COLLAS CRILL

Planning for the 'silver tsunami'

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Although much has been said about the 'great wealth transfer' in recent times, there has been less focus upon the genesis of that phenomenon.

While numerous factors are relevant, one which is frequently overlooked is our ageing population, or the "silver tsunami" as it has been referred to in Australia. That raises the spectre of disputes where the elderly matriarch or patriarch decides to re-visit their succession plans late in life, which with increasing frequency coincides with allegations of mental incapacity and/or undue influence.

The death of an economic settlor without well-documented plans after their passing only adds to what might already be a complex factual matrix. The challenges faced by trustees and their advisors to resolve such issues cannot be overstated, particularly when those scenarios have not been addressed in the trust deed.

Death and incapacity frequently become significant issues in the context of reserved powers.

It is well-known that the ability of a settlor to retain reserved powers has been placed on a statutory footing in many jurisdictions, including the Cayman Islands. The result is that a trustee's ability to make certain decisions in relation to the administration of a trust – including (but not limited to) the power to vary the terms of a trust deed, to vary the beneficial class and the power to restrict the exercise or discretion of trustees – may be subject to the settlor providing his consent, or exercising a 'power of veto.'

That is all well and good during the settlor's lifetime, but deficiencies in the drafting of a trust deed may only really begin to crystallise upon the death of a settlor, or at the time questions start to be raised about his capacity. All too often those preparing trust deeds have not considered whether that power of veto falls away upon the death or disability of the settlor.

Death can also lead to unfortunate consequences including the transfer of trust assets beyond the reach of certain members of the beneficial class who otherwise anticipated receiving a significant distribution from the trust fund, and threats of proprietary claims and injunctive relief to prevent improper dealings with trust assets. Those issues may also arise when protector consent in relation to the actions of trustees is required, but the protector passes away and no consideration has been given as to whether the requirement for consent also falls away.

What has become more prominent in recent years is decisions taken by trustees with a settlor's consent shortly before his death, then challenges being made by members of the beneficial class about the trustee's decision in circumstances where certain beneficiaries believed the settlor lacked capacity at the time consent was provided, such that the settlor was not actually in a position to understand the nature and effect of the

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action they were consenting to, the extent of the property he was disclosing of or indeed any ability to comprehend the claims which he was giving effect to.

The prudent trustee can successfully defend such actions where the issue of capacity has been raised and they have taken steps to ensure that a settlor has met the relevant criteria before providing the requisite consent, which might include the trustee obtaining medical opinions as to a settlor's capacity at or around the time such consent is provided. However, the absence of the same can have potentially dire consequences for trustees, who might be accused of breach of trust where capacity issues arise.

Considering all potential outcomes is crucial at the time of drafting.

First, defining 'capacity' or 'disability' in the trust deed. Then ensuring that wherever settlor consent is required before trustees may exercise their discretion in administering a trust, the trust deed adequately addresses what happens in the event of the death or disability of the settlor (or indeed a protector or enforcer who is required to provide the requisite consent).

- Are safeguards in place to ensure that beneficiaries who a settlor always intended should be provided for sufficient?
- Does the trust deed prevent a variation of its terms which might otherwise result in a settlor's wishes no longer being accounted for?
- Is the beneficial class clearly defined following the settlor's death?

All too often consideration has not been given by the draftsman to these types of issues, which is not only unfortunate but ironic, given one of the primary reasons for establishing a trust is succession planning.

Deficiencies in drafting can lead to difficult situations for trustees which might ultimately require an expensive court application to vary a trust deed or worse still, having to defend an allegation of breach of trust.

Conversations at the outset which consider all potential scenarios might ultimately prevent such disputes and thus avoid the need for costs being incurred in resolving such issues. Preserving the value of the trust fund by taking all possible steps to avoid such costs being incurred is clearly in the best interests of the entire beneficial class, which is why careful planning is key.

*This article was written by Andrew Peedom for **IMG Trust's** 'tensions in trusts' series on 8 May - featured **here**.*

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