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THE PERILS OF BEING AN INDEPENDENT TRUSTEE

Resignation Does Not Automatically Release a Trustee

If you retire as a Trustee your personal liability only ends once one of the following occurs:

- (a) If you are the Sole Trustee, you are replaced by another person as Trustee (Section 43(2)(c) of the Trustee Act 1956);
- (b) If there are two Trustees, you are replaced by another person as Trustee (Section 43(2)(c) of the Trustee Act 1956); or
- (c) If there are more than two Trustees, there are still at least two Trustees remaining at the time of your resignation.

So what most Trustees do not realise is that if none of the above occurs you will still be personally liable for the Trust's acts and omissions.

Tax Implications

The Income Tax Act 2007 provides that Trustees are jointly and severally liable for paying the income tax of the Trust. This means that if your Co-Trustees have not been paying tax, then you, as Independent Trustee, will need to pay the Trust's tax from your personal funds if the IRD seeks payment.

A Trustee is also personally liable for any GST payable by the Trust. Even if the Trustee has retired, they will continue to be liable, until the time the Trustee gives written notice to the commissioner of IRD that they have retired. The Trustee will still however be liable for GST up to the day they give notice.

Creditors' Claims

If a claim is filed against a Trust by creditors, then the Trustees are personally liable to meet the claims. For example in a recent case involving the BNZ, two Trustees attempted to retire prior to claims being made by BNZ. The Court rejected the Trustees' resignations and held that the two Trustees were still personally liable to the creditors.

In another recent case a Trust had entered into a transaction with a company. The Independent Trustee had no knowledge of the transaction or that the company was insolvent at the time. The creditors of the company subsequently sued the Trustee, who had retired since the transaction, and the Court held that the Trustee was liable to pay the sum of \$928,937 to the liquidators.

Claims by Beneficiaries

There is a growing trend of beneficiaries suing Trustees. Beneficiaries in the past have made the allegations against Trustees that did not follow a Memorandum of Wishes or followed one when they should not have, favoured one beneficiary over another without justification, did not invest Trust's assets properly, etc.

Where such claims are made by a beneficiary most Independent Trustees believe that they can use Trust funds to defend themselves against the claim and/or have the right to be indemnified out of Trust funds. However the rule applied by the Courts, is that if the litigation is 'hostile', which claims against Trustees by beneficiaries have been held to be by the Courts, then Trustee cannot use Trust funds to defend themselves. This means Trustees will have to use their own personal resources to cover the cost of the litigation, which could be costly.

In Conclusion

We would strongly suggest that you should seriously consider rejecting an offer to be Independent Trustee, as there is too much risk for you personally if something was to go wrong.

20 MINUTE FREE

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