

Let's chat

Read the deed – The hidden gems and traps of trust deeds – December 2020

With:

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Information provided is general in nature; precise application depends on specific circumstances

Read the deed

- Always should be done
- Old deeds***
- New deeds*
- Usual provider**
- Law firm provider**
- Includes checking execution clauses

Wilstead No. 5 Pty Ltd v Smyth
[2020] VSC 651

THE TRUST DEED

12. On 19 August 1988 the Trust Deed was executed by Mr Tiernan as settlor and the plaintiff as trustee. Mr and Mrs Bowen signed as directors of the plaintiff as trustee.
13. The recital to the Trust Deed provides that the settlor was 'desirous of making provision for the Primary Beneficiary, Primary Beneficiaries and General Beneficiaries hereinafter described as in the manner hereinafter set out ...'.
14. Clause 1 of the Trust Deed is the interpretation clause.
15. First, cl 1.2 defines the 'General Beneficiaries' relevantly as follows:

- 1.2.1 the Primary Beneficiary or Primary Beneficiaries as the case may be; and
- 1.2.2 the spouses, children and grandchildren of the Primary Beneficiaries; and
- 1.2.3 the brothers, sisters, fathers, mothers, grandfathers, grandmothers, uncles and aunts of the Primary Beneficiaries; and
- 1.2.4 the spouses and children of the persons described in sub-paragraph 1.2.3 hereof; and
- 1.2.5 any of the following entities whether formed in Australia or elsewhere which the Trustee may at any time and from time to time nominate in writing as a General Beneficiary...

PROVIDED HOWEVER that:

- 1.2.6 any person from time to time being the Settlor, the Guardian, the Appointer or the Trustee or Trustees hereof (hereinafter called "an excluded person"); and
- 1.2.7 any corporation in which and the trustees of any settlement or trust in or under which and any other legal entity in which any excluded person has any actual or contingent beneficial interest so long as such intent continues

are excluded from the class of General Beneficiaries unless specifically included in Clause 1.1 as a Primary Beneficiary.

16. Second, cl 1.1 of the Trust Deed relevantly provides:

- 1.1 The "Primary Beneficiary" and the "Primary Beneficiaries" means the children of the persons referred to in the Schedule hereto.

17. Third, there is one Schedule to the Trust Deed. It provides as follows:

Name of Trust: BOWEN FAMILY TRUST

The Primary Beneficiary: Robert Evan Bowen and Venetia Kitson Bowen and the children of Robert Evan Bowen and Venetia Kitson Bowen

The Guardian: Robert Evan Bowen and upon his death Venetia Kitson Bowen

The Appointor: Robert Evan Bowen and upon his death Venetia Kitson Bowen

18. The Trust Deed does not establish any different classes of interest within the General Beneficiaries. Clause 3.2 relevantly provides that the Trustee may accumulate the net income of the Trust or to pay the net income of the Trust in its absolute discretion for any one or more of the General Beneficiaries. Clause 4 relates to the distribution of the income and capital on the vesting of the Trust. It is a difficult clause to understand. It relevantly appears to provide that on vesting:

- (1) the Trustee may distribute the income and capital of the Trust to such of the General Beneficiaries and in such proportions as appointed by instrument with the consent of the guardian;
- (2) in default of such appointment, the Trustee may distribute the income and capital of the Trust to the Primary Beneficiaries in cl 1.1 and if more than one Primary Beneficiary as tenants in common in equal shares.

19. In light of the Trust Deed an issue has now arisen as to the meaning of the provisions on the Trust Deed relating to the Primary Beneficiaries. As I set out below, when cl 1.1 and the Schedule are read together, it is only the children of Mr Bowen and Mrs Bowen and the children of the children of Mr Bowen and Mrs Bowen who are Primary Beneficiaries under the Trust Deed. That would mean that neither of Mr Bowen or Mrs Bowen is a Primary Beneficiary. Of course each may be a General Beneficiary under cl 1.2.3 as the father and mother respectively of the Primary Beneficiaries. However, as Mr Bowen is both guardian and appointor, he would not be a General Beneficiary pursuant to cl 1.2.6.

20. The result is that Mrs Bowen is a General Beneficiary and Mr Bowen is neither a Primary or a General Beneficiary. In this proceeding the plaintiff seeks relief on the basis that this was not the subjective or objective intention of the parties. As a result, the affidavit material filed addressed the circumstances in which the Trust Deed was executed. I will now deal with that evidence.

Foreigner restrictions

22. Distribution Restrictions

22.1. The Trustee shall not make a distribution or do any other act which would:

- (1) cause the Trust to become a “foreign trust” for the purpose of the *Duties Act 2000* (Vic) or the *Duties Act 2001* (Qld); or
- (2) cause the Trustee to be a “foreign person” for the purpose of the *Duties Act 1997* (NSW) or the *Land Tax Management Act 1956* (NSW); or
- (3) cause the Trustee to be a “foreign person” for the purpose of the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

22.2. Clause 22.1 shall not be varied while the Trust Property includes an interest in real estate (including without limitation as purchaser under a contract for sale) in New South Wales,

Queensland or Victoria or for a period of three years following the sale or disposal of the last such interest in real estate.

Excluded Person means the following (even if any of them is named or would otherwise be or be included in a class of Beneficiary):

- (a) each person named or described in Item 14 in the Schedule or nominated by the Trustee to be an Excluded Person;
- (b) the Settlor and any Child of the Settlor who is at the relevant time under the age of 18 years;
- (c) any corporation in which a person in (a) or (b) above is a director or member or in which any of them has a beneficial interest in any share;
- (d) any trust in which a person in (a) or (b) above has a beneficial interest whether vested, contingent or otherwise; and/or
- (e) any Foreign Person;

Foreign Person means:

- (a) a foreign person or foreign trust for the purposes of Chapter 4 of the Duties Act 2001 (Qld);
- (b) a foreign person or foreign trust for the purposes of Division 4 of Part 3 of the Land Tax Act 2010 (Qld);
- (c) a foreign natural person, a foreign corporation or a foreign trust as defined in section 3 of the Duties Act 2000 (Vic);
- (d) a person holding a controlling interest in a foreign corporation or a substantial interest in a foreign trust for the purposes of sections 3A and 3B of the Duties Act 2000 (Vic) respectively;
- (e) an absentee person as defined in section 3 of the Land Tax Act 2005 (Vic);

- (c) Regardless of any other provision in this Deed, the Trustee must not exercise any Right under clause 19.1(a) or under the Applicable Law:
 - (i) in respect of Clause 3;
 - (ii) if any revocation, addition, release, deletion or variation would breach the rule against perpetuities;
 - (iii) if, as a result, any Excluded Person could or will become a Beneficiary, Appointor or Trustee of the Trust; or
 - (iv) in a way which is inconsistent with clause 19.4.

- (f) **Powers of attorney.** To give proxies and powers of attorney (with or without power of substitution) and appoint representatives for voting or acting on behalf of the Trustee in relation to any part of the Trust Fund. Without limitation, the Trustee may empower its attorney to take any action and/or perform any act on behalf of the Trustee and to sign and execute any deed, agreement or document that the Trustee may lawfully do, including the exercise of any of the Trustee's Rights or Obligations and the execution of mortgage and security documents. The Trustee may in its absolute discretion, grant powers of attorney or proxies to any third party including any mortgagee, lender or financier, any creditor of the Trust or any other party who may have an interest in the Trust Fund, other than an Excluded Person.

- 2.8 Notwithstanding any other clause in this document, any person whose inclusion as a beneficiary of the Trust would result in the Trustee of the Trust being a foreign person or foreign purchaser under the legislation outlined in the following clause, is excluded as a beneficiary of the Trust.
- 2.9 For clarity, the Trustee must not make a distribution or do any other action which would cause the Trustee of the Trust to be a:
- (a) foreign person for the purposes of the following legislation:
 - (i) *Duties Act 2001 (Qld)*;
 - (ii) *Duties Act 1997 (NSW)*;
 - (iii) *Land Tax Act 1956 (NSW)* and *Land Tax Management Act 1956 (NSW)*;
 - (iv) *Duties Act 2001 (TAS)*;
 - (v) *Duties Act 2008 (WA)*; or
 - (vi) *Land Tax Act 2004 (ACT)*;
 - (b) foreign purchaser for the purpose of the *Duties Act 2000 (Vic)*; or
 - (c) trustee of a foreign trust for the purposes of the *Stamp Duties Act 1923 (SA)*.
- 2.10 Clauses 2.8 and 2.9 are irrevocable and must not be varied by the Trustee.

- (b) No distribution of capital or Income of the Trust of or derived from Australian urban land shall be made in favour of any Beneficiary or class of Beneficiary excluded from acquiring an interest in Australian urban land under the *Foreign Acquisitions and Takeovers Act 1975* and *Foreign Acquisitions and Takeovers Regulation 1989* without the prior approval of the Foreign Investment Review Board. The Beneficiaries and classes of Beneficiaries excluded in this clause are specifically excluded from any subsequent nomination or appointment or assignment. Despite anything contained in clauses 9, 10 and 11 of this Trust Deed the Trustee or Appointor shall not have the power to amend the intention of this clause 3(b) that the Trustee at all times comply with the *Foreign Acquisitions and Takeovers Act 1975* and *Foreign Acquisitions and Takeovers Regulation 1989* as amended from time to time.

25. LIMITATION ON DISTRIBUTIONS TO FOREIGN PERSONS

Despite anything to the contrary in this deed, if any of the Secondary or Tertiary Beneficiaries are foreign persons within the meaning of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) the percentage of the Net Income in any year or capital at any time that the Trustee may Distribute to any one of those Beneficiaries or any two or more of them must not exceed the maximum percentage that the Trustee can Distribute without breaching that Act.

Vesting date

THIS DEED made the 11th day August One thousand nine hundred and seventy seven

- (b) "the distribution date" shall mean the first to occur of the following three dates, viz:
 - (i) the 31st day of December 2026;
 - (ii) the date of the death of the last survivor of the lineal descendants born before and living at the date hereof of his late Majesty King George the Fifth; and
 - (iii) the date (if any) which the Trustee shall in its discretion appoint as the distribution date of this settlement.

7. **“the Perpetuity Period”** means that period set forth hereunder which is the first to elapse:
1. The period of EIGHTY (80) calendar years commencing on the date of the making of the Deed;
 2. EIGHTEEN (18) calendar years after the date of death of the last survivor of the descendants now living of His Late Majesty King George V.

PROVIDED ALWAYS that notwithstanding anything herein contained to the contrary all powers and dispositions made by or pursuant to or contained in this Deed which but for this provision would or might vest take effect or be exercisable after the expiration of the Perpetuity shall vest and take effect and be exercisable only until the last day of the Perpetuity Period.

Beneficiary restrictions

"Exclusion from Benefits

Notwithstanding any definition or other provision in this Deed of Settlement, it is hereby declared that:—

- (a) the Settlor, his estate and any corporation or trust in which the Settlor or his estate has any actual or contingent beneficial interest are specifically excluded from all or any benefits whatsoever under this Trust; ... and
- (b) *any person who donates, assigns or transfers for less than full market value any item of property to the Trustee with the intention that such item of property be added to the Trust Fund will be specifically excluded from all or any benefits whatsoever under this Trust.*"

6. APPOINTMENT OF ADDITIONAL BENEFICIARIES

Notwithstanding anything to the contrary herein contained the Principal may at any time and from time to time before the Perpetuity Date by notice in writing to the Trustee appoint any person, corporation, trust, charity, body or association incorporated or unincorporated who or which is alive or in existence at the date of such appointment to be a Beneficiary for the purpose of this Deed and the appointee shall as and from the date of such appointment become a Primary Beneficiary, a Secondary Beneficiary or a Tertiary Beneficiary hereunder according to the specification in such appointment and in the event that such appointment does not specify the class of Beneficiary to which the appointee shall belong, the appointee shall as and from the date of such appointment become a Tertiary Beneficiary hereunder PROVIDED THAT the following shall not be appointed:

- (a) The Settlor or his estate;
- (b) The Trustee or any former Trustee hereof;
- (c) Any Corporation or Trust in which the Settlor or his estate, the Trustee or any former Trustee has any actual or contingent beneficial interest; and
- (d) Any Trust which would, if appointed, result in the infringement of the law against perpetuities.

F. "Nominated Beneficiary" means any person or limited or unlimited liability company or any trust who is nominated as hereafter provided to become an eligible beneficiary. The following shall not be capable of being nominated as aforesaid;-

(i) a person referred to in paragraphs (i) to (x) inclusive of the definition of "the Eligible Beneficiaries" contained in this clause; or

(ii) the Settlor; or

(iii) any person or company who or which is or has been a trustee of this Trust;

(iv) the legal personal representatives of the mother or the father in such capacities and who or which is at the relevant time the subject of a subsisting nomination made under clause 2(c) hereof.

...LAW FOR the time being in force;

...PROVIDED:

... (a) no person who is trustee of the trusts of this Deed may be a beneficiary under this Deed during the time which he is trustee of it; and

... on the termination day.
(b) Subject as hereinafter provided "beneficiaries"

means -

- (i) The Class A beneficiaries as hereinafter defined;
- (ii) The Class B beneficiaries as hereinafter defined;
- (iii) the beneficiaries of any trust under which any Class A or any Class B beneficiary has any interest whether vested or contingent or as beneficiary under a discretionary trust;
- (iv) any person or persons declared by the Trustee to be additional beneficiaries of the trusts of this Deed in pursuance of a declaration made under the provisions of Clause 7 of this Deed (hereinafter referred to as additional beneficiaries); and -
- (v) any charitable institution in Queensland being an institution the income of which is exempt from income tax under any income tax law for the time being in force;

PROVIDED:

(a) no person who is trustee of the trusts of this Deed may be a beneficiary under this Deed during the time which he is trustee of it; and -

Sole Director Corporate Trustee

- (c) If the Trustee is a company having a sole director who is also one of the beneficiaries or if the Trustee is a sole Trustee who is also one of the beneficiaries, no determination of the Trustee may be made distributing any capital to such beneficiary during the period the beneficiary is the sole director of the Trustee or the sole Trustee.

1.1.10. "Maximum Percentage " means the percentage specified in Part 12 of the Schedule.

3.14. Notwithstanding this Clause 3 the Trustee may not pay, apply or set aside an amount in excess of the Maximum Percentage of the income from the Trust Fund in any year to or for the benefit of:

3.14.1. a Secondary Beneficiary unless that Beneficiary is an Approved Secondary Beneficiary; or

3.14.2. a Tertiary Beneficiary unless that Beneficiary is an Approved Tertiary Beneficiary.

PART 12 (MAXIMUM PERCENTAGE) THIRTY NINE PERCENT (39%)

DISCRETION.

8. Add the following clause 35:

Limitation of Entitlements

36. Notwithstanding any other provision of this Deed, when exercising the Trustee's discretion under clauses 3.1, 4.2 and 4.3:

- (i) the Trustee must not distribute more than 39% of the income of the Trust Fund distributed in that year to any Beneficiary who is not an Unlimited Beneficiary, and that beneficiary's Small Business CGT Affiliates; and
- (ii) the Trustee must not distribute more than 39% of the capital of the Trust Fund distributed in that year to any Beneficiary who is not an Unlimited Beneficiary, and that beneficiary's Small Business CGT Affiliates.

13. EXCLUSION FROM BENEFITS

It is hereby declared that the Settlor and his estate, the Trustee and any former Trustee and any corporation or Trust in which the Settlor or his estate or the Trustee or any former Trustee has any actual or contingent beneficial interest are specifically excluded from all or any benefits whatsoever under this Trust except the Trustee in respect of its fees, charges and remunerations under sub-clause 8.3 hereof.

PROVIDED THAT THE FOLLOWING SHALL NOT BE GENERAL BENEFICIARIES NOTWITHSTANDING THAT THEY FALL WITHIN ONE OR MORE OF THE ABOVE CATEGORIES.

1.9.6.7 The Settlor.

1.9.6.8 Any trust under which the Settlor has a beneficial interest.

1.9.6.9 Any person or class of persons or any trust or corporation which the Trustee has declared in writing at any time (as it is empowered to do) to be incapable of being or to cease to be a General Beneficiary permanently or temporarily. The Trustee is also empowered to declare in writing that any person or class of persons or any trust or corporation shall be incapable of being or cease to be a General Beneficiary in relation to any distribution exceeding thirty-nine percent (39%) (or whatever other percentage the Trustee may from time to time determine) in relation to income and capital (or either of them) of the Trust.

15. EXCLUSION OF BENEFICIARIES

15.1 A person is an Excluded Person if:

- (a) an election made by the Trustee for the Trust to be treated as a family trust for the purposes of the Tax Act is in force;
- (b) the person is not a member of the relevant family group for the purposes of the election; and
- (c) a distribution of income or capital from the Trust to the person would give rise to a liability to pay family trust distribution tax for the purposes of the Tax Act.

15.2 Any person being a Beneficiary may by oral or written declaration recorded in the minutes of the Trustee at any time exclude himself from any class of Beneficiaries and no further income or capital sums shall be distributed to such Beneficiary provided that such notice shall not affect the beneficial entitlement to any amount to which such Beneficiary is entitled at the date of such notice.

15.3 Any income or capital of the Trust Fund paid to, applied or set aside for the benefit of, any Excluded Person shall be returned to the Trustee.


23. EXCLUSION OF CERTAIN PERSONS

Notwithstanding anything in this Deed:

- (a) the Trust Fund and the income thereof shall be held to the entire exclusion of and of any benefit to any person who is at that time a recipient of a means-tested Centrelink and/or Veterans' Affairs income support payment and their Associate (as the term "Associate" is defined under the Corporations Act) whether by contract or otherwise howsoever;
- (b) no part of the capital or income of the Trust Fund shall be paid or lent to or applied whether by way of remuneration or otherwise for the benefit either directly or indirectly of any person who is at that time a recipient of a means-tested Centrelink and/or Veterans' Affairs income support payment or their Associate in any manner or in any circumstances whatsoever; and
- (c) no power vested in the Trustee by this Deed or by reason of anything done pursuant to this Deed or by law shall be capable of being exercised and no provision contained in the Deed shall operate in such manner that any person who is at that time a recipient of a means-tested Centrelink and/or Veterans' Affairs income support payment or their Associate will or may become entitled either directly or indirectly to any benefit in any manner or under any circumstance.

The trustee (in his capacity as such trustee) of any trust or settlement in which any Beneficiary has an interest whether absolute or contingent or by way of expectancy and whether liable to be defeated by the exercise of any power of appointment or revocation or to be diminished by the increase of the class to which that Beneficiary belongs which the Trustee may at any time and from time to time nominate in writing as a General Beneficiary and whether or not such trust or settlement is in existence at the date of this Deed *but provided that the beneficial interest in property provided by such trust or settlement shall vest within the perpetuity period applicable to the trusts of this Deed.*

The specified class is:

1. 
2. The children, grandchildren and any adopted children of the persons mentioned in clause 1.
3. The mother, father, sister and brother of the persons mentioned in clause 1.
4. Any company, wherever incorporated or having its corporate office, in which any of the persons mentioned in clauses 1 and 2 holds shares or is a director; and
5. Any trust of which any of the persons mentioned in clauses 1 and 2 is a beneficiary, whether discretionary, contingent or vested.

Class A Beneficiaries

1. The Principal.
2. The Spouse of the Principal.
3. The widow or widower of the Principal.
4. The children and grandchildren of the Principal and the children and grandchildren of the Spouse of the Principal now living or born before the Perpetuity Date and the Spouses of such children and grandchildren.
5. The parents, parents-in-law, grandparents, brothers and sisters of the Principal and the Spouse of the Principal now living or born before the Perpetuity Date and their Spouses.
6. The uncles, aunts, nephews and nieces of the Principal and the Spouse of the Principal now living or born before the Perpetuity Date and their Spouses.
7. Such other natural persons whether now living or born before the Perpetuity Date as shall be appointed as a Beneficiary by instrument of appointment in writing signed by the Principal and whether expressed to be in the form of a deed or otherwise and delivered to the Trustee provided that the Settlor or his estate shall not be appointed.

Class B Beneficiaries

1. Companies whether incorporated at the date of execution of this deed or incorporated prior to the Perpetuity Date in which any of the Class A Beneficiaries is a director or holds one or more shares and any Related Bodies Corporate of such companies.
2. Trusts (whether discretionary or otherwise and including unit trusts) whether settled at the date of execution of this deed or settled prior to the Perpetuity Date under which any of the Class A Beneficiaries are beneficiaries.
3. Partnerships (including limited partnerships) in which any of the Class A Beneficiaries is a partner.

22. **Additional beneficiaries.** The Trustee may nominate anyone to be an additional primary or general beneficiary if:
- (1) the Trustee gives 14 days' notice to the Guardian (if any);
 - (2) the appointment of the additional beneficiary is made by a deed executed by the Trustee; and
 - (3) the appointment of the additional beneficiary is not contrary to any express provision of this Deed.
23. However, the following may *not* be appointed as an additional beneficiary:
- (1) a member of the excluded class described in clause 25;
 - (2) any person whose appointment would result in infringement of any rule or law against perpetuities or vesting which may apply to this settlement.

3.2 **Additional beneficiaries**

The Trustee may appoint a natural person who is not a beneficiary under clause 3.1 to be a beneficiary or a default beneficiary ('additional beneficiary') provided:

(a) the Trustee obtains the prior written consent of the Appointor to the appointment of the additional beneficiary;

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- (b) subject to clause 3.2(e), the appointment of the additional beneficiary is made by an instrument under hand of the Trustee;
 - (c) the appointment of the additional beneficiary is not contrary to any express provision of this deed;
 - (d) neither the Settlor, the Trustee for the time being nor any person whose appointment would result in infringement of any rule or law against perpetuities or vesting which may apply to the Trust may be appointed as an additional beneficiary; and
 - (e) additional default beneficiaries are only appointed in accordance with the procedures for amending the terms of this deed as contained in clause 10.

Provisions Relating to Trustee

8.1 No distribution to the Settlor or the Trustee

- (a) Income or capital, other than remuneration permitted under clause 8.2, may not be paid or transferred beneficially to or applied for the benefit of:
 - (i) the Settlor; or (ii) the Trustee;
- (b) No discretion or power conferred by this deed may be exercised and no provision of this deed operates so as to confer any direct or indirect benefit in the trust fund to the Settlor or to a trustee. Where the Trustee is a company having a sole shareholder who is a beneficiary, the Trustee is not taken to be in breach of clause 8.1(a) by paying or transferring income or capital to, or by applying income or capital for the benefit of, such sole shareholder.

Trustee restrictions

38. Who cannot be Trustee? The power to appoint a new Trustee contained in clauses 36, 37 and 83

must not be exercised in favour of:

- (1) the Settlor or the Settlor's spouse or domestic partner or statutory next-of-kin;
- (2) any notional settlor or the notional settlor's spouse or domestic partner or statutory next-of-kin;
- (3) anyone claiming under or in right of the Settlor or any notional settlor, their spouses or domestic partners;
- (4) a beneficiary if a change of trustee is assessable for ad valorem duty under the Duties Act 1997 (NSW) s 54(3) or the Duties Act 1999 (ACT) s 54(2).

39. If the new Trustee is a company and its sole director or sole shareholder is a beneficiary, then clause 38(5) does not operate to restrict the appointment of that company as the new Trustee.

7.5 Restrictions of Power of Appointment

The power to appoint a new trustee contained in this Clause must not be exercised in favour of:

- 7.5.1 the Settlor;
- 7.5.2 a person who is solely entitled to exercise the power of appointment for the time being; or
- 7.5.3 a person who settles property or moneys on the Trust by gifting moneys or property to the Trustee to be held as an accretion to the Trust Fund.

Other clauses

(g) The Trustee shall in respect of each financial year prepare a list which shall provide as follows:-

2

- (i) the name of each Income Beneficiary;
 - (ii) the proportion of income and/or amount of income and/or the amount of attributable income, and/or the amount or proportion of income from a category, if any, which the Trustee in its absolute discretion decides to distribute to each or any Income Beneficiary. The Trustee may express each proportion as a percentage of the total income and the percentage may include the figure 100% or 0% and such proportion of income and/or amount of income and/or amount of attributable income and/or income from a particular category, shall be listed against the name of each Income Beneficiary;
 - (iii) the list shall specify the financial year to which it applies;
 - (iv) the list shall be signed and dated by the Trustee;
 - (v) the list shall apportion and dispose of all of the income of the financial year which is not being accumulated.
- (h) (i) The Trustee shall enter particulars of any list prepared pursuant to this paragraph in the Minute Book of the Trust;
- (ii) in the event of the Trustee failing to enter particulars in the Minute Book the entries in the books of account of the Trust shall be sufficient.
- (i) In the event of a Trustee failing to prepare the list or to distribute the whole of the income (less any income to be accumulated in accordance with paragraph 5) of the Trust to the Income Beneficiaries then no Income Beneficiary shall be entitled to any of the said income by way of such failure and the rights of Income Beneficiaries shall be limited to the commencement of legal proceedings to compel the Trustee to comply with the provisions of this paragraph.
- (j) Where the Trustee is required by law to pay tax in respect of Income of the Trust distributed to a Beneficiary the Trustee may pay the same out of Income or Corpus to which the Beneficiary is presently entitled or may deduct the same out of moneys which may then or thereafter come into the hands of the Trustee or over which the Trustee has control and to which the Beneficiary is or becomes entitled. Tax on accumulation of income may be paid from Income or from Corpus as the Trustee decides.
- (k) Income or capital to which a Beneficiary becomes entitled and which can be identified as being of a category, retains its separate identity on passing to or being received by the Beneficiary or when the Beneficiary otherwise becomes entitled to it.

Trustee must not exercise certain powers until Appointor has been given notice

5.12 The Trustee may exercise any of the following powers where it has given the Appointor at least three day's written notice of the exercise of the power, including specific details of how the power is to be exercised:

5.12.1 The power to Distribute capital.

5.12.2 The power to resolve in writing how capital is to be Distributed on the Vesting Day.

5.12.3 The power to Distribute Income or accumulate it.

5.12.4 The power to resolve in writing how Income is to be Distributed.

5.12.5 The power to choose a person to whom capital or Income is to be Distributed.

5.12.6 The power to create a sub-trust.

103. **Notice by Trustee to Guardian before exercising specified powers.** If there is a Guardian at the time, then before exercising any power or discretion:

- (1) to appoint or nominate additional beneficiaries (clause 22);
- (2) to retain or employ an accountant who is a related person (clause 162);
- (3) to remove a beneficiary (clause 26);
- (4) to make a distribution (clauses 171, 188, 246 and 248), especially a distribution to a general beneficiary referred to in clauses 21(5), 21(9) (a company) or 21(6) and 21(10) (another trust);
- (5) to exercise its powers of maintenance and advancement (clause 236);
- (6) to provide unsecured loans to a beneficiary (clause 237);
- (7) to provide loans to a beneficiary on terms other than those in clause 237;
- (8) to make a family trust election or interposed entity election under the Income Tax Assessment Act 1997 (clause 159(a));
- (9) to amend this Deed (clause 266);
- (10) to appoint a termination date which is earlier than the date specified as the termination date in Item 15 of the Second Schedule (clause 244(a));
- (11) to change the governing law (clause 271);
- (12) to resettlement the Trust (clause 261); or
- (13) to revoke a revocable appointment validly made (clause 53) —

the Trustee must give 14 days' notice in writing setting out the manner in which it proposes to exercise its power or discretion to:

- (a) the Guardian; or
- (b) the Guardian's agent (if any) which the Guardian has nominated for that purpose or, if the Guardian has not nominated an agent, to the agent (if any) named, identified or described in Item 13 of the Second Schedule as the Guardian's agent.

4.5 Manner of Distribution

The payment, application or setting aside of income of a financial year may be effectively made as follows:

- 4.5.1 for a beneficiary who is not under a legal disability:
- (a) by paying the income to the beneficiary or to such person on behalf of the beneficiary as the beneficiary may authorise or direct; or
 - (b) by setting the income aside to a separate account in the books of the Trust in the name of the beneficiary whereupon such moneys will constitute a loan at call and will not bear interest unless the Trustee and the beneficiary otherwise agree;
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Manner of distribution

The payment, application or setting aside of income of a financial year may be effectively made as follows:

- (a) for a beneficiary who is not under a legal disability:
 - (i) by paying the income to the beneficiary or to such person on behalf of the beneficiary as the beneficiary may authorise or direct; or
 - (ii) by setting the income aside to a separate account in the books of the Trust in the name of the beneficiary whereupon such moneys will constitute a loan at call and will not bear interest unless the Trustee and the beneficiary otherwise agree;
- (b) for a beneficiary who is a minor or otherwise under a legal disability:
 - (i) by paying the income to an account with a bank or permanent building society in the name



- of the beneficiary or in the name of a person, who may be the Trustee, operating such account on behalf of or in trust for the beneficiary;
 - (ii) by paying the income as the Trustee may decide to a parent or guardian of the beneficiary to be applied for the benefit of the beneficiary;
 - (iii) by paying the income as the Trustee may decide to any person to be applied directly for or towards the benefit of the beneficiary;
 - (iv) by setting aside income to a separate account in the books of the Trust in the name of the beneficiary on which interest will accrue at such rate (if any) as the Trustee may decide; or
 - (v) by paying the income to any person who by law is entitled to receive moneys on behalf of or to administer the property of the beneficiary;
- (c) payment may be made to a beneficiary, not being a natural person, notwithstanding that such beneficiary may have a liquidator, provisional liquidator, receiver, receiver and manager or administrator appointed to it or in respect of its asset;
- (d) the trustee may, unless otherwise precluded by law, pay from an account referred to in clause 4.4(b)(iv), or an account in the name of the Trustee under clause 4.4(b)(i), moneys which are to be applied for the maintenance education or advancement of the beneficiary for whom the account is held; and
- (e) the Trustee may effect a distribution of income to a beneficiary by one, or partly by one and partly by any other, of the methods of allocation provided in clause 4.4(a) or (b).

Other issues

PROPERTY LAW ACT 1974 - SECT 45

Formalities of deeds executed by individuals

45 Formalities of deeds executed by individuals

(1) Where an individual executes a deed, the individual shall either sign or place the individual's mark upon the same and sealing alone shall not be sufficient.

(2) An [instrument](#) expressed—

(a) to be an indenture or a deed; or

(b) to be sealed;

shall, if it is signed and attested by at least 1 witness not being a party to the [instrument](#), be deemed to be sealed and, subject to *section 47*, to have been duly executed.

(3) No particular form of words shall be requisite for the attestation.

(4) A deed executed and attested under this section may in any proceedings be proved in the manner in which it might be proved if no attesting witness were alive.

(5) Nothing in this section shall affect—

(a) the execution of deeds by corporations; or

(b) how [instruments](#) are validly executed under the [Land Title Act 1994](#); or

(c) any deed executed before the commencement of this Act.

Issues Requiring Attention

This is a partial repeat of the previous requisition.

Queensland duty, under the Duties Act 2001, should be accounted for by notation on the deed of appointment of new trustee dated 30 May 2008. Please contact the Office of State Revenue on 1300 300 734 to arrange the duty notation.

Contact details

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