

RECORD KEEPING

Henry Stokes, Public Trust

Notes...

Lindsay: I'm pleased to introduce Henry Stokes, Managing Solicitor Northern Region at Public Trust. Henry's based in Hamilton and specialises in providing legal advice on all aspects of trusts, estates and elder law. Before his current role, he was in private legal practice with a special focus on trusts and asset protection.

Henry, we're going to talk about managing trust record keeping. Why's it important?

Henry Stokes: I agree. Often when we ask to review trust records, responses can range from people who say they don't have copies of anything through to people who can produce massive amounts of paperwork but often aren't sure what's amongst it. Everything is generally out of order and it can be a bit like solving a puzzle. Your job then becomes putting it all together and if you haven't got all the pieces, it can be hard to get a full picture on how the trustees have administered a trust.

Under the present law in New Zealand, a trust can run for a maximum of 80 years. It could mean as a trustee you may deal with generations of beneficiaries during the trust period and it's unlikely the trustees at the start will be the same at the end in 80 years' time.

Where it can get tricky for trustees, is where they are asked to explain a decision made many years before. For example, the trustees may decide to sell a property and distribute some of the proceeds from the trust. Then if 20 years later they are asked questions about what happened at the time, it may be difficult to explain exactly what happened if they don't have good trust records to refer to (for example, how much the property was sold for, what the money was used for, etc).

Lindsay: So taking that example you've just used, you're not necessarily suggesting there was a trustee error. It could simply be a situation where, say, the trustees have been asked questions by a beneficiary who may have been a very young child at the time the property was sold and they just wanted some more background on it.

Henry: Exactly. If the trustees haven't got any records to lay their hands on to show what has happened or what was considered by the trustees as part of their decision, it can be very hard to explain if the decision was appropriate or not.

Another area where record keeping is important is where a new trustee is being appointed to a trust. An incoming trustee may ask the existing trustees to produce the trust records to show how the trust

has been administered since it was established. The incoming trustee will likely want to know what they're getting themselves into and if the trust records are all there to look at, they'll be able to quickly see if the trust has been run properly and decide whether to become a trustee.

I'd recommend trustees should keep their records all in one location with everything filed in date order. That way they will then be able to show what's been done and how it's happened. It creates a much better picture of the management of the trust if people ever need to refer to it later on, or if they have to pass on the records to replacement trustees.

Lindsay: How long do trustees need to keep their trust records?

Henry: Trust records have to be kept by the trustees over the lifetime of the trust. I mentioned earlier that a trust can run for 80 years, so if it did run for 80 years, the trust records would have to be kept by the trustees for 80 years.

Lindsay: That's a long time. Which trust records are most important?

Henry: You've got all the trust establishment documents which the trustees need to keep the originals of. That would be the trust deed, which sets out all the powers and obligations of trustees and the actual terms of the trust. That's always your fundamental document and it should be a document that the trustees refer back to on a very regular basis. They should also include any variations to the trust deed (including variations made to the beneficiaries of the trust) and any deeds of appointment and retirement of trustees.

Next would be any letter of wishes from the settlors to the trustees. This document becomes very important once the settlors are no longer with us, because it can express exactly what the settlor's intentions or opinions are on trust matters. If ever the beneficiaries said to the trustees "Well mum or dad would never have wanted that to happen", then if it's been covered off in a letter of wishes, it will really help the trustees. The trustees should consider any settlor wishes whenever they make decisions for the trust.

Other important trust records would include:

- Resolutions of trust decisions made and the minute book where those resolutions are held.
- Minutes of annual meetings.
- Financial statements showing the assets and liabilities of the trust.
- Written contracts or service agreements between the trustees and other people or parties.

- The names and addresses of trustees and beneficiaries
- The Trust File.

The Trust File is quite an important record because this is where trustees can keep any trust records and information of the trustees annual meetings, for example, who attended, what was looked at, what was discussed, the review of financial statements showing the assets and the liabilities of the trust, what assets need to be maintained, what money is planned to be spent or distributed in the coming year, investments reports that have been reviewed, notes on the trustees inquiry into the needs and circumstances of all the beneficiaries, etc. All that type of information.

It's important that trustees should keep good notes as to the process they've followed and the information they've gathered as it's a bit difficult to recall ten years down the track, or even a couple of years down the track, exactly what was looked at and discussed at a meeting if you don't have the record that you can pull out, look at and then say "oh yes that's what we discussed, there it is in black and white". So, these would probably be the minimum records trustees should keep

Lindsay: Henry, your point about notes is important. I've seen situations where trustees use a note book to record their own notes of phone conversations, meetings and decisions that have been made about the trust, sort of like a trustee diary.

Henry: Yes and often it's that sort of information that trustees can have that's outside of the normal trust records that shows the process or systems the trustees have followed or used in making decisions or managing the trust.

Let's take an example of the process the trustees use when it comes to buying or selling a house. I would expect a good process to show the things the trustees considered or thought about as part of their decision making (for example obtaining a valuation, a builders report, a Land Information Memorandum and any legal or other professional advice they received) and I would expect to see a written resolution recording the decision to sell or buy the house, signed by all trustees.

Sometimes trustees have to make decisions that they know aren't always going to be popular with some beneficiaries. That doesn't give a trustee an excuse not to make a decision; there will often be tough decisions to make. Sometimes you have to say "no" when the beneficiaries are really wanting you to say "yes" and that's when you really need to make sure that your process and records are very robust.

I think it's important to get and keep professional advice and an example of where trustees might do that would be with the recent changes to insurance. You now need to set a replacement value on

the insurance policy for a home so in a trust the trustees might get a valuation from a valuer or a quantity surveyor on which they can then base their value for the insurance. The valuation advice should be kept with the trust records so that if anyone ever questions how they came up with the value, there's a copy of the valuation and the name of the professional adviser who did the report.

A final point about process is that I tend to advise trustees against making notes recording the actual reasons for their decisions. Such notes could make a decision much easier to challenge. It is not a case of recording the reasoning for the decisions made but more the process that has been followed by the trustees to gather the information and make their decision that is important.

Lindsay: They're all good points Henry. What problems arise with record keeping? What are some of the things that trustees need to be mindful of or look out for with keeping trust records?

Henry: I'd recommend for trustees to watch time-frames for things coming up like important dates within the trust. That's often a big one because things can easily be overlooked. An example could be the date the trust is due to be wound up or it may be the date the rental is to be reviewed for a lease or tenancy.

Often I see things left to just one trustee or the professional trustee to action when they're due. While that's okay, it's important all trustees have a good diary system so that they can follow up the other trustees and make sure that things do occur when they are due.

Another problem is often getting all the trustees together in one place for a meeting. It's not always possible to get all the trustees face to face when the annual meeting is due and it's easy to put the meeting off. Instead of letting the meeting slide, I'd recommend doing it by a telephone call or by exchanges of email where you record and discuss all of the things you need to.

Meetings don't have to be done face to face and with modern communication software like Skype, you can hold a meeting using your computer, tablet or smart phone. It's when meetings slide that we start to see gaps occurring in the trust record keeping.

Sometimes trustees have problems in knowing what decisions should be recorded and when. It's important trustees make sure that a resolution is completed each time any trustee decision is made. Often when you review trust records, the resolution is missing for a decision which has clearly been made and you will see an action like the sale of an asset has occurred, but there are no records to show what was decided and whether all trustees were involved.

The annual meeting is a good time to review what's happened in the past year and make sure all the right documents have been signed and are in place as part of the trust records.

Lindsay: What good practices do you recommend for trustees to manage their trust records?

Henry: A few of the essential practices I'd recommend for good record keeping would be:

- Making sure there's a good filing system would be the first one. It's important to keep everything all together in one place so that if trustees are ever after any particular information for the trust, they're going to find it easily, remembering that trust records need to be kept for the life of the trust. It also means all trustees know where they can access trust information.
- Attach information or advice that the trustees have obtained and considered as part of their decision making to the Trust File in date order. Often trustees have to base their decisions on the inquiry they have made or the advice they have received from professional advisers (such as legal or accounting advisers) and this information will help demonstrate the process the trustees have used to reach a decision.
- Where's there's more than one trustee, it's a good idea to make sure that each trustee has a copy of all the important trust records like the trust deed (and any variations made to the trust deed), letters of wishes and the financial statements. If ever there was a fire or an earthquake and a set of records was lost, you will have another set you can refer to. Of course you can always have a backup copy in electronic storage but it's important to keep it up to date.
- I'd strongly suggest the trustees meet at least annually to review the trust and use that meeting to look back over the year to make sure all the records and documents are in place. Keep good minutes of the meeting, who attended and what was discussed.
- Finally, I recommend that trustees should use a diary system to make sure critical dates in the trust are not overlooked.

Lindsay: Thanks Henry. You've set out some very good recommendations for trustee record keeping. If anyone would like to contact you, they can do so on telephone 0800 371 471 or through the Public Trust website www.publictrust.co.nz.

Henry: You are most welcome. Thank you.