

Update Law of Trusts

Service 59 — March 2021

Current developments

New tax disclosure requirements for trustees released

Bill Patterson discussed new tax requirements in “Tough new disclosure rules for trusts” (05 February 2021) ADLS Tough new disclosure rules for trusts: ADLS.

The government has released new requirements for trustees in the Taxation (Income Tax Rate and Other Amendments) Act 2020 (2020 No 65) (amending s 17GB and 59BA of the Tax Administration Act 1994). These amendments require trustees to provide:

- financial accounting information, including profit and loss statements, balance sheet items and other information to be specified by the Commissioner — for example, any transfers to the trust by associated persons;
- additional information such as loans to or by related parties; and
- information on distributions and settlements made during the income year.

These new reporting obligations apply to all trusts earning income from 1 April 2021.

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This service includes an updated index.

Legislative amendments

Trusts Act 2019

This Act amended the following Act, effective 30 January 2021:

- ss 21, 33, 41 and 51 of the Charitable Trusts Act 1957.

Updated commentary

Trusts Act 2019, ss 116, 117 and 118 — vesting land — Land Transfer Act 2017 requirements

The Trusts Act is clear that the vesting of land will not take effect until a transfer instrument is registered under the Land Transfer Act 2017 (LTA). This means when trustees retire or are removed and new trustees are appointed, a transfer must be registered to change the ownership of the trust’s land, just as under the former Trustee Act 1956: see *Landwrap* (Issue 160, September 2020) <https://www.linz.govt.nz/news/2020-09/landwrap-september-2020>. See [TRU116.01], [TRU116.02], [TRU117.02] and [TRU118.02].

Trusts Act 2019, ss 133 — trustee may apply to court for directions

Generally the best course of action when the beneficiaries (or some of the beneficiaries) disagree about the trustees' potential decision is to apply to the Court for directions under s 66 of the Trustee Act 1956 (now repealed, see now s 133 of the Trusts Act 2019): *Re Singh* [2020] NZHC 2479. See [TRU133.02].

Chapter 8 — Charitable trusts — liquidation of charitable trusts

Koanga Institute Inc v Kotare Community Land Trust [2021] NZHC 169 has significance in that it mentions the way in which the Court may, in a liquidation of a charitable trust, consider the terms and conditions of liquidation. See [8.7.3].

Chapter 8 — Charitable trusts — lost trust deeds — land transfer records

In *Re Young Men's Christian Association of Christchurch (Inc) Charitable Trust* [2020] NZHC 2027 the terms of the YMCA Trust ("the trust") were embedded in a transfer of land to the trust in the mid-19th century. Records of the trust must have been lost in a fire. With older charitable trusts therefore, it may be wise to look at land transfer records. See [8.20.5(a)].

Chapter 9 — Trusts and family law — validity of trusts — bundle of rights

The Privy Council in *Webb v Webb* [2020] UKPC 22, [2020] 5 LRC 465 found that the trusts should be set aside on the basis that the powers that the husband Paul Webb retained for himself in respect of trust assets were so extensive it was no different to ownership. See [9.2].

Chapter 9 — Trusts and family law — validity of trusts — s 44, Property (Relationships) Act 1976

In *Kwok v Rainey* [2020] NZHC 923, (2020) 32 FRNZ 525 Thomas J considered the elements of the trust in which Mr Rainey had extremely wide powers and whether the trust deed evidences an intention to create a trust at all. The validity argument was accepted but the case was decided under s 44 of the Property (Relationships) Act 1976 as the more obvious route. See [9.2] and [9.8].

Chapter 9 — Trusts and family law — validity of trusts — power to make unilateral decisions

In *Wylie v Wylie* [2019] NZHC 2638 the terms of the deed did not give Dr Wylie the power to make unilateral decisions. The trust deed thus did not give her the same sole control over trust assets as was the case with Mr Clayton in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551, [2016] NZFLR 230. See [9.2].

Chapter 9 — Trusts and family law — orders relating to trusts — ss 44 and 44C, Property (Relationships) Act 1976

The Court of Appeal in *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293 has confirmed that where s 44 applies but the Court declines to exercise discretion under s 44(2), s 44C compensation is not precluded. See [9.9].

Chapter 9 — Trusts and family law — s 182, Family Proceedings Act 1980 — nuptial settlement

In *Preston v Preston* [2020] NZCA 679 the Court of Appeal upheld the findings of Fitzgerald J that the addition (made in contemplation of marriage) of Mrs Preston as a

discretionary beneficiary (to a trust settled six years prior) was a settlement for the purposes of s 182 but declined to exercise discretion in Mrs Preston's favour. See [9.14].

Chapter 9 — Trusts and family law — s 182, Family Proceedings Act 1980 — nuptial settlement

In *Dyer v Gardiner* [2020] NZCA 385, [2020] NZFLR 293 the Court of Appeal found that the transfer of the home to the trust, the gifting programme and the transfer of shares to the trust were settlements for the purpose of s 182. Despite these findings the Court declined to exercise its discretion. See [9.14].

Chapter 9 — Trusts and family law — s 182, Family Proceedings Act 1980 — removal of trustees

In *Oldfield v Oldfield* [2019] NZHC 492 the couple separated after 44 years. Despite having the family home provided to him by the trust Mr Oldfield obstructed any attempt by Mrs Oldfield to have a home purchased for herself. The High Court replaced him and the other trustees and directed the new trustee to provide a house for Mrs Oldfield. See [9.14], [9.15] and [9.19].

Chapter 9 — Trusts and family law — s 182, Family Proceedings Act 1980 — removal of trustees

In *Oldfield v Oldfield* [2020] NZHC 8 Duffy J declined to split the assets of the David Oldfield Family Trust into two mirror trusts under s 182. Rather than resettling under s 182 the Court addressed Mrs Oldfield's position in the trust by removal and replacement of Mr Oldfield and his co-trustees. See [9.14] and [9.15].

Chapter 9 — Trusts and family law — s 182, Family Proceedings Act 1980 — exercise of Court's discretion

Housing was a significant factor in *Stiles v Stiles* [2019] NZHC 3462 where the Family Court decision to split the trust assets 60/40 in favour of the wife on the basis that it would provide her with some means to house herself and also because as a consequence of the husband's tax avoidance there was no relationship property. See [9.15].

Chapter 9 — Trusts and family law — removal of trustees — appointment of receiver — s 138, Trusts Act 2019

In *Lockhart Trustee Services No 56 Ltd v Ryan* [2020] NZHC 1823, (2020) 5 NZTR 30-019 after protracted proceedings between Ms Ryan and Mr Lobb, the independent trustee applied to have itself removed. As a last resort Edwards J appointed a receiver with powers under s 14(2) of the Receiverships Act 1993. See [9.19].

Chapter 9 — Trusts and family law — constructive trusts

In *Picard v Martin* [2020] NZHC 1206 the High Court overturned the findings of the Family Court that there was no constructive trust. Ms Picard and Mr Martin relocated a house onto land initially owned by a company controlled by Mr Martin's parents but later transferred to his mother. In assessing the quantum, Ms Picard was awarded half of the value of the improvements. See [9.20].

Chapter 9 — Trusts and family law — constructive trust — breach of trust — equitable proprietary interest

In *Enright v Newton* [2020] NZCA 529 the excluded Enright siblings sought a share of a property that was purchased using funds that were vested in them and disposed of to the

Southern Lakes Holdings Ltd (SLH) in breach of trust. The Court the Court found that the siblings were entitled to assert a proprietary interest to the extent of 43.17 per cent. See [9.20].

Charitable Trusts Act 1957, Part 3 — charitable trusts do not fail

In *Re Young Men's Christian Association of Christchurch (Inc) Charitable Trust* [2020] NZHC 2027, the “no termination” rule, the rule that charities do not fail, but merely change character, was discussed. See [CTAPART3.3].

Charitable Trusts Act 1957, Part 3 — charitable trusts do not fail — exception

Doreen Brown Trust Fund [2020] NZHC 449 sets out an exception to the “no termination” rule, the rule that charities do not fail, but merely change character; where the settlor has provided for the primary charitable trust to come to an end on the happening of a specified condition and has made a gift over to an alternative charitable purpose. See [CTAPART3.3].

Charitable Trusts Act 1957, s 33 — vary mode of administration of charitable trust

Re Te Mata Park Trust Board [2020] NZHC 239 the Trust Board wished to amend the process for appointing a descendant of the settlor so that it was not limited to male heirs of the settlor. The Trust Board also wished to appoint an additional trustee of mana whenua descent. The application was approved. See [CTA33.3].