

# WHETHER TO BE A TRUSTEE

Angus Rogers, Rogers & Rutherford

Notes...

**Lindsay:** I'd like to introduce Angus Rogers, a Partner of the Auckland law firm of Rogers & Rutherford. Angus has a strong personal interest in trusts, he's a professional trustee and he advises private clients on estate and asset planning.

Angus, today we're covering what you need to think about if you're ever asked to be a trustee. Before we do that, in a nutshell, what's the trustee's job and how many trustees do you need?

**Angus Rogers:** The trustee's job is simply to manage the assets of the trust in terms of the trust deed, for the benefit of the beneficiaries of the trust. The minimum number of trustees can be one, but it would be unwise to have just one trustee, especially where that trustee was either the settlor of the trust or a beneficiary of the trust.

**Lindsay:** We sometimes hear the terms independent trustee or independent professional trustee. Can you explain what they mean?

**Angus:** There is a distinction between an independent trustee and an independent professional trustee. There are many independent trustees who are merely family friends and who may not fully realise just exactly what their fiduciary duty is towards the beneficiaries of the trust. Sometimes they may act under an unwarranted sense of loyalty to the settlor or one of the beneficiaries.

To be truly independent, trustees really have to understand the extent to which their fiduciary duty requires them comply with the terms of the trust deed and to be fair and even-handed to all the beneficiaries of the trust. Trustees also need to consider the terms of any wishes the settlor has made known in a letter of wishes (sometimes called memoranda of wishes), provided those wishes are appropriate in the circumstances.

An independent trustee has no financial or beneficial interest in the trust. In other words, the person is an independent third party who is not a settlor or a beneficiary of the trust.

An independent professional trustee takes on a trustee role as part of their profession and will often be a lawyer, accountant or a trustee company. Professional trustees are held to a higher standard of care for doing the job as trustee and will often be paid for being a trustee.

**Lindsay:** I know some trustees can struggle with being fair and even-handed to all beneficiaries...

**Angus:** It can be hard even for professional independent trustees. The decision making is not always easy where the original settlor is also a trustee and also a beneficiary. Sometimes decisions may need to be made by trustees which do not work totally as the settlor might have wished.

**Lindsay:** So a trustee role is not one to be taken on lightly, it's full of obligations and responsibility. What are some of the things you need to think about before you decide to become a trustee?

**Angus:** The first thing to understand is what the trust deed says. Trustees need to read the trust deed so they know what they're obliged to do as a trustee. It's step number one and a bit like the three golden rules of real estate – position, position and position. The three golden rules of a trust are – the trust deed, the trust deed and the trust deed.

As a trustee you need to know what the trust deed says so you know if what you're being asked to do is in accordance with the trust deed. If a trustee doesn't know what the trust deed says, they're not acting as a trustee. You should ask if any variations have been made to the trust deed and obtain a copy of any variations.

The second critical thing for a person who is considering being a trustee is to understand how trustees are expected to be involved in making decisions for the trust. It's very unwise to get into a situation as a trustee where you are simply expected to rubber-stamp the decisions of another trustee. If a professional or independent trustee is being asked to "Jump" by the other trustees, they shouldn't ask "How high?", but "WHY?"

In other words, when a trustee is required to make a decision, a good place to start is to consider why what is proposed will be to the benefit of the beneficiaries, rather than just agreeing because a settlor/co-trustee wants something done in a particular way.

**Lindsay:** So, it's important to know how trustees will be involved in making decisions for the trust. Being a trustee will sometimes involve asking for more information or even saying "no" at times.

**Angus:** That's right. A trustee making a decision needs to know what they're doing – that it's in accordance with the trust deed and that they have considered the interests of the beneficiaries at the time they make their decision.

**Lindsay:** Angus, you've covered the trust deed and how decisions are expected to be made, what other things should you be looking out for if you're asked to be a trustee?

**Angus:** Once you've reviewed the trust deed to see what it

empowers you to do, look at who the beneficiaries are. If the trust has been operating for some time, establish what the needs and circumstances of the beneficiaries are and what their expectations are for support from the trust.

While trustees don't have to deal with beneficiaries equally, they do at least need to consider the interests of all beneficiaries. The trustees have the opportunity to look at each class or group of beneficiaries and determine if there are priorities between the different classes and if within particular classes there are greater needs and wants, the trustees may be justified in dealing with those beneficiaries differently from the others.

Next, I'd look at what the assets or liabilities of the trust are that you are going to have to be responsible for. In existing trusts, a good place to start is to obtain a copy of recent financial statements to see what the trust assets and liabilities are and understand recent movements in those assets and liabilities. You will also be able to review income received and payments made within the trust.

Inland Revenue obligations are important. Ask what processes are in place to ensure tax and/or GST returns and payments will be met by due date. Trustees have a personal liability for tax and GST obligations so if they are not met, trustees can be asked to pay trust tax or GST by Inland Revenue.

You'll want to consider how trust assets are to be, or are being, invested and whether that is in terms of any particular requirement laid down in the trust deed. For instance, the trust deed may advise that the assets are diversified or it may direct that assets be kept only in property for the use of beneficiaries or for housing the beneficiaries. For an existing trust, you should ask the trustees if they have a written investment policy or strategy for the trust and ask to see a copy.

If you're being asked to take over as trustee from someone else, you'll want to know how you are to be appointed and who has to authority to appoint you. Trustees are appointed in the trust deed for a new trust or in a deed of appointment for an existing trust. It's important to understand what liabilities you are taking on as a trustee, that you have been given the full indemnity of the trust and have limited your personal liability. Check the other trustees have been appointed correctly.

I would ask to see a copy of any wishes the settlor had made known to the trustees which might show some particular needs for various beneficiaries that trustees may need to take into account.

The trust minute book should be reviewed to see the resolutions that the trustees have passed for decisions made in the past. All this information would help you establish the position of the trust at the time you enter it as a trustee and help make sure that what you're stepping into is something that has been managed properly. And that's at the start of it all.

**Lindsay:** So you're recommending a pretty careful assessment, before you agree to take on a trustee role. It just emphasises the importance of getting good advice to recognise any pitfalls.

**Angus:** If you don't understand, get help. You need to establish that your co-trustees have been properly operating as trustees before your step in. Will all trustees be involved in the decisions to invest trust assets, to purchase or sell major assets or to distribute assets? Have any administrative processes been set up between the trustees to regularly discuss the trust and work through what the trustees have to be doing? For example, have some trustees just been saying "yes" whenever the settlor/co-trustee decides to buy something for the trust or are they asking "why" and actually making decisions together as trustees?

**Lindsay:** So here we're talking about the importance of good protocols and active involvement by all trustees in the management and decision making of the trust?

**Angus:** Yes. A trust is a creature of contract. It relies on its paper trail. Unless there is a clear paper trail of how decisions have been reached, there is the possibility that the trust has not been operated correctly or has not been managed correctly. The paper trail needs to be there at all times. That's why the trustees should sign a decision off with a minute that sets out what they've done.

Many people forget that with a few exceptions, most trust deeds require trustee decisions to be unanimous. A trust is not about running a business like a company. Decisions in a company are made by majority and companies are about taking risks and trying to improve the position of the company in a business venture.

A trust is about managing assets prudently, accumulating assets and making distributions to benefit the beneficiaries. That requires far more care, caution and conservative decision making than the decisions made in a company. For that reason unanimity of decision making by trustees is important because in the absence of unanimous agreement, the status quo remains.

If a trust deed is silent on how decisions are to be made, the default position is that unanimous decisions are required to be made by trustees. I would caution any person considering accepting a trustee

appointment under a trust deed which allowed for majority decisions.

Finally, you can't be a passive trustee. In other words, you can't not make a decision and allow the majority of trustees to make a decision. If that occurs, the passive trustee is tarred with the same brush as the others who make the decision.

**Lindsay:** So to summarise, if you're asked to be a trustee, read the trust deed, know what you're getting into and satisfy yourself how things will work within the trust and with the other trustees. And you've stressed the importance of trustees knowing their beneficiaries and considering their beneficiaries interests.

On that basis, if after a careful assessment of the trust you found that things hadn't been run as well as they should have been, it would also be okay to say "NO" and not become a trustee.

**Angus:** I agree. I also think anyone who feels that they're not competent should say no. There are risks involved. Trustees are personally liable. The trustees own the assets of the trust. The assets are held in the trustees' names. The trustees contract on behalf of the trust. If monies are borrowed, it is the trustees who are borrowing, so it is the trustees who are personally liable (unless they have contracted with the third parties to limit their liabilities to the assets of the trust).

It's very important that trustees, before signing anything, consider what it is they're signing and whether the third party should be prepared to limit the trustee's liability.

**Lindsay:** Angus, we'll share a quite detailed check list of things for people to consider if they are asked to be a trustee as an appendix to this guide (see **Appendix 1**).

Thank you for giving an understanding of what people need to think about before they agree to become a trustee. I think what you've said is just as important for people who are already a trustee and those trustees may wish to use the checklist in the Appendix to review their own situation.

Finally, if someone wants to make contact with you they can email you on [angus@r-r.co.nz](mailto:angus@r-r.co.nz).

**Angus:** Thanks Lindsay.