DRAFTING TRUSTS AND WILL TRUSTS IN NEW ZEALAND

Reviewed by Ken Lord in LawTalk 28 January 2011

Every lawyer in New Zealand who acts for clients setting up trusts or will trusts should have access to, or own, a copy of this book.

The reasons are that the book is easy to read, contains practical and legal guidance on an extensive range of trust issues, with authority referred to on the same page as the guidance, and has excellent precedents for the trust practitioner to use.

It is an easily digested 348-page practical guide to drafting trusts and will trusts. (I read it during my summer break instead of a novel or four!). From the first few pages, important lessons are taught to the reader – better learned by reading this book than courting litigation. As an example, the reader is advised of the importance of involving a medical practitioner to ensure capacity by an infirm client when he or she makes a will. The short introductory chapter headed “First Principles” hammers home the importance of good drafting – disastrous tax and other consequences follow slovenly drafting.

To assist the draftsperson, Chapter 2 is tantamount to a style guide for New Zealand trusts and wills. Topics covered include punctuation, use of capitals (for Dickens, capitals offered “a resting place in the immense desert of law...to break the awful monotony and save the traveller from despair”! (page 10)), sentence length, and indentation. The text moves the reader quickly through the topics, practising what it preaches by using numbered paragraphs and keeping them short.

Not only does the work have good forward momentum, particularly over questions of style and pragmatic guidance, but the book also frequently deepens into substantive law. A scholarly purvey of the law relating to principles of construction, for example, is set out in Chapter 3, arguing for a more “purposive approach” (page 35) when construing the meaning of words in trusts and wills.

Sprinkled throughout the book are examples of clauses that have been used by New Zealand drafters but which are defective. Each clause is set out in full, criticised, and a solution offered. This mode of dealing with problem clauses is very helpful, as everything the reader needs is contained on the one page – the problem, and the precedent solving the problem. For example: “What, then, is the answer to the problem of the profligate beneficiary? The best solution is also a simple one: the beneficiary’s interest should be *terminable at the trustee’s discretion...*the problem is solved” (page 40).

James Kessler QC and Kerry Ayers discuss provisions relating to beneficiaries, trustees, trust property, the rule against perpetuities, life tenancy trusts, and trustee powers, to name a few of the chapter headings. They have a practical chapter entitled “Wills and Residential Care Fee Planning”.

It is very useful to keep the reader’s focus by having each page headed up with the name of the paragraph and topic addressed on that page. The book is very practical. Excellent precedents are available both in text and online.

In conclusion, therefore, the book is a must for every trust practitioner. Do not be daunted by the number of pages. The convenient headings, headings, index, page layout, and clear language will make it accessible.

Ken Lord is Convenor of the Trusts and Wills Committee of the Property Law Section, and the author of Chapter 8 Law of Trusts. Ken joined Parry Field Lawyers in 1980 becoming a partner with Peter van Rij in September 1980. Ken’s focus is on property and personal law with strong interests in issues relating to the elderly and charitable trusts and an interest in resource management law. Ken is an active member of a Rotary Club (President in 2002) as well as a keen musician and, more recently, a road cycling racer.

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