



Mental Decline? Make sure you act in time Aug 2010

One of the most important issues in dealing with the elderly is knowing when a person has lost their mental faculties. It is not straightforward, and with more people living longer, the problem arises often. Family and caregivers of older people usually see a steady slow decline, starting with forgetfulness, then mental dependence on a spouse or partner, then occasional confusion and muddlement, possibly ending with senility and dementia.

If an older person leaves it too late, they will not be able to sign a valid will or enduring power of attorney. The loss of their mental capacity has serious legal consequences. The fall-back position is costly and cumbersome. The family has to make an application to the court to have a welfare guardian and property manager appointed - not a user-friendly procedure, and one involving substantial on-going compliance costs.

It is often difficult for a caregiver to appreciate how far diminished their loved one's mental capacity has become, because of the gradual decline of the older person. Sometimes an adult son or daughter, making an infrequent visit to their parent, will be shocked at the extent of the mental deterioration. If a vague and easily suggestible mentally dependant elderly person makes a will or signs legal documents, this can be a recipe for disaster. It can happen that in blended families, the children of the first marriage or relationship will claim their parent's second spouse or partner is exercising undue influence over the parent. Disappointed or excluded family members can mount legal challenges to the validity of those documents.

If you are concerned that such a situation might develop in your family, see your lawyer smartly. Experienced property lawyers are skilled at anticipating and identifying such problems and working through them. They collaborate with the medical profession and take an inclusive approach, consulting widely with those affected, to avoid disharmony and working to achieve a solution that satisfies the whole family. Subsequent litigation risk is minimised. Just letting things drift and hoping for the best is unwise. For those in this situation, don't leave it until it's too late. The distress and cost can be avoided by acting in time, before your loved one becomes mentally incapable.

For more information, please contact one of our offices.

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TRUSTS - THE PAPERWORK IS CRUCIAL

Trusts are a popular choice for people who are concerned about protecting their assets for themselves and for their children. However, the formation of a trust by the execution of a trust deed and transfer of assets to the trust is only the start. A successful trust is one that is regularly monitored by the trustees and where there is a clear paper trail evidencing the ongoing administration of the trust by the trustees.

Why the need for paperwork?

If the trust is not properly administered, there is a risk that it may be seen to have either "lapsed" or that it is simply a "sham". This usually occurs where the assets which form part of the trust fund are treated by the trustees as if they are their own personal property held for their own benefit rather than assets held by them for the benefit of the beneficiaries of the trust. Given that trustees are frequently both trustees and beneficiaries of the trust, it is all the more important that a clear distinction exists in the minds of the trustees regarding assets which are held by them personally and those which belong to the trust.

Essential paperwork

The administration of a trust will depend very much on the nature of the assets which make up the trust fund. A trust fund that consists of the family home in which the beneficiaries reside will not require the trustees to do a great deal for so long as that situation continues. If there is a debt owing by the trust to the settlors of the trust (i.e. the persons who originally set up the trust and transferred assets to it) then the debt should be gifted by the settlors in annual increments of \$27,000.00 (for each settlor) until the entire debt has been forgiven. We can monitor this for you and complete the annual gifting documents.

In addition to gifting, trustees should meet at least once a year to review the trust fund and the manner in which the trust fund has been applied for the benefit of the beneficiaries. There may be no need for the trustees to make any decisions but the important point is that:-

- The trustees have turned their minds to their duties and responsibilities; and
- A trustee resolution records how those duties have been discharged over the previous 12 month period.

In the case of trusts that hold income producing assets (such as investment properties and shares), the matters which trustees should attend to include:

- Regularly reviewing the performance of investments
- Preparing and filing a tax return
- Ensuring that the trustees meet at least annually and possibly more frequently, depending on the nature of the investments which they are monitoring
- Ensuring that any new investments and/or transactions that the trust may enter into are properly documented and supported by appropriate resolutions
- If the trust receives income then a separate trust bank account must be opened and the income channelled through that.

Minutes of trustees' meetings should be kept and particular care taken to record decisions taken concerning investment of trust funds and distributions to the beneficiaries.

Conclusion

The advantages of keeping the paperwork for your trust up to date cannot be overstated. A trust which is properly administered will provide a much greater degree of protection than one which is effectively dormant because the trustees have not turned their minds to their duties and responsibilities under the terms of the trust deed.

If you have any doubts as to whether your trust is being properly maintained, please phone us.

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