Trust eSpeaking

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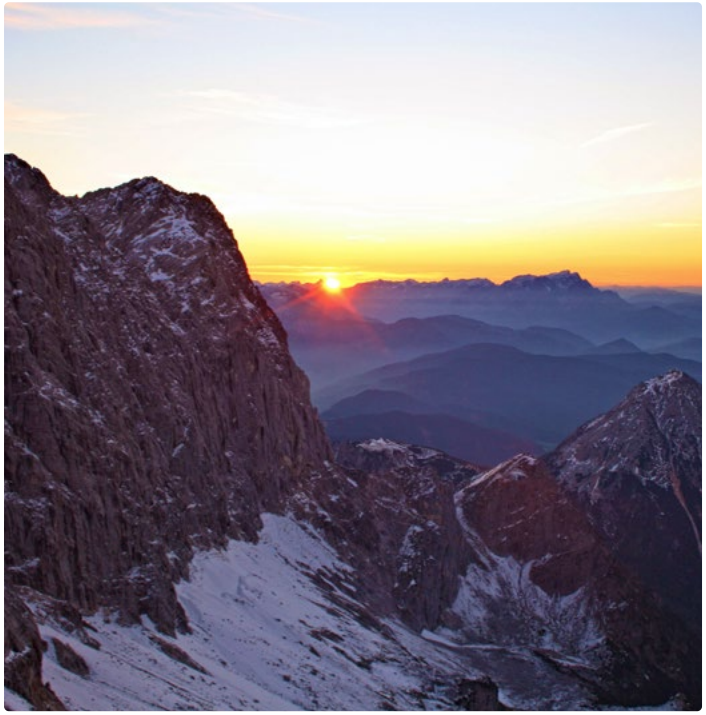
Welcome to the Autumn edition of *Trust eSpeaking*. We hope you find the articles both interesting and useful.

If you would like to know more about any of the topics covered in this edition of *Trust eSpeaking*, or about trusts in general, please don't hesitate to contact us — our details are on the right.



Succession and trust law changes

Extension of Māori Land Court jurisdiction

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Trustees' expenses

Should be reimbursed, but no need for extravagance

When trustees incur expenses, they are not expected to be out of pocket in carrying out their responsibilities. Trustees are entitled to use trust money or to get a refund from the trust fund if they incur expenses in carrying out their duties. Trustees' expenses, however, must be fair and reasonable. A recent case shows why it is also important to be sure that you can trust your trustee not to take advantage of the right to claim expenses.

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New trusts legislation now in force

Disclosure of trust information to beneficiaries

The Trusts Act 2019 came into force on 30 January 2021. One major topic of discussion arising from the new Act has been the provisions governing disclosure of trust information to beneficiaries.

The purpose of these provisions is to ensure that beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees. We explain what trustees can disclose to beneficiaries.

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NZ LAW
Stronger Together.

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

Succession and trust law changes

Extension of Māori Land Court jurisdiction

A significant change to the succession laws relating to Māori land[1] came into force on 6 February 2021 (Waitangi Day).

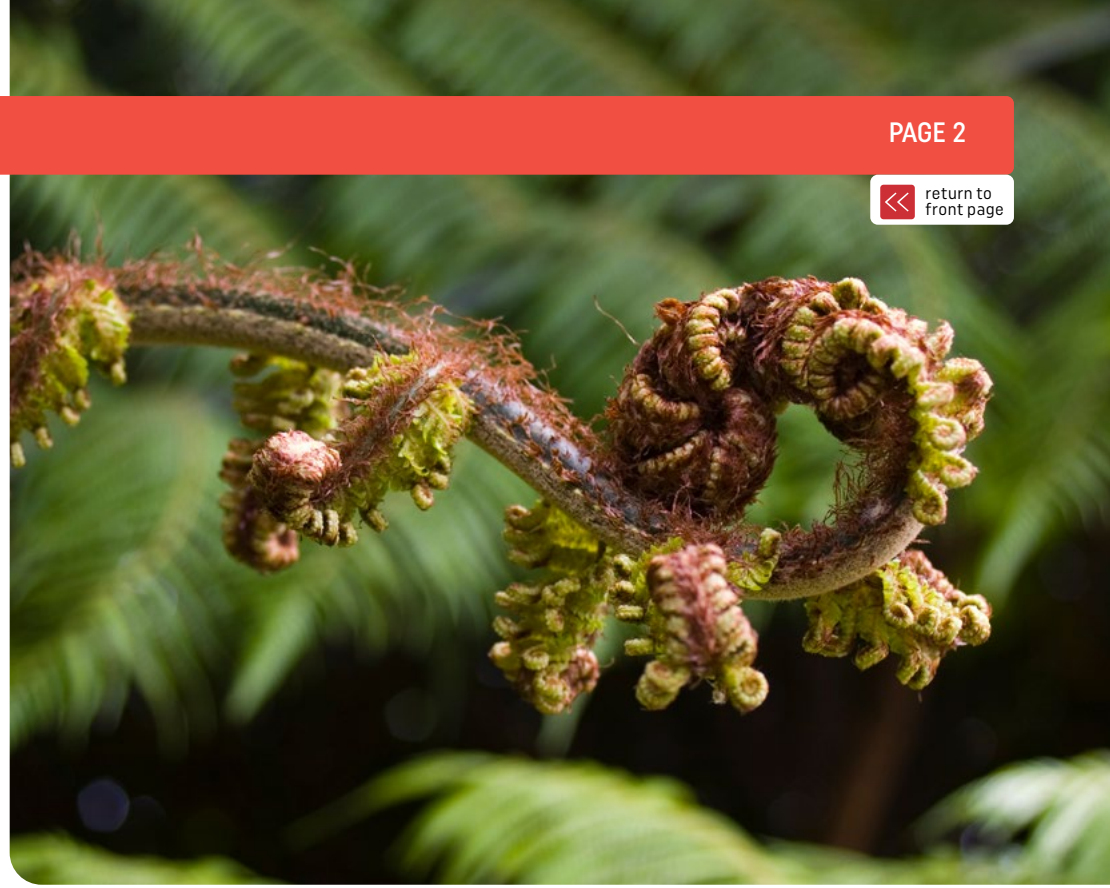
Te Puni Kōkiri **states** that the amendments to Te Ture Whenua Māori Act 1993 are intended to better support whānau to succeed to their land by:

- Enabling simple and uncontested succession applications to be dealt with by a Māori Land Court registrar, instead of going through a full court hearing process in front of a judge (though applicants can still elect to go through the full court process)
- Allowing a landowner's descendants to immediately succeed to their Māori land interests on the death of the landowner (instead of having to wait until the death, new relationship or surrender of interests of the landowner's spouse who may not have any connection to the land), while still allowing the surviving spouse or partner a lifetime right to income from the land as well as the right to occupy a family home on the land
- Clarifying that the tikanga of the relevant iwi or hapū will determine whether whāngai are eligible to succeed to a land interest, and
- Giving whāngai children the right to receive income or grants from the land and/or the right to occupy the family home, even where the relevant tikanga does not recognise a relationship of descent.

Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020 also amends the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949, by giving the Māori Land Court jurisdiction to hear claims under those Acts in respect of Māori freehold land.

The amendments to Te Ture Whenua Māori Act 1993, the Family Protection Act 1955, and the Law Reform (Testamentary Promises) Act 1949 are in sympathy with the broader review of succession law that is being undertaken by the New Zealand Law Commission Te Aka Matua o te Ture. In particular, the amendments balance the interests of a landowner's descendants to take an active part in decisions relating to the land, while still respecting and protecting the interests of spouses and other claimants.

1 Te Ture Whenua Māori (Succession, Dispute Resolution, and Related Matters) Amendment Act 2020.
2 *Moke v Trustees of Ngāti Tarāwhai Iwi Trust* 2019 Māori Appellate Court MB 265.



Treaty settlements

In 2019 the Māori Appellate Court issued a decision of great interest to trustees and beneficiaries alike[2]. At issue was s 236(1)(c) of Te Ture Whenua Māori Act 1993, which states that the Māori Land Court has jurisdiction over 'every other trust' constituted in respect of any 'General land owned by Māori'. The question was whether that section extended to common law trusts established to receive Treaty settlement assets, which include not only land but also money or other types of assets.

The phrase 'General land owned by Māori' is a defined term in the Act. It means 'General land that is owned for a beneficial estate in fee simple by a Māori or a group of persons of whom a majority are Māori'. The Māori Appellate Court found that a trust constituted to receive the proceeds of a Treaty settlement, that includes at least one parcel of General land, comes within s 236(1)(c) of the Act and is therefore within the Māori Land Court's jurisdiction (in addition to every other common law 'Mum and Dad' trust that holds a family home, where the majority of beneficiaries are Māori).

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Trustees' expenses

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When trustees incur expenses, they are not expected to be out of pocket in carrying out their responsibilities. Trustees are entitled to use trust money or to get a refund from the trust fund if they incur expenses in carrying out their duties. Trustees' expenses, however, must be fair and reasonable. A recent case shows why it is also important to be sure that you can trust your trustee not to take advantage of the right to claim expenses.

Carrying out a trustee's obligations and responsibilities can take up much time and some expenses can be incurred in doing this. Trustees are not usually entitled to charge a fee for their time, unless the trust deed or will allows them to do this. The trustees are, however, at least entitled to have their expenses met from the trust fund, provided the expenses are fair and reasonable. If the trustee has to pay for anything personally, the trustee is entitled to be reimbursed.

When it can go pear-shaped

A recent case[4] is a good example of what can go wrong where trustees go too far when claiming expenses. The *Kellerman* case was mentioned in the news last year.

John Kellerman died in 2018; his will left some of his estate for his wife but he also had three children by an earlier marriage. His will also provided for those three children and named one of them, Margaret, as executor and trustee.

Margaret lives in the UK. In order to deal with the work of executor and trustee, including clearing out the estate properties, she travelled from the UK to New Zealand on four separate occasions. Each time she flew business class with her husband. They took the cost of travel from the estate. They also charged the estate for them both to stay at a Hilton Hotel and have three meals a day there while dealing with the estate.

Court says expenses were unreasonably extravagant

One of Margaret's brothers complained to the High Court. The court agreed that travelling business class was 'unreasonably extravagant'. It should not have been necessary to travel to New Zealand four times; local contractors could have been hired to do much of the work. Staying at the Hilton was also considered extravagant. Margaret should have considered a motel, or even the house she apparently owned nearby. Charging the estate for the three meals a day at the hotel was also excessive — the judge commented that Margaret and her husband would have had to eat wherever they were and whatever they were doing. It was also unreasonable to expect the estate to meet her husband's airfare, accommodation and meals.

Court removes trustee

The judge decided to remove Margaret as executor/trustee and to appoint the directors of a Wellington specialist trust law firm as trustees. They were directed to review all of the expenses charged and to decide how much Margaret should be required to refund to the estate.

The Court of Appeal had previously confirmed, "It is one of the fundamental rights of an honest express trustee that costs and expenses properly incurred in the administration of the trust are compensable out of the assets of the trust."[5]

The courts have, however, always been careful to ensure that expenses charged to a trust or estate are reasonable. As one judge put it, "Every dollar paid in trustees' expenses is a dollar denied to beneficiaries of the trust."[6] ●

4 *Kellerman v Kellerman-Thornton* [2020] NZHC 2297.
5 *Butterfield v Public Trust* [2017] NZCA 367.
6 *New Zealand Māori Council v Foulkes* [2015] NZHC 489 at [31].

New trusts legislation now in force

Disclosure of trust information to beneficiaries

The Trusts Act 2019 came into force on 30 January 2021. One major topic of discussion arising from the new Act has been the provisions governing disclosure of trust information to beneficiaries.

The purpose of the new disclosure provisions is to ensure that beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees. Historically, in some trusts, disclosure of information has been very limited, and beneficiaries often do not find out they are beneficiaries, or that they are entitled to trust information, for many years. This makes it difficult for beneficiaries to know who to contact, or what kind of information to request, to ensure the trustees are doing their job properly.

The disclosure provisions are expected to encourage trustees to be transparent with the beneficiaries — when things are going well, and when things go wrong.

What does the Act say?

The legislation contains a presumption that 'basic trust information' will be made available to every beneficiary or their representative. The basic trust information is the fact that a person is a beneficiary of the trust, the name and contact details of the trustee, details of trustee changes as they occur, and the beneficiary's right to request a copy of the trust deed or other trust information.

The Act also contains a presumption that when a beneficiary does request trust information, such as a copy of the trust deed, the trustee must disclose that information within a reasonable period of time.

Both of these presumptions will apply unless the trustees consider that, in any particular case, they shouldn't apply.

The legislation goes on to provide a list of considerations for trustees when deciding whether one or both presumptions applies. This includes:

- The nature of the beneficiary's interest, including the likelihood of their receiving trust property in the future
- Whether the information is subject to personal or commercial confidentiality
- The intentions and expectations of the settlor when the trust was created
- The age and circumstances of the beneficiary, and other beneficiaries of the trust
- The effect on that beneficiary of having the information, as well as the effect on the trustees, other beneficiaries, and third parties of giving the information
- In the case of a family trust, the effect that providing information will have on relationships
- The nature and context of the request for information, in a situation where a beneficiary has already received basic trust information and seeks further information, and
- Any other factor the trustee reasonably considers to be relevant.

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Succession and trust law changes

Looking ahead

It will be interesting to see how the Māori Land Court interprets the existing succession legislation in its unique context, and how this will inform the ongoing review of succession law in this country by the New Zealand Law Commission Te Aka Matua o te Ture.

There will also be, no doubt, a growing volume of trust decisions from the Māori Land Court once beneficiaries realise the superior accessibility and cost effectiveness[3] of the Māori Land Court compared with the High Court.

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New trusts legislation now in force

What does this mean in practice?

The process set out in the Act allows trustees to be practical when considering what information to disclose to beneficiaries.

If two settlors have, say, five children and 16 grandchildren, the trustees might reasonably decide that the grandchildren do not need to be notified of basic trust information, and only inform the five children.

If trustees are concerned that young adult children might not cope well with information about the value of trust assets, the trustees might not want to disclose full financial information about the trust, even if requested.

Many trustees worry that beneficiaries could be upset to find they have been treated differently from their siblings. This is very normal — children have different needs. If beneficiaries request financial statements, the trustees might reasonably decide to disclose these, but with certain information redacted or removed so that family harmony is preserved.

Disclosure gives transparency

The new disclosure provisions have been a hot topic of conversation amongst trustees and settlors, but it is hoped they will be useful in ensuring transparency for beneficiaries. Where there are concerns about disclosing specific information, these can usually be managed effectively.

3 A hearing fee of $60 compared with $1,350 in the High Court.