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# New Zealand

## International Estate Planning Guide

Individual Tax and Private Client Committee

Contact:

Claudia Shan

Cone Marshall

*Auckland*

[cshan@conemarshall.com](mailto:cshan@conemarshall.com)

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## I. Wills

### A. Will formalities

To be valid under New Zealand law, a will must be:

- in writing (a valid will may be handwritten or typed);
- signed at the end by the testator and two witnesses, with all three being present together, and with all three seeing each other sign (it should be noted that, in response to the Covid-19 pandemic, the New Zealand Government has introduced a temporary measure permitting wills to be signed and witnessed using audio-visual links, thereby suspending the requirement for the testator and the two witnesses to be in each other's physical presence when they signed);
- intended by the testator to take effect as a will; and
- made at a time when the testator had testamentary capacity.

Where a purported will does not meet the formal requirements listed above, section 14 of the Wills Act 2007 empowers the High Court of New Zealand to declare the purported will to be valid if it is satisfied that the document expresses the deceased person's testamentary intentions. In assessing the validity of the purported will, the court may consider:

- the document;
- evidence on the signing and witnessing of the document;
- evidence on the deceased person's testamentary intentions; and
- evidence of statements made by the deceased person.

The introduction of this provision has empowered the New Zealand courts to hold valid many purported wills that were made without adherence to the traditional legal formalities for valid wills.

A will may be revoked by the testator at any time.

### B. Testamentary capacity

A will may not be admitted to probate in New Zealand if it is not established that the testator possessed legal capacity at the time of making the will. The test for testamentary capacity in New Zealand was confirmed by the New Zealand High Court in *Woodward v Smith* [2009] NZCA 215 where it was confirmed that the testator must understand:

- the nature and effect of making a will;
- the extent of the property that the person has for disposal; and
- the moral claims of potential beneficiaries when making the will.

This is an endorsement of long-standing legal principles regarding testamentary capacity. In the case of elderly or vulnerable clients, lawyers should exercise care to ensure that the client possesses the requisite testamentary capacity at the time of making a will. However, in the decision of the Supreme Court of New Zealand in *Sandman v McKay* [2019] NZSC 41, it was recognised that where a lawyer is instructed to make a will, but suspects that the client may lack capacity, it is not up to the lawyer to determine capacity and, on balance, the position is arguably that a lawyer should nevertheless draft and arrange for execution of a will. Nonetheless, it will always be prudent for a lawyer to arrange for a medical certificate to be obtained if there is any concern around capacity. Significant reliance was placed by the court on contemporaneous documentation in this case, and this should also serve as a reminder to lawyers of the importance of taking comprehensive file notes and recording observations or concerns about capacity in legal advice and correspondence.

### C. *Wills made outside New Zealand*

Dispositions of property in New Zealand under a will made in another jurisdiction will be valid in New Zealand provided that the disposition was valid under:

- the law of the place where the will was made;
- the law of the place where the person was domiciled when the will was made;
- the law in force, when the will was made, in the place where the person had his or her domicile of origin; or
- the law of the place where the person was domiciled when he or she died.

## II. **Administration of estates**

### A. *Testate succession*

When a person dies, his or her property is administered by personal representatives. If the personal representatives were appointed in the will, they are known as executors. Where there is no will, they are appointed by the court and are known as administrators.

Where executors are appointed under a will, their authority to deal with the estate is confirmed by the High Court in a grant of 'probate'.

Applications to the High Court for grants of probate require the submission of the original will together with a number of formal documents, including an affidavit affirming that the person who made the will has died, and evidence of where the deceased was living just before he or she died and stating that the will is the deceased's last will.

Once the court has granted probate, a will becomes a public record and it is possible to request a copy of it from the court.

Following the grant of probate, the assets of the deceased vest in the personal representative, who is responsible for distributing the assets of the estate in accordance with the terms of the will (and any applicable court applications that might affect the distribution of the estate).

### B. *Intestate succession*

Section 77 of the Administration Act 1969 sets out who is entitled to benefit if a person dies without a valid will. If there is a will, but it only deals with part of the estate, then section 77 will apply to the part of the estate not covered by the will.

Under the rules of intestacy, the estate of the deceased will be distributed depending on the persons who survive him or her:

- Where there is a spouse/partner, but no parents, children or other descendants, the spouse or partner will receive the whole estate. Civil union partnerships, de facto partners or same sex partners are all included.
- Where the deceased is survived by a spouse/partner *and* children or other descendants, the spouse/partner will receive the personal chattels (ie, boats, cars, furniture, clothing, jewellery etc) plus NZ\$155,000 (with interest) and one-third of any remaining assets. The amount of NZ\$155,000 increases in line with inflation. Interest is payable on this amount from the date of death to the date it is paid out. The rate of interest paid also increases in line with inflation. The children/descendants will receive the remaining two-thirds. If they have passed away, their share will go to their children, and so on for each generation.
- Where there is a spouse or partner *and* parents, but no children/descendants, the spouse/partner is entitled to personal chattels, NZ\$155,000 and two-thirds of the remainder. The parents will receive the remaining one-third.

- Where there are children/descendants but no spouse/partner, the estate will be shared equally among the children. If any of the children/descendants have died, their children will receive their share.
- Where there is no spouse/partner and no children/descendants, but the deceased is survived by parents, the estate will be divided equally among the parents.
- Where there is no spouse/partner, no parents and no children/descendants, but there are surviving siblings, the whole estate will be divided equally among these siblings, or their children if they have passed away.
- Where none of the above survive, but there are grandparents or uncles/aunts, half the estate will go to the mother's side of the family and half will go to the father's side.
- If the deceased is not survived by any of the above, the entire estate will belong to the New Zealand Crown. If there is a surviving dependant person, or persons who had reasonable grounds to have benefitted from the estate, an application may be made to the New Zealand Treasury to receive a share in the estate.

### C. *Forced heirship*

New Zealand succession law operates on the basis of testamentary freedom and does not have any forced heirship rules.

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 his or her lifetime to make provision for a person in his or her will, and the satisfaction of that promise from the estate where no provision has been made for the person challenging the will. Additionally, the Family Protection Act 1955 allows the court to make orders mandating departure from the provisions of the will where inadequate provision has been made for persons to whom the testator owed a moral obligation of financial support.

## III. **Trusts**

Trusts are a common feature of New Zealand estate planning for both resident and non-resident settlors. Trusts are commonly used for family succession, asset protection, to hold businesses and real property, financial assets, art/car/wine 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.

A non-resident settlor may establish a 'foreign trust'. The trust's worldwide income is exempt from tax in New Zealand on the basis that the settlor is not tax resident in New Zealand. Foreign trusts are typically used to hold a variety of assets and multiple jurisdictions either directly or through a holding company or New Zealand limited partnership.

New Zealand trust law has recently been significantly modernised by the enactment of the Trusts Act 2019 (TA 2019), which entered into force on 30 January 2021. This act is a snapshot of many of the pre-existing trust law principles that had been recognised by the New Zealand courts prior to the enactment of the act. The TA 2019 makes few significant changes to New Zealand's pre-existing trust law as developed by the New Zealand courts, but simply places these principles into legislation. Where the TA 2019 is silent, or there is a question of interpretation, existing rules of common law and equity continue to apply. Some of the key features of the TA 2019 are discussed below.

The TA 2019 represents a monumental overhaul of trust law as it replaces the previous Trustee Act 1956, which was not designed to facilitate the management and administration of trusts. The TA 2019 clarifies the high standards imposed on trustees, as well as the protections they have under the law. It also makes the law accessible to settlors and beneficiaries in terms of their rights and protections.

A trust is established when a person, known as the settlor, transfers the legal ownership of assets to trustees, who will then hold the trust property for the benefit of the trust beneficiaries. It is important to note that, unlike a company, a trust is not a separate legal entity under New Zealand law.

While legal ownership of the trust assets is held by the trustees, the trustees hold these assets for the benefit of the trust's beneficiaries and are under a fiduciary duty to act in the interests of the beneficiaries.

It is permissible for the settlor to act as a trustee of the trust, but it is important to note that, from the date that the assets are settled on the trust, these assets cease to be the property of the settlor and become part of the trust fund that must be managed by the trustees under the terms of the trust deed. However, it is important to note that the settlor may not be the sole trustee if he or she is the sole beneficiary as it could be argued that the settlor has not released beneficial and legal ownership of the assets. Structuring a trust in this manner runs the risk of the trust being set aside by the courts as a 'sham trust'.

The majority of trusts fall into one of two broad categories, namely discretionary trusts and fixed trusts. In the case of a discretionary trust, each of the trust beneficiaries holds an equal, indivisible beneficial interest in the trust fund. It is important to note that none of the beneficiaries holds any fixed interest in any portion of the trust assets. Rather, each of the beneficiaries has an entitlement to be considered for distributions from the trust, at the discretion of the trustee. The settlor of a trust can also be named as a beneficiary of the trust. The trustee of a fixed trust does not enjoy the same discretion, as the terms of the trust give beneficiaries a fixed interest in the income and capital of the trust in proportion to their respective interests. The trustee is therefore under an obligation to make distributions from the trust only in accordance with the entitlements of the beneficiaries.

#### *A. Benefits of trusts in estate planning*

The key benefits of trusts from an estate planning perspective include the following:

- As the trust property is no longer under the legal ownership of the settlor, the trust assets will not be inherited under the terms of the will (or under the rules of intestacy).
- A trust may be used to preserve assets for future generations – rather than passing all assets to the next generation only.
- Additionally, trusts may be used to provide for children with disabilities or to provide for children who cannot manage their own affairs (for reasons other than a disability). Where a settlor does not wish such children to receive assets in their sole name, either under a will or on intestacy, the assets may be placed in trust, so that the assets can be managed on behalf of the beneficiaries by the trustee.
- Trusts may also offer protection of assets from creditors and/or the spouses of beneficiaries.

#### *B. Rights of trust beneficiaries*

The TA 2019 clarifies beneficiaries' rights and provides many protections for them. A beneficiary may apply to the court to review the exercise of a person's power to remove or to appoint a trustee under section 95 of the TA 2019. A beneficiary will need to make a preliminary case to the court before his or her action may proceed. The court will examine

the way the decision was made rather than whether the person made the 'correct' decision. The court will not substitute its decision but rather review whether the person acted within their legal powers as set out in the trust deed and the TA 2019.

The TA 2019 restates many of the common law principles regarding the duty of trustees to disclose trust information to beneficiaries. Sections 45–48 of the TA 2019 require trustees to retain core trust documents, which includes the trust deed (including any variations); records of the trust property (appropriate to its value and complexity); records of trustee decisions; contracts; accounts and financial statements; documents appointing, removing or discharging the trustee; letters of wishes; and any other documents necessary for the administration of the trust. Trustees must keep these documents for the duration of their trusteeship and are required to pass the documents they hold to a continuing or replacement trustee.

The express purpose of the disclosure provisions is to ensure that beneficiaries have sufficient information to enable the terms of the trust and the trustees' duties to be enforced against the trustees. The TA 2019 employs two presumptions regarding the discretion of trustees to disclose trust information to beneficiaries.

Section 51 of the TA 2019 provides for a presumption for the trustee to notify the beneficiaries of the trust. This section contains a presumption that a trustee must provide basic trust information to every beneficiary (or their representatives). Basic trust information comprises the fact that a person is a beneficiary of the trust; the name and contact details of the trustee; the details of appointments, removals and retirements of trustees as it occurs; and the right of the beneficiary to request a copy of the terms of the trust or trust information.

Section 52 also provides for a trustee's presumption to disclose information to beneficiaries. This presumption sets out that a trustee must give trust information on request to at least one beneficiary (or their representative). 'Trust information' as set out in this section is a broader category than 'basic trust information' that includes any information regarding the terms of the trust, the administration of the trust, or the trust property that is reasonably necessary for the beneficiary to have to enable the trust to be enforced. Trust information expressly does not include reasons for trustees' decisions.

Neither the presumption to notify or the presumption to disclose are absolute. The trustee still has discretion to decide whether or not to disclose the information. Section 53 of the TA 2019 sets out a list of factors that the trustee must consider before disclosing information to beneficiaries. These factors include (but are not limited to) the following:

- the nature of the interests in the trust held by the beneficiary and the other beneficiaries of the trust, including the degree and extent of the beneficiary's interest in the trust and the likelihood of the beneficiary receiving trust property in the future;
- whether the information is subject to personal or commercial confidentiality;
- the expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole and the beneficiary in particular would be given information;
- the age and circumstances of the beneficiary;
- the age and circumstances of the other beneficiaries of the trust;
- the effect on the beneficiary of giving the information;
- the effect on the trustees, other beneficiaries of the trust and third parties of giving the information;
- in the case of a family trust, the effect of giving the information on relationships within the family;

- the relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole;
- in a trust that has a large number of beneficiaries or unascertainable beneficiaries, the practicality of giving information to all beneficiaries or all members of a class of beneficiaries;
- the practicality of imposing restrictions and other safeguards on the use of the information (eg, by way of an undertaking, or restricting who may inspect the documents);
- the practicality of giving some or all of the information to the beneficiary in redacted form;
- if a beneficiary has requested information, the nature and context of the request; and
- any other factor that the trustee reasonably considers is relevant to determining whether the presumption applies.

Once these factors are considered by the trustee, the trustee may make a decision on whether the presumptions in clauses 51 and 52 apply, if the trustee is of the reasonable belief that these presumptions do not apply, he or she may withhold some or all of the basic trust information the beneficiaries and/or refuse a beneficiary's request for trust information.

Typically, a trustee is recommended to provide trust information to at least one beneficiary, in addition to the settlor if he or she is also a beneficiary because a trustee is not permitted to extinguish its duty to account.

#### **IV. Taxation**

##### *A. Domicile and residency*

###### 1. INDIVIDUALS

Under section YD 1 of the Income Tax Act 2007, a natural person will be considered a tax resident in New Zealand if:

- the person is personally present in New Zealand for more than 183 days in total in any 12-month period and has not become a non-resident;
- the person has a 'permanent place of abode' in New Zealand, even if he or she also has a 'permanent place of abode' elsewhere; or
- the person is away from New Zealand in the service of the New Zealand Government.

Citizenship or visa status is not determinative of residency for tax purposes.

###### 2. PERMANENT PLACE OF ABODE

As set out above, in addition to the 183-day rule, a person may also be considered a New Zealand tax resident under the second test (permanent place of abode) even if the 183-day rule is not satisfied. A permanent place of abode is not defined in the Income Tax Act 2007. However, guidance from the Inland Revenue Department (IRD) states that to have a permanent place of abode in New Zealand, there must be somewhere in New Zealand (ie, a house or other dwelling) where a person habitually resides from time to time. Determining this requires an overall assessment of his or her circumstances and the nature and quality of the use he or she habitually makes of the place of abode.

In determining whether an individual has a permanent place of abode in New Zealand, the IRD would look at all the circumstances, including the following:

- how much time the individual spends in New Zealand and whether he or she is there continuously or from time to time;

- how the individual has previously used the accommodation he or she has in New Zealand and the individual's connection with it, that is, whether he or she owns it, leases it or controls it;
- where the individual's family lives (especially immediate family) and if he or she belongs to any New Zealand clubs, associations or organisations;
- if the individual has bank accounts, credit cards, investments, life insurance or superannuation funds in New Zealand; and
- if the individual has vehicles, clothing, furniture and other property or possessions kept in New Zealand.

### 3. TRANSITIONAL RESIDENCY

New Zealand's transitional residency rules may allow individuals becoming tax residents in New Zealand to qualify for a temporary tax exemption on some of their foreign income during their first four years in the country.

A person who qualifies for the exemption will be known as a 'transitional resident' for the duration of the exemption period.

The temporary tax exemption is available to those who:

- qualify as a tax resident in New Zealand on or after 1 April 2006; and
- are new migrants or returning New Zealanders who have not been resident for tax purposes in New Zealand for at least ten years prior to qualifying as a tax resident in New Zealand (transitional residents).

The exemption can only be granted once in a lifetime, and a person cannot extend his or her tax exemption or renew it after its expiry date. The temporary tax exemption for foreign income is for four calendar years (up to 49 months). The exemption starts on the first calendar day of the month that the individual qualifies as a tax resident in New Zealand and ends on the last calendar day of that month four years later.

The tax exemption is automatically granted if a person qualifies. The person is required to provide the IRD with accurate information and to notify it of any foreign income that is not tax exempt by filing an IR3NR (non-resident income tax return) every year, as long as they have foreign income.

The following types of foreign income are *not* tax exempt in New Zealand:

- employment income from overseas employment performed while living in New Zealand; and
- business income relating to services performed offshore.

If an individual (including a transitional resident) has either of these types of income, the individual must declare them on his or her individual tax return from the date of his or her arrival in New Zealand.

When a person's tax exemption expires, the person ceases to be a transitional resident and must include all his or her foreign income when the person files his or her IR3 (individual tax return) along with his or her New Zealand income. The person must file an income tax return after the end of his or her exemption, and every tax year after that, as long as the person has foreign income, regardless of whether or not the person notified the IRD of his or her foreign income upon his or her arrival.

Dividends paid by overseas companies to transitional residents and capital gains derived from foreign sources will not be subject to income tax in New Zealand during the four-year exemption period.

#### 4. COMPANIES

A company will be tax resident in New Zealand if it meets any of the following criteria:

- the company was incorporated in New Zealand;
- the company has its head office in New Zealand;
- the company has its centre of management in New Zealand; or
- control by the company's directors is exercised in New Zealand.

##### B. *Gift, estate and capital taxes*

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

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

As mentioned above, New Zealand does not have capital gains tax and, typically, no tax will be levied on gains arising from the sale of shares. However, such gains will be taxable where the IRD considers the seller to be a 'trader'. While there is no precise definition of a 'trade' in the New Zealand tax code, a person will typically be considered a trader where he or she purchases the shares with the intent of selling them for a profit (as opposed to buying and holding long term to earn dividend income), or are in the business of trading shares. The primary factors that the IRD will consider are trading patterns and the frequency of trades to determine whether a person is a trader.

For traders, their capital gains are considered taxable income. However, one advantage that traders have is that they can claim capital losses on shares against future gains to reduce their taxable income. In addition to the aforementioned rules relating to the sale of shares, similar rules are applied by the IRD to the purchase and sale of residential property. As a general rule, where a New Zealand tax resident purchases residential property that he or she subsequently sells, the sale proceeds will not be taxable if the property is the seller's main home or was purchased as a long-term investment property.

In assessing whether the sale proceeds will be subject to tax in New Zealand, the IRD will consider two tests. First, the IRD will apply the 'intention test' to determine the intention of the seller on the date he or she purchased the property. If the property is purchased with a

firm intention to resell the property, then the sale proceeds will be taxable. As in the case of buying and selling shares, one of the factors which the IRD will take into account to determine the seller's intention is that person's history of buying and selling properties. If the person has a pattern of buying and selling property, then he or she may be considered a property dealer and may have to pay tax when they sell property.

The second rule applied by the IRD is the 'bright-line property rule'. If a person buys and sells a property (other than his or her main home) purchased on or after 29 March 2018, within five years, they will incur tax on the income earned from the sale. This rule applies regardless of the intention when the property was purchased.

### C. *Income tax rates*

#### 1. INDIVIDUALS

New Zealand tax residents are subject to New Zealand income tax on worldwide income and New Zealand-sourced income. The current income tax rates are as follows:

<i>Taxable income (New Zealand dollar)</i>	<i>Income tax rate (%)</i>
Up to 14,000 per year	10.5
14,001–48,000	17.5
48,001–70,000	30
70,001–180,000	33
Remaining income over 180,000	39

An individual's taxable income includes the following sources:

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

#### 2. COMPANIES

The worldwide and New Zealand-sourced income of companies is taxed at 28 per cent.

#### 3. TRUSTS

Whether a trust will be liable to tax in New Zealand depends on whether the trust is established by a New Zealand resident settlor or is a foreign trust, established by a non-New Zealand resident settlor, and the trustee is tax resident in New Zealand.

A complying trust is a domestic New Zealand trust that has been established by a New Zealand resident settlor. Complying trusts are taxed at a rate of 33 per cent on worldwide and New Zealand-sourced income.

New Zealand law also recognises 'foreign trusts', which are established by a non-resident settlor and have 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 per cent. Provided that 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 and the settlor has not made an election of the IRD. Distributions of capital gains and income from a non-complying trust are taxed as beneficiary income or taxable distributions at a rate of 45 per cent.

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