

Removing a trustee with dementia

The incidence of dementia is now so common in the community that all trust deeds should contain a mechanism to enable the speedy and inexpensive removal of a trustee who loses cognition



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The Court of Appeal's decision in *Mason v Triezenberg & Another* [2022] NZCA 138 highlights two things: the ignorance of many trustees of their duties, especially their duty to act impartially, and the need for trust deeds to have provisions enabling trustees who develop dementia to be removed and replaced.

The case involved Alexander and Wendy Mason who settled two trusts. Over the course of time, Wendy Mason developed dementia and became wholly unable to act as a trustee.

I deal with the topic of trustee ignorance first. The High Court removed Alexander Mason as a trustee for a catalogue of deficiencies. In my practice in trust litigation, I see many similar cases.

Here are some of the reasons why the Court of Appeal said Mason should be removed:

- disputes between the trustees had led to legal expense and significant cost;
- the need to involve lawyers was "inappropriate and unsustainable";
- there was no prospect of the trustees being able to work together on an ongoing basis;
- future disputes were inevitable and recourse to a dispute resolution mechanism would involve "disruption, delay and cost that would erode trust assets";
- Mason "did not believe in the concept of trusts and regarded the assets as his and his wife's and in respect of which he should be able to do with them as he liked";
- Mason was not well placed to actively consider the management of trust assets and the exercise of discretions;
- he "was no longer capable of giving fair and impartial consideration to two beneficiaries";
- he had fallen out with his two co-trustees, his lawyer, medical professionals and caregivers of a beneficiary; and
- he was 'extremely hostile' to his co-trustees and two of the beneficiaries.

With the large number of small family trusts in New Zealand,

it is inevitable that many trustees will manifest these types of failings. They ought to know their removal as trustees is also inevitable.

I turn to the second lesson from the case. As time went on, one of the trustees succumbed to dementia. Removing a trustee who suffers from dementia is problematic in ways that were illustrated by the two trust deeds in this case.

Alexander Mason did not have the power to remove and appoint trustees. That power was vested in both him and his wife and she couldn't make a decision about her removal as she had dementia. He therefore purported to remove her pursuant to s 43 of the Trustee Act on the grounds that she was incapable of acting as a trustee.

His attempt to remove her under s 43 was held to be invalid. So long as his wife was alive, she remained a person who was required by the trust deed to participate in a decision to remove herself as a trustee.

The court held that a requirement to involve the participation of a "continuing trustee" probably included a trustee who had lost capacity and that "the appropriate procedure was to apply to the court" for an order to remove a cognitively-impaired trustee and an order to appoint a replacement. The purported removal of Wendy Mason pursuant to s 43 was therefore invalid.

One of the two trust deeds in this dispute authorised each settlor to appoint and remove a trustee. It was held that this clause didn't authorise Alexander Mason to remove two trustees as they had not been appointed by him.

The outcome was that the deed by which Mason purported to remove his two co-trustees was held to be "invalid and of no effect".

The lesson from this case is obvious. The incidence of dementia is now so common in the community that all trust deeds should contain a mechanism to enable the speedy and inexpensive removal of a trustee who loses cognition. ■

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