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Private Wealth

New Zealand: Trends & Developments

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Trends and Developments

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Introduction

No doubt, the year 2020 will be remembered for the impact of COVID-19 on all walks of life – private wealth being no exception. The other major themes in the New Zealand private wealth space include the Trusts Act 2019 and initiation of a review of the law of succession.

As for many other things, COVID-19 has caused significant instability in the private wealth context. Changes in legal processes have been required and the economic impact of the virus has renewed dialogue on taxation, among other changes to the regulatory environment.

The Trusts Act 2019 (Trusts Act or Act) continues to be a major theme. There is increasing awareness and understanding among practitioners of the emphasis of the Trusts Act on plain language drafting, in keeping with its aim to make trust law more accessible to lay trustees and beneficiaries; as well as the Trusts Act's requirements for disclosure of trust information to beneficiaries and the common changes that may be required to existing trust deeds.

Following its review of the law on the division of relationship property, the New Zealand Law Commission has commenced a review of the law of succession. The Law Commission is currently conducting preliminary consultation with stakeholders to identify the key issues arising under the existing legal framework.

COVID-19

Legal processes

In response to COVID-19, New Zealand was on "full lockdown" from 25 March 2020 to 28 April 2020. During this time, all New Zealand residents were required to self-isolate in their homes and practise social distancing. After the lockdown, restrictions were progressively eased over May and early June 2020.

Given the restrictions on movement and social distancing requirements, clients faced difficulties in attending lawyers' offices to complete legal processes, which, under the existing legal framework, were required to be completed during face-to-face meetings. Temporary exemptions were introduced by the legislature, courts and other regulatory authorities to allow use of audio-visual technology to overcome the issues caused by self-isolation and social distancing.

Some of the temporary exemptions, which were introduced in the private wealth context, are discussed below.

Witnessing of wills and enduring powers of attorney

Immediate Modification Orders were introduced in relation to wills and enduring powers of attorney. Under normal circumstances, Section 11 of the Wills Act 2007 requires wills to be signed before two independent witnesses. During the lockdown period, will-makers were generally only in contact with their family members and had difficulty finding independent witnesses. Similarly, under New Zealand law, enduring powers of attorney must generally be signed before an authorised witness (usually a practicing lawyer) after the donor has been advised on the implications of the enduring power of attorney. The witness is required to sign a certificate to this effect. In the past, standard practice has been for both wills and enduring powers of attorney to be signed in the physical presence of the relevant witnesses.

In order to allow wills and enduring powers of attorney to be made in self-isolation, the government passed the Epidemic Preparedness (Wills Act 2007 – Signing and Witnessing of Wills) Immediate Modification Order 2020 (Wills IMO) and the Epidemic Preparedness (Protection of Personal and Property Rights Act 1988 – Enduring Powers of Attorney) Immediate Modification Order 2020 (EPA IMO).

Broadly, the Wills IMO and the EPA IMO allowed wills and enduring powers of attorney to be signed and witnessed by audio-visual or audio link (eg, via Zoom, Skype or FaceTime). For wills, changes were permitted to the attestation clauses included in the wills and the will-maker and witnesses could each sign separate copies of the will. The witnesses, generally, were required to sign certificates in relation to the process followed for signing and witnessing the wills. Similarly, under the EPA IMO, the donor, the attorney(s) and the authorised witness were each able to sign separate copies of the enduring power of attorney. In all cases, each copy of a will or an enduring power of attorney was to be returned to a single holder as soon as practicable (including in electronic form).

Land transfer authority and instruction forms

Title to land in New Zealand is held under the Torrens system of land registration. An electronic land register is operated by Land Information New Zealand (LINZ) and it provides proof of

the ownership of any particular land. Registration on the land register as the owner of an estate or interest in land generally provides indefeasible title (in the absence of fraud). Therefore, strict protocols are in place to ensure no changes are made to the land register without authority from the relevant parties and without their identity being confirmed. The parties to a land transaction are generally required to sign an authority and instruction form (A&I) which confirms that the client authorises the dealing with land and his, her or its identity.

Generally, A&Is must be signed by a client and witnessed by a lawyer "in person". However, clients could be identified, and A&Is signed and witnessed, using audio-visual link, if the legal practitioner had known the client for more than 12 months and various other requirements were met. On 30 March 2020, LINZ extended this rule to permit the use of audio-visual technology to identify new clients (not known for more than 12 months) and witness the signing of their A&Is. Practitioners were given flexibility in taking other reasonable steps to verify their client's identity. These steps could include making use of identity information held by the Department of Internal Affairs (which oversees AML compliance by law firms), relying on robust digital signing services, and obtaining written confirmation directly from the client's bank that it has carried out sufficient identity verification procedures on the client.

Compliance with AML identity verification requirements

Law firms' compliance with the Anti-Money Laundering and Counter-Financing of Terrorism Act 2008 is overseen by the Department of Internal Affairs (DIA). During the lockdown, the DIA recognised that compliance with customer due diligence procedures may be difficult or impossible, and accordingly, provided some leeway. In particular, the DIA authorised customer due diligence procedures to be carried out in a delayed manner, as soon as practicable after the COVID-19 Alert Levels were lifted and after the business relationship had begun. Under normal circumstances, customer due diligence must be completed (where applicable) before any work is completed for the client.

In general, there was a greater focus on adopting a "risk-based" approach to customer due diligence.

The above exemptions were only temporary. The various Immediate Modification Orders were made under Section 15 of the Epidemic Preparedness Act 2006 and are revoked on the expiry of the Prime Minister's Epidemic Preparedness (COVID-19) Notice 2020. Despite their temporary nature, the exemptions allowed new legal processes to be trialled which may inform future reform.

Other processes undertaken by law firms also underwent change. As would be expected, remote signing of other documents and the use of electronic signature software also became more common.

Nevertheless, in our view, the use of remote technologies was not suitable for all matters. In the private wealth context, we experienced greater difficulty in identifying potential issues of testamentary capacity while taking instructions over audio-visual link. Body language and other non-verbal cues were more difficult to grasp. We also encountered difficulty in seeking capacity assessments over audio-visual link from medical practitioners.

Regulatory environment

The New Zealand general election is scheduled for 19 September 2020. Given the impact of COVID-19, there may be regulatory changes which will be relevant for trustees, including when they consider their powers to invest trust property.

The current Labour government has previously considered introducing a comprehensive capital gains tax (CGT), across a broad range of asset classes. The report of the Government's Tax Working Group (TWG) was released in February 2019. Due to insufficient support from coalition partners, the government was, at the time, unable to proceed with a CGT. Prime Minister Jacinda Ardern later publicly stated that she would not implement a CGT while she remained Prime Minister.

In light of recent government spending, the need to stimulate economic growth and the fiscal burdens anticipated by the government in the long term, the issue of taxation may become relevant again following the 2020 election.

The TWG's report discussed several proposals which may be re-considered in the future, including the extension of the taxation of capital gains. The majority of TWG members supported a broad-based GGT (excluding the family home) but a minority preferred incrementally subjecting different asset classes to CGT over time. Changes to marginal tax rates for individuals was canvassed (although raising the top marginal tax rate was beyond the TWG's terms of reference). Changes to the company tax rate were also raised. The TWG recommended that no change be made at this time.

Other changes that have also been raised for debate include raising the superannuation entitlement age from 65 years to 67 years, as a means of reducing government expenditure.

As a part of its 2020 election campaign, the Green Party has suggested a wealth tax. At the time of writing, it is proposed that tax be charged at a rate of 1% of the value of an individual's net

equity that is above a NZD1 million threshold, and at a rate of 2% of the value of net equity above a NZD2 million threshold. At the time of writing, the other main political parties in New Zealand have largely opposed the proposal.

Trusts Act 2019

The Trusts Act comes into force in January 2021. It will partially codify trust law in New Zealand. The Trustee Act 1956 will be repealed and replaced with more comprehensive legislation. Some areas of trust law have been reformed.

Plain language

The Act distinctly shifts towards plain English in keeping with its aim to make trust law more accessible. The Trusts Act seeks to summarise and restate trust law principles using everyday terms. By way of example, the Trusts Act expressly sets out the duties already imposed by on trustees by law, with the aim of improving trust administration. To ensure the law is accessible to lay trustees and beneficiaries, these duties are summarised using modern language.

A clear hierarchy of trustee duties is set out. Trustees' duties are divided into mandatory duties, which cannot be modified or excluded by the terms of the trust, and default duties. Default duties may be modified or excluded by the terms of the trust. Any adviser who is paid to prepare the terms of the trust or to advise in relation to them is obliged to alert the settlor to any such modification or exclusion.

The rule against perpetuities, which was often difficult for lay trustees and beneficiaries to understand and apply, has been abolished and the maximum lifetime of a trust has now been set at 125 years.

Clauses in the terms of trust that limit, exclude or provide indemnities for trustees' liability for breaches that involve dishonesty, wilful misconduct or gross negligence are invalid. Advisers who prepare or advise on the terms of trust must take steps to ensure the settlor is aware of the meaning and effect of any such clauses.

Prescriptive rules will govern what documents trustees must hold and how they must hold them. For example, Section 45 of the Trusts Act provides that the trustees must hold the trust deed, any variations to the trust deed, records of trust property, records of trustee decisions, any written contracts, accounting records, etc.

Rather than including a lengthy list of the powers of trustees, Section 56 of the Trusts Act simply provides that a trustee has all the powers necessary to manage the trust property and all the powers necessary to carry out the trust. The Law Commission considered that trustees' powers should be wide and regulated by imposing clear duties on the use of those powers.

Trusts practitioners are currently considering the extent to which they will update their trust deed templates to ensure they use plain, easily understandable, language and are consistent with the terminology used in the Trusts Act.

Beneficiary disclosure

Prior to the Trusts Act, the law on beneficiary disclosure was not always well understood by lay trustees and beneficiaries. The Trusts Act provides for two presumptions. The first is that trustees must make available basic trust information to every beneficiary. Trustees bear the onus of providing information, regardless of whether it is requested. Basic trust information includes the fact that a person is a beneficiary of the trust; the name and contact details of the trustee; details of any appointment, removal or retirement of trustee; and the right of the beneficiary to request a copy of the terms of trust or trust information.

The second presumption is that trustees must give a beneficiary trust information requested by that beneficiary. Trust information means any information regarding the terms of the trust, the administration of the trust or the trust property which is reasonably necessary for the beneficiary to have in order to enable the trust to be enforced. It does not include reasons for trustees' decisions.

When considering whether to give basic trust information or, if requested, other trust information, the trustees must have regard to the factors set out in Section 53 of the Trusts Act. If, after considering these factors, the trustees reasonably consider that the relevant information should not be provided to the beneficiary, the presumptions are rebutted and do not apply.

If a person, who was not previously aware that he or she was a beneficiary of a trust, receives basic trust information, there is a real possibility he or she will request further trust information.

This was recently demonstrated by the New Zealand Court of Appeal's decision in Addleman v Lambie Trustee Limited [2019] NZCA 480. Mrs Addleman and Ms Jamieson (sisters) were discretionary beneficiaries of the Lambie Trust. The trust was settled in 1990, using funds received by Ms Jamieson as compensation for an injury she had sustained. There was evidence that the trust was primarily intended to benefit Ms Jamieson. Mrs Addleman was unaware of the trust's existence until 2001, and after being notified of its existence by the trustees, requested further information. She requested copies of the trust deed, all financial accounts from the trust's inception and other trust

documents. To the date of the hearing, the trustees had only disclosed the trust deed and the identity of the trustees.

The court held this disclosure was insufficient for Mrs Addleman to assess whether the Trust had been properly administered. Assurances given by the trustees to Mrs Addleman that all distributions from the trust fund were proper and in accordance with their duties under the law were disregarded. The court held that:

"while a beneficiary does not have an absolute right to the accounts, the circumstances in which such accounts may be properly withheld from a close beneficiary are likely to be limited. As the Supreme Court observed in Erceg, 'the strongest case for disclosure would be a case involving a request from a close beneficiary for disclosure of the trust deed and the trust accounts, which would be the minimum needed to scrutinise the trustees' actions in order to hold them to account'."

For trusts that have wide classes of beneficiaries (as was common in past drafting practice), the beneficiary disclosure obligations may be onerous. The volume of documents that potentially may be requested could be significant, especially for older trusts (such as the one in Addleman). Also, the preliminary consideration of whether the presumptions apply and how the various factors in Section 53 should be weighted may be difficult.

In New Zealand, many trusts are family trusts settled by parents for the benefit of themselves and their children. There is concern about how disclosure of the trusts' assets and income may impact parent-child relations.

Review of trust deeds

As expected, trust practitioners have received many instructions to review trust structures, as a result of the changes brought about by the Trusts Act. Among other things, trust reviews commonly consider whether the scope of beneficiaries included within the trust deed reflects the wishes of the settlor, and if not, whether some beneficiary classes should be excluded. Other considerations are whether any exclusion of liability and indemnity provisions in the trust deed comply with the Trusts Act and whether the maximum duration of the trust can be increased. In some cases it is appropriate to review whether the trust deed includes appropriate grounds for the removal of trustees. Section 103(2) of the Trusts Act provides that trustees may be removed on the basis of any grounds set out in the trust deed.

Lawyers also review whether appropriate provision has been made for the power of appointment and removal of trustees (or any other power typically held by an appointor or a protector) to be delegated on the death or loss of mental capacity of the person in whom such power is currently vested.

Review of the Property (Relationships) Act 1976 and the Law of Succession

In July 2019, the New Zealand Law Commission published its final report on its review of the Property (Relationships) Act 1976 (PRA). The Law Commission concluded that the PRA does not reflect New Zealanders' contemporary attitudes towards the division of property on separation.

Some of its key recommendations (among others) included that the family home should no longer be automatically treated as relationship property and subject (usually) to equal division. Instead, if one partner owned the home before the relationship began or received it as a third party gift or inheritance, only the increase in the home's value during the relationship should be shared.

It explored whether the courts should have broader powers to "look-through" trusts and ensure a just division of property when a trust holds property produced, preserved or enhanced by the relationship.

It found that the law should apply equally to all marriages, civil unions or de-facto relationships. Currently, some provisions, such as Section 182 of the Family Proceedings Act 1980 (which allows relationship property claims against "nuptial settlements") only apply to married couples.

It considered issues of jurisdiction. To avoid proceedings needing to be transferred to the High Court, it found that the Family Court's jurisdiction should be expanded to include jurisdiction over all aspects of relationship property matters, including in relation to trusts, companies and general civil law where relevant.

It found that children's best interests, including rights to occupy the family home immediately after separation, should be given greater priority in relationship property matters.

It also canvassed the possibility of a new family income sharing arrangement that provides for family income to be shared beyond the end of a relationship, for a limited period.

The Law Commission is considering the rules applying to relationships ending with death as a part of a broader review of succession law. The Government will consider the Law Commission's reports on the PRA and succession law together.

The Law Commission is currently consulting with stakeholders in relation to the key issues arising in relation to succession law.

Issues which have been raised at this preliminary stage include the fact that the intestacy rules need to be updated for changes in attitudes, society and family structures. For example: Section 77 of the Administration Act 1969 provides that where the deceased has a spouse and children, the spouse gets all personal chattels, a sum of NZD155,000 (with interest from the date of death) and one third of the residuary estate.

Comparatively, under the PRA, the spouse or partner may be entitled to up to one-half of all assets of the deceased's estate classified as relationship property. Also, with blended families becoming more common, the entitlement of step-relatives needs to be considered further. Initial consultation also shows that some parts of society may be less likely to make wills, and are therefore likely to be disproportionately affected by the intestacy rules. It needs to be considered whether intestacy rules are appropriate for their circumstances.

Another issue is that New Zealand succession law generally favours testamentary freedom. However, this is limited by the Family Protection Act 1955 (FPA) (among other laws). The FPA recognises that a will-maker owes moral duties to various family members. If the will-maker makes insufficient provision in his or her will for a family member, that person can apply to the court for provision from the deceased's estate. Stakeholders have commented that the FPA creates unaffordable litigation for estates as there is usually significant uncertainty about the scope of the moral duty owed by the will-maker and what constitutes "sufficient" provision under the will.

Conclusion

The key themes in 2020 have been the impact of COVID-19 on legal practice, a greater awareness of changes brought about by the Trusts Act, and the potential for further reform as result of the Law Commission's review of the PRA and its ongoing review of succession law.

We expect the Trusts Act will continue to be a dominant theme in the year ahead.

Hesketh Henry is a commercial law firm based in Auckland, New Zealand. The private wealth team comprises: three partners, one senior associate and three solicitors. They advise clients on a wide range of services with a focus on trusts and estates; establishing, administering and restructuring trusts and advising on trust structures; opinions on complex trust issues for existing clients of the firm and referrals from other law firms; preparing and advising on relationship property agreements and help in assisting in the resolution of relationship property issues; wills and advice on issues that arise relating to wills and estate planning; enduring powers of attorney; administering estates; trust disputes and advice on the establishment and operation of charitable trusts; establishing family office structures and advice in managing those through the generations. The firm is unique in that it combines a depth of expertise in both contentious and non-contentious areas of private wealth law. There are also two practitioners in the litigation team that specialise in this area of law.

Authors

Mary Joy Simpson leads Hesketh Henry's private wealth team. Her principal areas of practice are estate planning, trusts, relationship property and estate management. A specialist in trust law, Mary Joy regularly reviews and provides advice on personal asset management. She is often asked to speak at seminars and is a member of the Society of Trust and Estate Planning Professionals. Relationships are important to Mary Joy and she has developed strong and trusted relationships with her clients. Mary Joy also regularly advises charitable organisations on legal and structuring issues.

John Kirkwood is a highly experienced commercial and trust lawyer with more than 30 years in private practice. He operates at the intersection of commercial and private wealth law. John's particular expertise is in small to medium enterprise businesses and the business, personal and wealth planning requirements of the people who own and operate them. He has experience across the wide range of legal issues affecting these individuals with a particular interest in business and trust structuring, succession planning for individuals and exit and transition planning for the businesses they own. John also oversees the firm's estate administration practice.

Emma Tonkin is a partner in the private wealth team. She specialises in private wealth, real estate and overseas investment. Emma regularly advises on trust structures, both private and charitable, estate and asset planning and enduring powers of attorney. Emma is also an expert in relation to the Overseas Investment Act and guides clients through the regulatory process surrounding overseas ownership of sensitive New Zealand assets. She has broad experience across a number of industries, with a particular focus on real estate. Emma is a trusted family adviser who guides clients on all aspects of their New Zealand estate plan.

Brett Morley is the firm's senior litigation partner, with more than 30 years' experience, and has been counsel in litigation at all court levels. One of his specialities is complex trusts and estate disputes and he is sought after to provide opinions and resolve conflicts in this area. Key clients include a number of charitable trusts, including several that were created many years ago through specific acts of parliament. Brett has appeared as counsel in a number of significant cases in this area.

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