of the beneficiaries (or the permitted purpose), and
- Exercise trustee powers for a proper purpose.

Trustees will also have a number of default duties. These duties can be excluded or modified by the trust deed. For example, trustees have a default duty not to benefit themselves or to act where they have a conflict of interest, but a trust deed can allow a trustee to act in their own interest. Even now, trust deeds will often specify situations in which a trustee is permitted to act in his or her own interest, for example, when a trustee is also a beneficiary. It is important to know the terms of the trust and what is, or is not, allowed.

Most of the duties restate the current case law, but the requirement that trustees be familiar with the terms of the trust may be a warning for non-professional trustees who may not fully understand their obligations. Trustees will also be obliged to retain copies of trust documents, which is a practice even some professional trustees fail to follow at present.

Information

The draft Bill provides a process for disclosure of 'trust information.'

There's a presumption that trustees must notify 'qualifying beneficiaries' that they are beneficiaries, and they must provide trust information to a beneficiary who requests it within a reasonable time. They may only withhold information in certain circumstances.

'Trust information' includes the trust deed, documents relating to trust administration and trust property, and other information necessary to hold trustees accountable.

A 'qualifying beneficiary' is a person who the settlor intends to have a realistic possibility of receiving trust property. While the requirements give trustees flexibility where necessary, it makes it clear that there is a presumption in favour of keeping beneficiaries informed.

There are a number of other proposals contained within the draft Bill (for example, the documents trustees are required to keep throughout their trusteeship) but those outlined above are some of the significant ones of interest for trustees.

We will keep you up-to-date on the progress of this legislation through the House. In the meantime, if you have further questions about your current obligations as a trustee, please contact us.

Will Your Business Survive if You Don't?

Planning is key

Most owners want to ensure their business will continue after they have died. Often they want their family to be able to carry on the business. A common form of business in New Zealand is the family farm and this poses particular problems all of its own. Most people know that they need to have an up-to-date Will and Enduring Powers of Attorney (EPA) to cope with any unexpected events. However, there is a lot more planning that you should do as well.

Keeping the business running

You need to make sure there is someone who can step in and keep your business going if anything happens to you. Even if you are just stuck in hospital for a time following an accident, you should have someone who has an EPA and can look after the business for you.

Usually the best structure is a company where you can be the main shareholder. It is usually best if there are two directors, or at least an alternate director. If you are unable to take care of business, the other director can do so. If you are incapacitated, the person who holds your EPA can exercise your voting

return to front page

rights as shareholder and appoint a new director in the interim.

The same would happen if you were to die. The executor of your estate can take over the shares and appoint a new director if needed. It's important that your family and employees know who to contact if anything like this happens. They also need to know who holds the EPA and who is named in your Will. As well, you need to have a contingency plan.

Who will own the business?

If you operate your business in your own name, then the business becomes part of your estate when you die. Your executor must step into your shoes and must be able to carry on all of the work you were doing. Your executor needs to be chosen with care!

If you run your business through a company, which is usually the best approach, then your executor will take over your shares in the company as the shares (not the business itself) will be part of your estate. Your executor needs to be able to select the right person to run the business. You may have some ideas about who that person might be and the qualities they will need to do this successfully. This will help not only preserve the capital of the business, but also retain its reputation and integrity. This should be mentioned in a letter of wishes or some similar informal document.

It's usually better not to specify too much detail in your Will because things can change and what seems like a good idea now may prove totally impractical later on.

Your Will also needs to give your executor enough powers to continue to run your business or to sell it. The executor may need to have power to borrow money to keep the business going. You also need to think about whether the business should be inherited by your partner or family – or should the executor sell the business so your family has the money?

Keeping it in the family

In the UK, business advisors have a saying, 'Shirtsleeves to shirtsleeves in three generations.' This reflects a common experience. The first generation creates the business. The second generation was brought up being told all about the business and keeps it going. The third generation has the business handed to them, believe that they are successful entrepreneurs and manage to lose the business.

Ensuring that later generations of the family work together in a business is not easy. Sooner or later most of the family will want to go their own way with their own share of the family inheritance. Often the best advice is to leave it to the family to negotiate a buy-out. A member or members of the family who are keen on the business can buy the others out and everyone can move forward. Locking the business away in a trust and expecting it to last for 80 years – or even for the lifetimes of your children – may be unrealistic.

The family farm

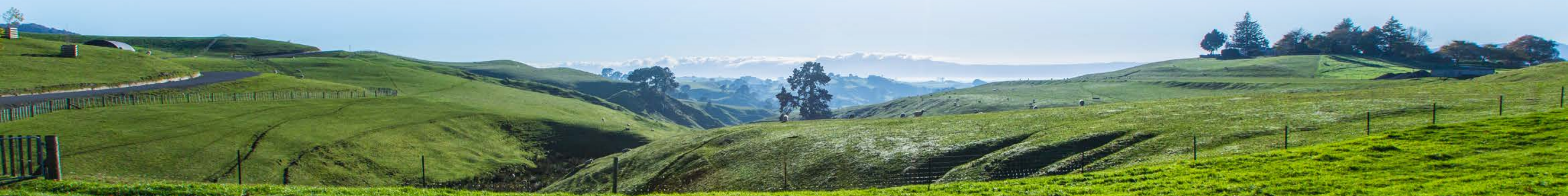
One of the most common examples of bitter litigation in New Zealand is the fight over the family farm. Traditionally the parents expected one son to carry on the farm and did not want him to start off with too much debt. So arrangements were made to give the farm to that son.

These days it can just as easily be a daughter who wants to take over the farm. More importantly, the other members of the family are likely to be unhappy that they are effectively cut out or receive only a small share of your estate. In the past various structures such as trusts have been used in an attempt to prevent possible claims after death.

A common arrangement now is to have a company that owns the farm. The shares in the company can be sold progressively, at a fair value, to the family member who wants to carry on farming. This ensures that there is a flow of funds which can be used to make provision for the other members of the family. In farming families, as in most other families, the best advice is to try to be fair. Playing favourites is likely to lead to some bitterness down the track. You do not want your legacy to your children to be years of family feuding.

Good sense to plan ahead

Making arrangements to deal with business issues if you're incapacitated, or when you die, can be viewed as too hard and/or somewhat macabre. It is, however, good business sense and your family will thank you for some forward thinking to enable your business to continue to operate successfully.



return to front page

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Relationship property claims

If you are a beneficiary under a Will and you're married, in a civil union or de facto relationship, the gift (under the Will) is separate property (as opposed to relationship property). The difference is important because if your marriage or relationship breaks down or you die, your spouse or partner cannot claim half of the gift (or its proceeds) because it's separate property which is not subject to the equal sharing regime under the Property (Relationships) Act 1976.

However, if your gift under the Will is intermingled with you and your spouse's relationship property or it's used for the benefit of relationship property (for example, by repayment of a joint mortgage over your family home) it may lose its separate character and may become relationship property.

Therefore, when you receive an inheritance and you're either married or in a relationship, it's good practice to open an account in your sole name to keep your inheritance separate. If you use your inheritance to clear a relationship debt, such as a mortgage, make sure it's recorded as a loan that you can call up later or demand to be repaid if the need arises.

Alternatively you could set up a separate account in your own name before the estate is distributed so that the inheritance is kept separate from other assets. You can then ask the trustees to pay the inheritance into that account when the time comes.

Creditors and the Official Assignee

If you receive a gift by inheritance it becomes an asset which is available to your creditors. If you are bankrupt at the time the estate is distributed, the gift will pass into the hands of the Official Assignee to be used to pay your creditors.

If you're making your Will and know your intended beneficiary may have financial problems or be exposed to potential claims by creditors because, for example, they operate a business or have signed a guarantee or a lease, you should consider altering your Will to take this into account. This will ensure your gift goes to a family trust set up for your beneficiary and their family rather than the beneficiary personally.

Alternatively, a trust can be set up in your Will for the benefit of your beneficiary and their family rather than a gift directly to the beneficiary.

It's easy for a beneficiary to lose the benefit of a gift intended by a relative or friend. The gift can, however, be protected by careful planning and communication between the Will-maker, the beneficiary and the person who prepares the Will.