How to Conduct a Trustee Meeting...

Trustees have a duty to review the affairs of a Trust. Holding (at least) an annual trustee meeting can ensure that this duty is satisfied, and is also a useful means to better ensure the proper management of the trust. However, how should a trustee meeting be conducted?

It is important that all trustees attend the meeting, so set the date well in advance and ensure everyone can be present. If applicable, ask professional advisors to attend the meetings.

As for the conduct of the meeting, it is important to keep in mind that there is no such thing as the “controlling trustee.” Trustees are equally liable and none are permitted to take a passive role in trust management. A trustee meeting, while perhaps being chaired by one trustee, is an opportunity for all trustees to contribute to the management of the Trust.

It is important to set and follow an agenda so that all relevant matters are covered. During the meeting, the trustees may wish to:

- ascertain and discuss the objectives of the Trust and how they can be advanced in the coming year. Trustees are not required to make substantial profits, but they are required to invest prudently.
- update the schedule of assets and liabilities of the Trust. Pay particular attention to how well investments are performing and how much debt the Trust is open to.
- review and sign off the financial statements of the Trust. For a single residential property owning Trust, this may simply be a Balance Sheet recording the ownership of the property and how it is financed (Trust capital, settlor / beneficiary loans, and external debt). For Trusts earning investment income, and Trading Trusts, the financial statements will be more comprehensive and an income tax return will be required.
- consider developing a beneficiary schedule – the needs of beneficiaries should be considered at trustee meetings, and if appropriate distributions can be approved by the trustees.
- ensure that documents relating to the Trust are properly managed. One master file should contain all documentation and correspondence. Each trustee should also retain copies of the Trust deed and the minutes of meetings and trustee resolution. Where the trustees have engaged an Administration Service provider, the Trust deeds, trustees’ minutes and resolutions, financial statements and income tax returns should be maintained and retained by the provider of the service.
- check that any physical assets of the Trust are being maintained, and if not, how these will be managed going forward.
- check that the assets of the Trust are covered by insurance. Trustees have a duty to protect the assets they control.

Perhaps most importantly, following the meeting the Minutes should be written up and signed by all trustees. These Minutes will detail any decisions made and record the trustees’ agreement to these.
Enduring powers of attorney are a common (and important) part of asset and estate planning. However, the early signs of dementia can be subtle. If an enduring power of attorney is only effective when a person loses mental capacity, it is important to recognise when that might be the case. Although dementia can occur at any age, it is far more common amongst the older demographic.

Signs of dementia, can include:

- Vulnerability
- Dependency
- Physical, mental and emotional depletion
- Failing memory
- Personality changes
- Loss of prior decisiveness
- Inter-family hostility
- Decisions being made in the absence of informed, independent legal advice
- Uncharacteristic haste in decision making.

If you are a person’s attorney under an enduring power of attorney it is important to seek advice before assuming that a person has lost mental capacity.

Beneficiaries’ rights to trust information have been challenged in the recent Court of Appeal decision in Erceg v Erceg....

Prior to the Court of Appeal decision in Erceg v Erceg it was settled law in New Zealand that beneficiaries had a right to trust information. However, this is no longer the case. The new position is that whether beneficiaries are entitled to information is determined by the trustees. The decision whether or not the trustees will make disclosure is not by reference to beneficiary rights, but rather requires the exercise by the trustees of their discretion.

The approach trustees should adopt when considering a request for disclosure is what information should be provided to beneficiaries to:

a) ensure the sound administration of the trust?

b) discharge the powers and discretions in respect of the fiduciary obligations the trustee owes the beneficiary, in particular the trustee’s duty to account?

c) meet the trustee’s obligation to fulfil the settlor’s wishes? This refers to the principle that the exercise by a trustee of the trustee’s dispositive discretionary powers is “an essentially confidential process”.

The considerations for trustees will always be circumstances dependent. However, trustees should consider the following when deciding whether or not to provide information to a beneficiary:

a) Whether there are issues of personal or commercial confidentiality

b) The nature of the interests held by the beneficiary or beneficiaries seeking disclosure

c) The competing interests of — and therefore the impact on — the beneficiary or beneficiaries seeking disclosure, the trustee(s) themselves, other beneficiaries and any affected third parties

d) Whether some or all of the documents can be withheld in full, or disclosed only in a redacted form

e) Whether safeguards should be imposed on the use of the disclosed trust documentation (for example, undertakings or professional inspection) to avoid illegitimate use

f) Whether (in the case of a family trust) disclosure would be likely to embitter family feelings and the relationship between the trustee and applicant beneficiary to the detriment of the beneficiaries as a whole

g) The nature and context of the application for disclosure.

The addition of point (g) to the list may provide some solace for beneficiaries given that (in the writer’s experience) the practical reality is that many information disclosure request refusals are not based on trustees making a considered exercise of discretion, but more a knee-jerk reaction to ensure the trustees avoid scrutiny.
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