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Welcome to the first issue of *Trust e.Speaking* for 2006. We hope you find the articles of interest. If you would like to talk further about any topic in this newsletter or about trusts in general, then please do not hesitate to contact us.

Trustees' Contractual Liabilities

- Limitation clauses

Beneficiaries' Right to Information

- Keeping all informed

Funeral Trusts

- Why have one?

Warning: 31 March 2006 is fast approaching. If your trust has a balance date of 31 March then we recommend supplying your trust's accountant with all the information required to enable preparation of financial accounts for your trust as soon as possible after 31 March. This is particularly helpful in the event that your trust intends distributing income to beneficiaries prior to 30 September 2006.

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Trustees' Contractual Liabilities

- Limitation clauses

Trustees routinely enter into contracts with third parties on behalf of their trust. Perhaps the most common types of contracts signed by trustees are agreements for sale and purchase of real estate, although the entry into loan documentation by trusts would come as a close second. Also trusts commonly enter into other commercial contracts such as leases and listing authorities registering properties for sale.

In entering into contracts such as those listed above, trustees need to do as much as possible to limit their personal liability by stipulating their liability is limited to the assets of the trust.

Trustees' limitation clauses

The primary method of limiting liability is ensuring that a clause known as a 'Trustees' Limitation Clause' is inserted in the contract. The following is an example of a limitation clause:

"The parties agree that the liability of [Insert Full Name] (the 'Trustee') being a Trustee of the [Insert Name of Trust] pursuant to a deed of trust dated [Insert Date of Trust Deed] (the 'Trust') shall not be unlimited personal liability but shall be limited to the extent of the assets for the time being of the Trust which are under the Trustee's control in the ordinary course of administration of the Trust less all liabilities for the time being."

The wording of the limitation clause can vary depending upon the circumstances and the documents. Before entering into any contractual documents on behalf of a Trust, we recommend you contact us.

It is not possible to limit trustees' personal liability in all circumstances. For example, the other party to a contract may agree that an independent trustee (that is to say a trustee who is not also a beneficiary) may limit his/her liability to the assets of the trust, but may not be prepared to permit the trustees who are also beneficiaries (and frequently the people who originally set up the trust) to limit their liability. Banks certainly adopt this stance when considering the insertion of trustees' limitation clauses in mortgage and loan documentation.

Inserting 'Trustee' alongside signature

It is not possible for trustees to limit their liability by merely identifying themselves as trustees when executing a contract, for example by inserting the word 'Trustee' alongside their signature.

In the New Zealand High Court case of *NZHB Holdings Limited*, NZHB sued various trustees in their personal capacity, basing its action upon two documents in which a limitation of liability of trustees clause had not been inserted, but in which some trustees, when signing, had clearly indicated that they were signing the documents as trustees of a trust. The High Court held that trustees always contract in their own right, and are personally liable in respect of any contract they enter into, subject to limitations. The trustees' attempt to avoid personal liability failed.

Our advice

In summary, trustees also assume a personal liability when executing documents on behalf of a trust unless an appropriate trustees' limitation clause is inserted in the documentation. We recommend that trustees contact us before signing documents on behalf of their trust.



Beneficiaries' Right to Information

- Keeping all informed

Many trustees do not appreciate that beneficiaries have the right to obtain information concerning trusts.

Amongst the duties that a trustee owes to the beneficiaries is a duty to keep beneficiaries informed about the trust's assets, its investments, and to keep a record of account for the trustees' assets and how they are being managed.

It was once thought that a beneficiary of a trust had what was referred to as a 'proprietary right' in a trust, and could ask and expect to receive any of the information held by the trustees.

The old position was viewed by the courts as follows:

"The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own . . . The right to discovery is a right to see someone else's documents. The proprietary right is a right to access documents which are your own."

O'Rourke v Derbyshire (1920)

In a recent English decision of *Schmidt v Rosewood Trust*, the position appears to have been clarified.

In the Schmidt case, the court was particularly concerned with considering the potential rights that the beneficiaries had under the trust, and noted that the court may have to "balance the competing interests of different beneficiaries, the trustees themselves, and third parties. Disclosure may have to be limited and safeguards may have to be put in place . . . In many cases the Court may have no difficulty in concluding that an applicant with no more than a theoretical possibility of benefit ought to be granted any relief."

What sort of documents must a trustee therefore disclose to a named beneficiary? In a New Zealand case, *Foreman v Kingston*, the court noted:

"Beneficiaries are entitled to receive information which will enable them to ensure the accountability of the trustees in terms of the trust deed. They are entitled to have the trust properly managed and have the trustees account for their management. They are entitled to receive trust accounts.

"Beneficiaries are not entitled to the reason behind the exercise by the trustees of their discretions."

A guide for beneficiaries

As a guideline, it would seem that beneficiaries are entitled to:

- All financial statements relating to trusts of which they are beneficiaries
- All statements covering the winding-up and distribution of trust assets, including details of beneficiaries to whom distributions were made
- Copies of deeds appointing trustees
- Details of the assets and liabilities of trusts
- The names of all past and present trustees, including copies of deeds and documents that effect those changes.

Beneficiaries are not entitled to the following:

- The trustees' reasons to vary, partially distribute or re-settle a trust
- Memoranda of guidance from the settlors which contain confidential information regarding the circumstances of beneficiaries
- Other documents which relate to the management of the trust property, which is properly managed within the discretions and powers of the trustees.

The provision of information to beneficiaries is not always appealing. It is for that reason that, as far as practicable, it is preferable to limit the number of beneficiaries of a trust.



Funeral Trusts

- Why have one?

Funeral arrangements are not everybody's favourite topic. However as funeral directors promote pre-paid funerals, the alternative of a funeral trust is often raised.

Pre-payment of funeral costs

The cost of a funeral varies depending on location, type and style of funeral director, the choices made by the family and the wishes of the deceased. Subject to those factors, the cost of an average funeral is likely to be about \$6,000. Many funeral directors provide a service where you can plan and pre-pay for your own funeral, but an interesting and useful alternative is a funeral trust.

What is a funeral trust?

A funeral trust is a separate trust with sufficient funds set aside for funeral expenses. To keep legal costs to a minimum a funeral trust is set up using a fairly standard format. For instance, law firm partners may be the trustees, funds will probably be placed in a bank term deposit, and the trust's compliance costs (such as filing a tax return) will be paid out of interest with the balance of income then added to the capital.

Who should have one?

Establishing a funeral trust will appeal to anyone who wishes to set aside the cost of their funeral to make it financially easier for their family after their death. Under the current rest home subsidy policy it is possible to set aside up to \$10,000 without affecting eligibility for a rest home subsidy – about \$4,000 more than the current cost of an average funeral.

Without a funeral trust, funeral costs will be deducted from the deceased's estate. If the deceased was already on a rest home subsidy due to their assets having been reduced to the required level, funeral costs will be deducted from those meagre assets.

A pre-paid funeral trust, on the other hand, sets aside funeral expenses and probably allows some extra funds to be available, thereby increasing the amount available to the beneficiaries. For many people a funeral trust brings peace of mind to both themselves and their families, and it will appeal to those who want to plan their finances carefully. People considering setting up a funeral trust must understand they will forego any future income from the capital used to set up the trust.

When should you form a funeral trust?

Whilst it probably appeals to older people, a funeral trust can be formed at any time as long as you have the cash or assets to put into it.

However, one word of warning – the transfer of funds into the funeral trust may be a dutiable gift and must form part of any gifting programme that you are undertaking. That aspect should be discussed very carefully with us.

What will it cost?

Setting up a funeral trust is a fairly routine procedure – which keeps costs to a minimum. However, any trust must be tailor-made to suit an individual's needs.

How do I start?

Call us to talk more about setting up a funeral trust; we'll be happy to discuss this with you.