Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering comparative analysis from top ranked lawyers

Private Wealth

Second Edition

New Zealand
Law and Practice
Cone Marshall Limited

chambers.com

2019

Law and Practice

Contributed by Cone Marshall Limited

Contents

Cone Marshall Limited is a leading global and independent advisory and fiduciary services firm comprised of lawyers, trust officers, wealth planners and accountants. It specialises in trusts, wealth and asset management, succession planning, tax planning and fiduciary services. The firm advises on how to securely and efficiently structure wealth and plan for its succession to future generations, whether in domestic, international, individual, family or business situations. The team has special skills in resolving conflicts of law across multiple legal systems. Formed in New Zealand in 1998, Cone Marshall has expanded into a global group, which now administers trusts and related entities across multiple jurisdictions, with offices in the US (New York, Wyoming and Florida), Hong Kong, Montevideo, Geneva, London and Milan.

Authors

Geoffrey Cone is a leading international trust and tax planning lawyer and the founder and senior principal of Cone Marshall. As a respected authority, he has shared his knowledge and expertise in publications such as Rothschild Trust Review, Trusts & Trustees and the New Zealand Law Journal, as well as many other journals and guides dealing with trusts and international law. He has participated in cases at all levels of the New Zealand courts as leading counsel, including the Privy Council.

Ziyad Matti is an associate at the firm and a barrister and solicitor of the High Court. He counsels high net worth individuals and families as they accumulate assets, experience life changes, seek to preserve their wealth, and ultimately pass it on to future generations. His clients include multinational families whose members, businesses and assets span the globe, and for whom he sets up and runs trusts, limited partnerships and companies. His broad range of expertise extends to tax, business and commercial law.

Claudia Shan is a partner and the head of legal and international compliance at the firm. She has advised a wide range of clients on asset protection and establishment, administration, restructuring and termination of their personal, investment and business structures. Both resident and non-resident clients consult her on local and foreign trusts, tax residency, asset protection and further international tax and trust law issues. Claudia is a full member of STEP and is a respected author and contributor to international journals and reviews.

1. Tax

1.1 Tax Regimes

New Zealand's tax system does not include the following:

- inheritance tax/estate tax;
- wealth tax;
- gift duty;
- stamp duty;
- social security tax;
- capital gains tax (with some limited exceptions); and
- local or state taxes (apart from property rates levied by some local councils and authorities).

Individual Tax

An individual New Zealand tax resident (NZTR) is subject to New Zealand income tax on worldwide income and New Zealand-sourced income.

All personal income tax rates were reduced as of 1 October 2010:

- up to NZD14,000 per year – 10.5%;
- from NZD14,001 to NZD48,000 – 17.5%;
- from NZD48,001 to NZD70,000 – 30%; and
- NZD70,001 and over – 33%.

An individual's income includes the following sources:

- business;
- partnership;
- employment;
- interest;
- dividends;
- government pension;
- annuities;
- beneficiary income under a trust; and
- royalties.

Non-residents (individuals and entities) are taxed on New Zealand-sourced income including interest, dividends and royalties.

Trust Tax Regime
A complying trust is a domestic trust that has been established by a New Zealand resident settlor. It is taxed at a rate of 33% on worldwide and New Zealand-sourced income.

A foreign trust is established by a non-resident settlor and has a New Zealand resident trustee. A foreign trust is exempt from New Zealand income tax on worldwide income and is only taxed on New Zealand-sourced income at a rate of 33%.

Foreign trusts are unique in that they can be used as offshore vehicles by non-residents as part of their estate and wealth planning. Provided none of the assets of the trust are New Zealand-situs assets, then in most cases the income derived from the holding of those assets can be distributed to non-resident beneficiaries, without any liability to tax arising in New Zealand.

A non-complying trust occurs when the non-resident settlor of a foreign trust becomes a New Zealand tax resident. Distributions of capital gains and income from a non-complying trust are taxed as beneficiary income or taxable distributions at a rate of 45%.

A person becomes tax resident from the date:

- they cease being a transitional resident; or
- their first day of residence in New Zealand.

The settlor should make an election (for the non-complying trust to become a complying trust) within 12 months of becoming tax resident to prevent punitive tax rates from applying to distributions.

Company and Limited Partnership Regime
The worldwide and New Zealand-sourced income of a company is taxed at 28%.

A limited partnership is transparent for tax purposes. In determining its income tax liability, the general partner may attribute the partnership's income, expenses, tax credits, rebates, gains and losses to the underlying partners in proportion to their partnership interests.

The partnership can be a useful offshore vehicle for a non-resident.

Transitional Residence Rule
The transitional resident exemption enables persons who become resident in New Zealand to receive most of their worldwide income tax-free for 48 months from the date they become tax resident.

This exemption is also available to New Zealand residents who have been absent from New Zealand for ten years or more.

1.2 Stability of the Estate and Transfer Tax Laws
Traditionally, tax policy in New Zealand has been stable and consistent over recent decades and this is expected to continue.

The new coalition government that was elected in 2017 established a Tax Working Group to review the current taxation system. The mandate of the Working Group was to provide an opportunity for the government and country to review the fairness of the tax system and debate options for change.

The government has responded to the recommendations proposed by the Working Group. It has stated that it will not be introducing capital gains tax, wealth tax or land tax. Furthermore, the government has no policy or intention to change the rates of tax to which businesses are subject. Instead, it is considering reducing the tax-compliance costs businesses face by looking at the options and adjustments proposed by the Working Group. The government has also stated that work is already underway on various taxation instruments that tax businesses that have a negative environmental impact, in order to reduce greenhouse gases, address water pollution and abstraction issues, as well as solid waste disposal. At the same time, the government acknowledges that more work needs to be done on environment tax policy.

The government has stated there is no foreseeable need to change the tax system for fiscal reasons. The absence of wealth tax and most capital taxes makes New Zealand an attractive and stable place to live and invest.

On 30 July 2019, New Zealand enacted the Trusts Act 2019. It comes into force in 18 months' time to replace the Trustees Act 1956 (the TA) with a modern, coherent and useful statute which takes the most fundamental trust law principles from the common law and puts them into accessible legislation for all to understand. The Trusts Act 2019 does not codify all trust law but recognises the complexity, nuances and desire for continued development through case law. These reforms will enhance New Zealand's reputation as a trust jurisdiction.

1.3 Transparency and Increased Global Reporting
New Zealand implemented FATCA and the provisions of a Model 1 Intergovernmental Agreement in July 2014.

In 2017 its tax laws were amended to implement the Common Reporting Standard (CRS) as well as update New Zealand foreign trust disclosure rules (the NZFTDR). Under the NZFTDR, where a non-resident has settled a foreign trust with a New Zealand resident trustee, that foreign trust will need to be registered with the Inland Revenue Department (IRD).

The information that must be disclosed to the IRD is almost exactly the same as that under CRS, however, it is important to note that the two regimes are entirely separate and there is no automatic exchange of information under the foreign trust rules.

The NZFTDR has the following features:

- compliance is necessary to maintain the foreign trusts' income tax exemption, which includes filing the annual return and financial statements;
- the trustee needs to file the trust deed, provide contact details for the settlor, protector, any non-resident trustees, and any other natural persons who have the ability to control the trust;
- the information disclosed to the tax department is confidential and the register may not be accessed by members of the public; and
- the information will only be shared by the IRD on receipt of a valid request on notice to the trustee from a New Zealand treaty partner under exchange of information arrangements (double tax agreements, tax information exchange agreements and/or the Multilateral Convention on Mutual Administrative Assistance in Tax Matters).

New Zealand's Anti-money Laundering and Countering Financing of Terrorism Act 2009, FATCA, CRS and the foreign trust rules register enhance New Zealand's reputation as a safe, politically and economically stable country within which legitimately sourced wealth can be protected for future generations. These laws help to uphold New Zealand's international reputation as a tax-compliant and co-operative jurisdiction. In addition, within New Zealand the registration of foreign trusts has been effective in restoring public confidence in the industry, as disclosure requirements are similar to those of New Zealand domestic qualifying trusts.

As a founding member of both bodies, New Zealand is fully compliant with FATF and OECD standards and is known as a transparent and safe jurisdiction.

Further, New Zealand as a jurisdiction provides the following features which are beneficial for international trust and wealth planning purposes:

- it is a member of the OECD group of countries;
- it is party to numerous important double taxation treaties and taxation information exchange agreements;
- it has comprehensive anti-money laundering legislation;
- trusts may operate for a maximum of 80 years (soon to be extended to 125 years) and may be terminated at any time; and
- a New Zealand trust may hold any assets, including property, as well as trade or operate a business.

2. Succession

2.1 Cultural Considerations in Succession Planning

Individuals tend to pass assets to the next generation freely through wills and trusts. There are no forced heirship laws, and individuals have testamentary freedom.

New Zealand succession laws apply to a non-resident who has property located in New Zealand as well as to an individual who is living in New Zealand and has property located in New Zealand.

Trusts are commonly used for family succession, asset protection, to hold businesses and real property, collections, and for charitable purposes. There are approximately 250,000 registered domestic trusts in New Zealand, and 10,000 foreign or international trusts; the actual total is probably close to 400,000. This compares to 204,000 trusts in the United Kingdom (2006).

2.2 International Planning

There is no gift/transfer tax nor estate/inheritance tax in New Zealand. The taxation of domestic trusts is relatively simple and foreign trusts are exempt from income tax on non-New Zealand-sourced income.

When distributing wealth to family members, taxation of distributions will depend on the tax status of the trust and the tax residence of the beneficiary. Provided none of the assets of the foreign trust are New Zealand-situs assets, then in most cases the income derived from the holding of those assets can be distributed to non-resident beneficiaries, without any liability to tax arising in New Zealand.

However, residents, non-residents and migrants to New Zealand need to be aware of disclosure and reporting requirements that may apply to the proposed wealth transfer under FATCA, CRS and/or foreign trust rules.

2.3 Forced Heirship Laws

New Zealand does not have forced heirship laws. There is no corresponding legal category under which a foreign court order could be enforced in New Zealand. It would be difficult to sustain an action for the enforcement of a foreign judgment, as the New Zealand-resident respondent would usually hold the assets at issue pursuant to a trust.

Although individuals have testamentary freedom, there are some important exceptions to this principle. In addition to pursuing the standard common law challenges to the validity of a will (lack of testamentary capacity, duress, etc), there are two statutory mechanisms that allow courts to intervene and alter the division of an estate as stated in the will. The Law Reform (Testamentary Promises) Act 1949 provides for the recognition of promises made by a testator during their lifetime to make provision for a person in their will, and the satisfaction of that promise from the estate where no provision has been made for the person challenging the will. The Family Protection Act 1955 allows the court to make orders mandating departure from the dispositive provisions in the will where inadequate provision has been made for persons to whom the testator owed a moral obligation of financial support.

2.4 Marital Property

In New Zealand the Property (Relationships) Act 1976 (PR Act) deals with how the relationship property of married couples, civil union partners and de facto couples is divided when a relationship ends (through separation or death). Usually, it is distributed equally.

Whether the rules in the PR Act apply depends on the characteristics and duration of the relationship.

One spouse or partner cannot transfer relationship property without the consent of the other spouse or partner. They may contract out of the provisions of the Act by entering into a contracting out agreement (sometimes known as a 'prenuptial' agreement). The formalities prescribed under the PR Act must be followed, including the requirements for the agreement to be in writing and that both parties must obtain independent legal advice. The purpose of the formalities is to help ensure that each party understands the effect of the agreement, which may be contrary to their own interests, and to limit the impact of undue influence from the other party to sign the agreement.

Nevertheless, even where the formalities are satisfied, the court may still override the agreement if it considers that enforcement will result in serious injustice to one party.

However, some judges may be more inclined to enforce the agreement if each party understood the difference in their entitlements at the time of signing the agreement and had merely changed their mind later.

Furthermore, separate property may become relationship property if it is intermingled with relationship property or used for joint purposes or to purchase joint assets. Additionally, if debts were jointly incurred by both parties, or were incurred for the purpose or benefit of the couple or any child of the relationship, spouses are jointly liable for such debts. A spouse cannot, however, be held liable for debts incurred by either of the respective spouses prior to the marriage.

The PR Act applies to couples residing within New Zealand, regardless of their citizenship.

2.5 Transfer of Property

Usually the transfer of property does not affect the cost basis of property being transferred. However, the transfer/sale of property may be taxable and/or require regulatory consent.

A residential land withholding tax applies to an entity controlled by offshore persons, an offshore entity and to an offshore person (ie, including a non-resident and New Zealand citizen who has not been resident for three years, or a person who does not hold a resident visa or permanent resident visa) who buys a residential property located in New Zealand and sells it within two years (or within four years in the case of a trust with a beneficiary who is an offshore person). The seller's main home exemption will not usually apply because the property is unlikely to be an offshore person's main home if they do not live in New Zealand.

The Overseas Investment Amendment Act 2018 has drastically changed foreign investment in New Zealand residential property. The main thrust of the Act is that it brings 'residential land' within the definition of 'sensitive land' for the purposes of the Overseas Investment Act 2005 (OIA). This means that the acquisition of residential land by overseas buyers will now require the consent of the Overseas Investment Office (OIO). 'Sensitive land' also includes non-urban land over five hectares, land situated on most of New Zealand's outlying islands, land adjacent to foreshore and seabed, and land with special historical or environmental significance.

2.6 Transfer of Assets: Vehicles and Planning Mechanisms

There are no gift taxes that would apply to transfers of assets. Usually, no tax planning mechanisms are required to transfer assets to heirs or between generations.

Inter vivos and will trusts are the most popular family-succession planning vehicles used in New Zealand.

2.7 Transfer of Assets: Digital Assets

New Zealand does not have the legal regulatory framework for succession of digital assets such as email accounts, cryptocurrency and block-chain. They are not recognised as currency or property by the Financial Markets Authority, Reserve Bank or the IRD.

There are, however, no legal barriers to transferring digital assets to the trustee of a New Zealand trust. This would entail transferring possession and legal title, ie, by providing the trustee with the means to obtain possession and legal title (such as usernames and passwords etc).

3. Trusts, Foundations and Similar Entities

3.1 Types of Trusts, Foundations or Similar Entities

Families who intend to come to New Zealand as permanent residents should take planning advice in advance of their coming to New Zealand. That way, they can establish pre-migration structures outside New Zealand which can be used to hold families' overseas investments and property and which need to be properly managed from a tax and accounting perspective once the beneficial owners become resident.

Trusts

Both on and offshore trusts have been traditionally used as estate planning vehicles in New Zealand since the early 19th century. It is quite common for New Zealand families to hold their assets in trusts. In addition, a large number of New Zealand businesses and significant asset-holding enterprises are held or managed by trusts.

New Zealand permits the use of private trust companies which have no special regulatory requirements, as there is no request for licensing or registration. Trusts are private documents and are not registered on a public register.

Foreign trusts, ie, trusts which are established by a non-resident person, are not taxable on their overseas-sourced income.

New Zealand trust law is well established, with a strong local jurisprudence and court knowledge. New Zealand trust law is derived from English law and is regulated by the TA. In early 2021, this Act will be replaced by the Trusts Act 2019 (TA 2019), a modern, coherent and useful statute which takes the most fundamental trust law principles from the common law and puts them into accessible legislation for all to understand. It does not codify all trust law but recognises the complexity, nuances and desire for continued development through case law. These reforms will enhance New Zealand's reputation as a trust jurisdiction.

New Zealand trust law has some unique features, including the ability to have trust advisers, protectors, investment advisers and managers, with wide discretionary powers and the ability to add and remove beneficiaries. A protector or investment manager, who need not be a New Zealand resident, can be given relevant advisory and discretionary powers.

Limited Partnerships and Companies

The worldwide and New Zealand-sourced income of a company is taxed at 28%.

A limited partnership is transparent for tax purposes. In determining its income tax liability, the general partner may attribute the partnership's income, expenses, tax credits, rebates, gains and losses to the underlying partners in proportion to their partnership interests.

The partnership can be a useful offshore vehicle for a non-resident. Partnerships are generally recognised as separate legal entities under foreign law, and therefore can be useful in jurisdictions that do not recognise trusts. A foreign trust could act as the limited partner of the partnership and hold 100% of the partnership interests. The income generated by the partnership assets would therefore flow through to the trust in its entirety. The foreign trust would be eligible for all of the estate, wealth planning and other benefits these offshore trusts offer non-residents under New Zealand law.

A limited partnership consists of the usual general partner (GP) and a limited partner and a simple partnership agreement. The GP manages the business of the partnership and the limited partner takes a passive role to allow it to retain its limited liability. The limited partner's liability for the debts and liabilities of the partnership is limited to its capital contribution.

A limited partnership has the following characteristics:

- it is registered with the New Zealand Companies Office (the partnership must keep its own register of limited partners at its registered office);
- it must have a New Zealand registered office;
- it will require at least one GP that is New Zealand resident; however, the limited partner need not be a New Zealand resident; and
- any legal person may be a GP or a limited partner.

Foundations

New Zealand does not have foundations laws so a foundation may not be established under New Zealand law. They may be recognised as an incorporated entity such as a company or limited partnership. They are commonly used as part of offshore structures for non-residents.

3.2 Recognition of Trusts

Trusts are recognised and respected in New Zealand. There are no forced heirship rules under New Zealand law, and there is no analogous legal category under which forced heirship concepts can easily be accommodated. In addition, New Zealand is not a signatory to the Hague Convention on trusts, and its courts are, therefore, not required to take into account the customary or legal requirements of foreign jurisdictions in relation to trusts. Consequently, attempts to enforce the judgment of a foreign court based on forced heirship principles against a New Zealand resident trustee would face significant hurdles.

3.3 Tax Considerations: Fiduciary or Beneficiary Designation

Generally, foreign structures which are established and funded by New Zealand tax residents, are taxed in New Zealand on their New Zealand-sourced and worldwide income.

Where a New Zealand resident holds a controlling interest in a foreign company, the income of the CFC will be attributable to that resident in proportion to their respective interest, unless 95% or more of the CFC's income is derived from an active business enterprise, in which case an active participation exemption applies. Holdings in foreign companies, which are not controlled by a New Zealand resident (known as a Foreign Investment Fund or FIF), result in the attribution of the FIF's income to a New Zealand resident shareholder in proportion to their shareholding, if those holdings are 'attributing interests' for tax purposes.

If a New Zealand tax resident receives beneficiary income from a domestic trust or foreign trust (with a non-resident trustee), foundation or similar entity, then that resident will, in most cases, subject those distributions to income tax.

Where a New Zealand resident serves as a fiduciary or trustee, he/she will need to consider disclosing the trust to the IRD. Under Foreign Trust Disclosure Rules, all foreign trusts with a non-resident settlor must be registered with the IRD. Thereafter, an annual return setting out the trust's settlements and distributions must be filed along with financial statements within six months of the trust's elected balance date.

Domestic trusts that earn income must be registered with the IRD to obtain an IRD number, as this income is generally taxable in New Zealand. The annual income tax return of the trust will also include details of distributions of trustee and beneficiary income made to beneficiaries.

3.4 Exercising Control over Irrevocable Planning Vehicles

Unlike some offshore jurisdictions, the ability to reserve powers is not enshrined in the TA or the TA 2019. However, under trust law it is permitted for the settlor to draft a trust deed that confers powers on the settlor, protector and other third parties. It is common for settlors to reserve powers to appoint and remove the trustee. A settlor may retain the power to amend a trust deed.

The scope of power to amend the trust deed must be carefully drafted before the trust is established. Should the trustee or settlor propose an amendment in the future, such amendment must have been contemplated by the parties when the trust deed was made.

It is not recommended that a settlor retain extensive powers, as this may undermine the nature of the trust and make the arrangement appear to be a nominee arrangement between the settlor and trustee rather than a discretionary trust.

In addition, in Clayton v Clayton (2016) NZSC 30, the Supreme Court followed the decision in Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Limited and others (2011) UKPC 17 in holding that reserved powers are property and therefore may be taken into consideration when reviewing the assets of a settlor in divorce proceedings.

4. Family Business Planning

4.1 Asset Protection

The most popular method of protecting assets in New Zealand is through the use of trusts. Trusts are part of New Zealand's culture and it is estimated that there are between 300,000 and 500,000 trusts operating in New Zealand, making it the highest concentration of trusts per capita globally.

While tax is not taken into consideration when establishing trusts, New Zealand does offer favourable tax treatments for trusts when compared with other jurisdictions. For New Zealanders settling assets into a trust, there is also no estate duty, gift duty, stamp duty or capital gains tax.

New Zealanders use family trusts to protect assets for beneficiaries from creditors, relationship property claims, risky business ventures and lawsuits.

New Zealand domestic trusts are private and confidential. There is no public registry of trusts or an obligation to submit information to any government or public body if the trust earns no income.

New Zealand foreign trusts must be registered with the IRD; however, the register is not public and cannot be accessed by the general public. Any information registered with Inland Revenue will only be disclosed if there is a valid request from a government authority in New Zealand or overseas under the relevant tax information exchange agreement entered into with that particular country.

For these reasons, people may establish more than one trust to hold different assets for different benefits or beneficiaries.

4.2 Succession Planning

Legal advisers and trust specialists know that family business succession planning can be a complex and emotional subject. Planning can take time and requires advisers to be patient with their clients, as the process can vary depending on the individuals involved and the assets they hold.

Business succession planning is not only for large businesses or high net worth individuals in New Zealand. Business owners (whether of small or medium-sized businesses) are encouraged to create and implement a sound succession plan to ensure the business's continuous and smooth transition to the next generation or the new owners.

Accordingly, New Zealand company constitutions or limited partnership agreements may contain provisions allowing for business succession between shareholders. Commonly, these set out a mode of pre-emption on a notice of sale or the death of a partner or equity owner which enables that person's share to be valued and disposed of to the continuing owners.

An alternative method of business succession planning is through the use of trusts. The shares or participation in the company or partnership are held in a trust which is then distributed to family members or others at dates agreed by or fixed by the settlor.

Business succession planning can also include the use of asset protection and estate-planning arrangements such as limited liability companies, wills and relationship property agreements.

4.3 Transfer of Partial Interest

Transferring a partial interest in a New Zealand entity does not trigger tax consequences.

The market value of the interest is based on an accountant or business broker's assessment of the overall value of the entity. However, since there are no tax consequences, valuations are merely done for accounting and other non-tax-related reasons.

5. Wealth Disputes

5.1 Trends Driving Disputes

The TA 2019 was enacted on 30 July 2019 and comes into force 18 months from then.

This Act replaces the TA, which is outdated, and provides a welcome modernisation of New Zealand's trust laws. It takes the most fundamental trust law principles (including common law principles) and puts them into accessible legislation for all to understand.

It does not codify all trust law but aims to simplify core trust principles and essential obligations for trustees. The TA 2019 recognises the complexity, nuances and desire for continued development through case law.

It is expected that the clarification of common law principles in the TA 2019 will help to avoid or reduce wealth disputes.

The majority of differences between the TA 2019 and the TA are already well established in case law. The same applies to the information disclosure provisions that cover the presumption for disclosure (and the exceptions) found in the New Zealand Supreme Court's decision in Erceg v Erceg (2017) NZSC 28 which replaced the UK Privy Council's decision in Schmidt v Rosewood Trust Ltd (2003) UKPC 26 as the leading authority in New Zealand for this issue.

The TA 2019 introduces a presumption under Section 51 that "…a trustee must make available to every beneficiary the basic trust information." The TA 2019 defines 'basic trust information' as:

- the fact that a person is a beneficiary;
- the name and contact details of the trustee;
- the details of appointments, removals and retirements of trustees as they occur; and
- the right of the beneficiary to request a copy of the terms of the trust or trust information.

Incorporating these principles into trust legislation adds nothing to the common law as it currently stands, it merely clarifies and creates certainty around the trustee's 'duty to disclose information.'

There are three principal areas where concern has been expressed. Firstly, that beneficiaries may, in obtaining information, 'attack' the trust and question the decisions of the trustees; secondly, that the interests and needs of individual beneficiaries may be different, and in some circumstances, the trustee may have concerns about advising the individual that he or she is a beneficiary; and thirdly, how a trustee can ensure the information reaches every beneficiary, given that classes of beneficiaries can be very broad.

However, the requirement to pass information to beneficiaries is not absolute; there are exceptions.

Section 53 provides for a list of 13 factors that the trustee must take into consideration before deciding whether it is appropriate to provide the information to the beneficiary. These factors are comprehensive, and if they do not provide the trustee with the reassurance it seeks, Section 53(m) allows them to consider "any other factors that the trustee reasonably considers are relevant to determining whether the presumption applies."

The same presumption to disclose information and its exception apply equally to the more in-depth 'trust information' under Section 52. It is important to note that here, 'trust information' does not include reasons for trustees' decisions.

Section 54 covers the procedure that applies when the trustee decides not to provide the information. Here, the trustee must apply to the court for direction that the decision to withhold information was reasonable. However, under Section 54(3), if one beneficiary already has the basic trust information, this will not apply, and the trustee will be free to exercise its discretion not to provide the information to the other beneficiary(ies). (Clearly this will be satisfied where the settlor is also a beneficiary.)

5.2 Mechanism for Compensation

Claims can be made by a limited partner against the general partner and other limited partners of a limited partnership, by shareholders against directors, and by beneficiaries against trustees of trusts. Civil claims can be filed in the High Court.

6. Roles and Responsibilities of Fiduciaries

6.1 Prevalence of Corporate Fiduciaries

Corporate fiduciary services are common in New Zealand with independent providers providing trustee and corporate services for local and international clients. However, given the trust culture, most trusts are administered by individuals or their personal lawyer or accountant.

It is also common for private client law firms or accounting firms to provide corporate services and/or trusteeship. The conduct of fiduciaries and/or trustees is governed by the TA and the TA 2019 and other principles derived from case law.

Trustees are expected to take the same standard of care as an ordinary prudent person of business in the circumstances of a trust, act in the best interests of the beneficiaries and treat them in an even-handed manner. There is also a requirement that the trustee invests prudently, and the TA and TA 2019 set out a number of factors the trustee is required to take into account when making investment decisions.

Professional trustees (corporate or otherwise) that are remunerated for their trustee services are expected to exercise a higher standard of diligence and knowledge than an unremunerated trustee. This includes duties under the Financial Transactions Reporting Act 1996, where the trustee is required to report any unusual trust settlements or transactions and those under the Anti-money Laundering and Countering Finance of Terrorism Act 2009 where the trustee must conduct due diligence prior to accepting their trustee role.

6.2 Fiduciary Liabilities

It is possible to pierce the veil of companies and trusts in New Zealand in limited circumstances.

The assumption in New Zealand is that trusts serve as a means by which settlors can protect their assets and preserve their capital for their benefit and that of future generations. However, the case is not the same when it comes to relationship property, with more and more trusts being attacked.

Relationship property is governed under the Property (Relationships) Act 1976 (PR Act) where the PR Act serves to achieve a fair division of property when a relationship comes to an end. Claims under the PR Act and claims of constructive trust pose challenges to trusts.

In the recent case of Clayton v Clayton (2016) NZSC 29 and Clayton v Clayton (2016) NZSC 30, the Supreme Court ruled that powers to control a trust may constitute property under the PR Act.

The PR Act can also apply in situations where a person has disposed of property into trust with the intention of defeating their partner's claims or rights under the Act. Under these circumstances, the court can recover property from the trust or order one partner to compensate the other to avoid serious injustice to one party.

Other remedies found in the law of equity include claims that a trust is invalid because it is a sham, alter ego or illusory trust or a claim that a trust is subject to a constructive trust for the benefit of one of the partners.

6.3 Fiduciary Regulation

Trustee investments are regulated under the TA and the TA 2019, where the trustee is able to invest in any property but must do so with diligence and the same care as an ordinary prudent person of business would have when managing the affairs of others. Where the trustee's profession, employment or business involves acting as trustee or investing money for others, the trustee must exercise the same level of care, diligence and skill as when engaged in their own employment or business.

Furthermore, Section 13E of the TA sets out a non-exhaustive list of considerations that a trustee may take into account in exercising a power of investment, as follows:

- the desirability of diversifying trust investments;
- the nature of existing trust investments and other trust property;
- the need to maintain the real value of the capital or income of the trust;
- the risk of capital loss or depreciation;
- the potential for capital appreciation;
- the likely income return;
- the length of the term of the proposed investment;
- the probable duration of the trust;
- the marketability of the proposed investment during, and on the determination of, the term of the proposed investment;
- the aggregate value of the trust estate;
- the effect of the proposed investment in relation to the tax liability of the trust; and
- the likelihood of inflation affecting the value of the proposed investment or other trust property.

The remaining provisions in the TA impose a duty on the trustees to comply with any requirement imposed on investment by the trust deed, and empower the trustee in relation to company securities, applying trust capital to pay call on shares, and making certain loans and investments on the strength of a valuation, and they provide that the trustee will not be liable for losses caused by reason of improperly secured investments.

6.4 Fiduciary Investment

Prior to 1988, the TA included a list of authorised investments which required the trustees to invest in specific approved investments using the trust funds. By 1988 changes to the law abandoned the list of authorised investments and through the Trustee Amendment Act 1988 the 'prudent person' standard was created which requires the application of modern portfolio theory, where trustees are required to make investments that would increase trust income but minimise risks.

Accordingly, the amendments to the law brought about portfolio management as the approved method of trust investment in New Zealand. Portfolio management is a recognised method of investment and one that satisfies the prudence test found in the Trustee Amendment Act 1988.

The TA permits the trustee to delegate its investment powers to professional investment advisers, something which most New Zealand trustees do if the trust is substantial and consists of financial assets, as opposed to the majority of trusts which tend to hold one primary asset, the family home.

Section 59 of the TA 2019 continues the 'prudent person' standard and adds two further considerations which require the trustee to have regard to the objectives or permitted purpose of the trust and the trustee's overall investment strategy.

7. Citizenship

7.1 Requirements for Domicile, Residency and Citizenship

New Zealand has several visa categories, some of which can lead to residency. The criteria for obtaining a visa for New Zealand is determined by the New Zealand government's Immigration Policy. In setting out the Immigration Policy, the New Zealand government considers the competing forces of economic growth, cost to the state and security.

The main categories for residency are as follows:

- Business Category;
- Family Category;
- Skilled Migrants; and
- Residence from Work.

The Business Category is best suited for those seeking to invest or operate a business in New Zealand. This category includes what is known as the Investor 1 and 2 category and the Entrepreneur Work and Residence Visa.

Other pathways to residency are subcategories of the Skilled Migrant category and Residence from Work.

Qualified and skilled migrants may be eligible for a work visa under the Long-Term Skill Shortage List Work category, the Talent (Accredited Employers) Work category or the Skilled Migrants category.

All these categories have different requirements and applications can be made based on the applicant's eligibility.

Citizenship in New Zealand is administered by the Department of Internal Affairs and can be obtained by descent or it can be granted. To be eligible for citizenship by descent, an applicant must have at least one parent who is a New Zealand citizen. To be eligible for citizenship by grant, an applicant must:

- have an intention to stay on in New Zealand;
- have held residence status for five years prior to making an application for residence;
- have a good understanding of English;
- be of good character; and
- have an understanding of the responsibilities and privileges of New Zealand citizenship.

Once an application is approved, the applicant is invited to make an oath of allegiance or an affirmation of allegiance at a citizenship ceremony.

The Department of Internal Affairs may choose to interview an applicant prior to granting them citizenship.

7.2 Expeditious Citizenship

An expeditious pathway to residency and citizenship can be through the Business Category (mainly the Investor 1 and 2 category visas). New Zealand's investor visas are open for all investors who want to gain residence in New Zealand.

To be eligible for an Investor 1 visa, applicants must:

- invest NZD10 million in an acceptable investment in New Zealand for three years;
- meet certain health and character requirements; and
- stay in New Zealand for at least 44 days per year in year two and three of the investment period.

Eligibility for the Investor 2 visa is based on a points system that requires applicants to first submit an expression of interest to Immigration New Zealand. Provided the applicant satisfies the visa criteria, they are awarded points and are then invited to apply for residency.

Points are awarded according to the applicant's age, health, character, English-language capabilities, business experience and investment funds. Once invited to apply, applicants must:

- invest a minimum of NZD3 million in New Zealand assets over four years;
- spend 146 days in New Zealand in each of the last three years of the four-year investment period or 438 days over the four-year investment period;
- have a minimum of three years' business experience;
- have sufficient English-language ability; and
- be under 65 years of age.

Applicants must prove investment funds were lawfully acquired by submitting high-level evidence, and New Zealand investments must fit the 'acceptable investment' criteria which can be:

- equity in New Zealand firms (public or private);
- bonds, issued by the New Zealand government, New Zealand local authorities or approved New Zealand banks, finance companies or firms;
- new residential property development that is not for the investor's personal use and designed to make a commercial return on the open market; and
- philanthropic investment (up to 15%).

Overall, the investment must be capable of making a commercial return under normal circumstances, contribute to New Zealand's economy and not be for the personal use of the investor.

8. Planning for Minors, Adults with Disabilities and Elders

8.1 Special Planning Mechanisms

Planning for minors and adults with disabilities is done through the use of trusts. Minors are protected through inter vivos trusts or inheritance trusts. Inheritance trusts provide certainty and security that assets will be held and protected for minors despite what the future may hold. These types of trusts offer benefits throughout the minor's or disabled adult's lifetime and assets held in trust can be distributed or applied for the benefit of the minors or disabled adults at any stage, even while the parents or caregivers are alive.

Some of these trusts are established by a will and are accompanied by a letter of wishes setting out what the parents or caregivers wish to happen with the trust fund.

8.2 Appointment of Guardian

Parents of children (mothers and fathers) are automatically guardians of their birth child and are referred to as the child's natural guardians.

People other than the natural guardians can become legal guardians through an appointment via the Family Court.

Other than testamentary guardians, the arrangement of appointments of guardians is governed by the Care of Children Act 2004 (the CCA) and the Oranga Tamariki Act 1989 (the OTA). A person other than the natural guardians can apply to become a caregiver of a child or young person under the CCA. The Family Court may then appoint that person as a guardian either in addition to an existing guardian or as sole guardian.

If a child is in need of care or protection, an additional guardian can apply to the Family Court for a guardianship order to be appointed as guardian.

Testamentary guardians are those appointed by a will. The appointment takes place upon the granting of probate. Testamentary guardians have certain guardianship responsibilities in contributing to the child's development, providing a safe and secure home, schooling, medical treatment and social aspects, such as language and culture. Responsibilities do not extend to providing day-to-day care for the child. If testamentary guardians wish to have the child in their care, they have to apply to the Family Court for a Parenting Order.

As testamentary guardians can be appointed after the death of only one of the child's parents, the testamentary guardian will then be a guardian alongside the surviving parent. Appointments can be challenged by the parent or existing guardian by way of an application to the Family Court.

8.3 Elder Law

People are encouraged to seek professional legal, financial and medical advice to plan ahead while they still have the legal capacity to do so and to sign documents.

A popular arrangement is the use of Enduring Powers of Attorney or what is commonly called an EPA. EPAs are legal documents which can be set up for 'personal care and welfare' and/or for 'property.' The document works while the donor is alive and allows someone else (the attorney) to act on their behalf if they cannot, or do not wish to, look after their own affairs. The attorney's main responsibility is to act in the donor's best interest.

An EPA for 'personal care and welfare' is set up to manage the donor's personal health and well-being. The appointed attorney will look after things such as accommodation and medical decisions. This EPA is invoked when the donor is no longer capable of making or communicating their decisions, and can only be given to one individual.

An EPA for 'property' is set up to manage the donor's financial affairs and assets. The donor can specify a certain date when they want the EPA to take effect if they wish to do so prior to becoming incapacitated. The donor can also give the appointed attorney full power over all their property, or limit the power to certain property.

The arrangement is different from a will as it deals with decisions taken while the donor is still alive and only comes to an end once the donor dies.

The person with powers of attorney can be a family member, a trusted friend or a professional such as a lawyer or accountant. For the elderly, an EPA can provide peace of mind that their well-being and property will be well looked after while they are alive.

EPAs are very specifically dealt with under New Zealand law and clients are required to seek independent advice before granting anyone an EPA. They are also encouraged to speak to the people they intend to name as their attorneys.

While other arrangements are recognised in New Zealand, an EPA under the laws of another country is unlikely to be recognised. Accordingly, migrants settling in New Zealand with New Zealand property, or those who may regularly spend time in New Zealand, are encouraged to make an EPA.

Without an EPA, loved ones and spouses must seek an order from the Family Court to deal with personal care and welfare. The order can be specific to an issue or it can appoint a welfare guardian to make general welfare decisions.

The same can be done for property, where the Family Court appoints a property manager to make decisions on how assets are to be dealt with.

9. Planning for Non-Traditional Families

9.1 Children

The adoption of children in New Zealand is governed under the Adoption Act 1955. Adopting a child in New Zealand requires the adoptive parents to make an application to the Family Court, and in most cases formal consent of the birth parents is required.

If the child being adopted is not from New Zealand, then it is considered an inter-country adoption and that is governed under the Adoption (Inter-Country) Act 1997.

New Zealand law considers the birth mother and her partner as the legal parents of a child. The birth parents are named on the child's birth certificate and are the parents for all legal purposes. In order to become the legal parents of the child, the intending parents or guardians must file an adoption application and legally adopt the child.

Accordingly, all laws relating to inheritance apply as if the child was born to the adoptive parents.

Children born to a surrogate mother are considered to be her legal children. While surrogate pregnancy arrangements are recognised in New Zealand, commercial surrogacy is illegal.

Under a surrogate pregnancy arrangement, the intending parents have no parenting rights over the child regardless of whether one or both of them donated their genetic material for the pregnancy.

Becoming the legal parents of the child requires the intended parents to file an adoption application through the Family Court. The court must also be satisfied that the intended parents are fit and proper people capable of adopting the child. The surrogate mother and/or her partner must consent to the adoption.

Adopted children have the same inheritance rights from their adoptive parents as the biological children of those parents. The same applies for children who are born to parents outside the traditional arrangement of marriage.

Adopted children have the right to receive property from their adoptive parents under New Zealand's intestacy laws. For example, if a parent dies without a will or an estate plan, the adopted children have the same rights to the estate as the biological children. The Family Protection Act 1955 allows adopted children to claim against the estate if they are not adequately provided for in the will.

9.2 Same-Sex Marriage

Unions of same-sex couples have been recognised in New Zealand since 2005 under the Civil Union Act 2004.

In 2013, the definition of marriage found in the Marriage Act 1955 was extended to include same-sex couples and defined marriage as the union of two people, regardless of their sex, sexual orientation, or gender identity. Accordingly, same-sex marriage is recognised in New Zealand.

10. Charitable Planning

10.1 Charitable Giving

New Zealand's tax treatment of charities encourages charitable giving, as it offers a tax deduction to the donor. Charitable organisations that are registered can be granted an exemption from income tax.

Provided the charitable organisation is an approved donee, individuals can claim a 33.33% tax rebate on the amount they donate. Companies can also claim a tax deduction for donations made to an approved donee providing the claim does not exceed the company's total annual net income.

An approved donee is a non-profit organisation which can include a society, association or a group. The organisation can be incorporated or unincorporated. The activities of the organisation must not be conducted for profit or the gain of any member, and the rules of the organisation must not allow any money or property to be distributed to any member. Approved donees can also include overseas aid organisations.

Many people donate a portion of or all of their estate to charities whether through their family trusts or through their wills. Some also create charitable trusts through their will.

10.2 Common Charitable Structures

Charities in New Zealand can be set up and run through charitable trusts or incorporated societies.

Charitable Trusts

Charitable trusts are subject to the same rules as any other trust. However, to be registered under the Charitable Trusts Act 1957, a charitable trust must exist for a charitable purpose.

The trust must have a deed of trust or a document setting out the aims of the trust and how it will be run. It is important that there is a clear intention to donate property for a charitable purpose, which must be clearly defined as having a purpose for the benefit of the community.

When making an application to register the charitable trust with the Registrar of Incorporated Society, it is important to show that the trust's activities are lawful and there will be no personal gain from the assets of the trust by a private individual.

The Charitable Trusts Act 1957 allows for trustees of a charitable trust to become incorporated as a charitable trust board. As a charitable trust board, it is easier for them to hold money or assets and carry out activities for charitable purposes, as they can limit their liability. Furthermore, they can have perpetual succession.

Incorporated Societies

An incorporated society is an organisation registered and incorporated under the Societies Act 1908. To be eligible for registration, the organisation must exist for a lawful purpose, not be primarily commercial in purpose and should not distribute profits to private individuals or shareholders etc.

When registered, an incorporated society gains its own legal identity which separates it from the identity of its members. This means its members are generally not personally liable for the society's debts, contracts or other obligations and the society can continue to exist as a legal entity even though its membership may change.

Under the Societies Act 1908, an incorporated society cannot operate for financial gain and must have at least 15 members. The members must also have a set of rules that set out in detail the purpose of the society, how it will be managed, how members can join, how meetings will be conducted and how its assets will be used and handled.

An incorporated society can enter into contracts in its own name, purchase or sell property and borrow funds in its own capacity.

If the incorporated society's aim and purpose is exclusively for charitable purposes and its board of trustees, members or associates are operating a non-profit organisation, it can then register with the Charities Services, and apply to the Inland Revenue Department to have a non-profit tax exemption.

Cone Marshall Limited

Level 3
18 Stanley Street
Auckland 1010
New Zealand

Tel: +64 9 307 3950
Fax: +64 9 366 1482
Email: gcone@conemarshall.com
Web: www.conemarshall.com