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Why trustees must consider a settlor's intentions

WILLS & TRUSTS OPINION

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The emphasis in the Trusts Act 2019 on the need for a trustee to take account of a settlor's intentions is beginning to be recognised by the courts.

For example, in *Bartlett v Kirkpatrick & Others* [2024] NZHC 1923 Harland J considered a settlor's intentions and, to a limited extent, the significance that should be given to them [56-58].

The Trusts Act's focus on the need for both trustees and the courts to give consideration to a settlor's intentions can be seen from a number of sections in the Act, including the following:

- Section 4(a) which requires that "a trust should be administered in a way that is consistent with its... objectives". The objectives of a trust will be the purposes the settlor intended the trust to achieve.
- Section 21 which provides that trustees must "have regard to the objectives of [a] trust". It says "in performing the mandatory and default

duties set out in the Act", a trustee must "have regard to the ... objectives of the trust".

- Section 26(b) which provides that when a trust has a "permitted purpose", the trustees must attempt to "further the permitted purpose of the trust". The precise words of the section are that trustees must "in the case of a trust for a permitted purpose, ... further the permitted purpose of the trust".

The words "permitted purpose" are defined in s 9 as meaning "a charitable purpose and any other purpose for a trust that is permitted at law and specified in the terms of the trust"."

- Section 27 which uses the term "proper purpose" rather than "permitted purpose". The two terms are different. A permitted purpose is one that it is said to be "specified in the terms of the trust" whereas a "proper purpose" can be either specified in the terms of the trust or can be discerned from the terms of the trust or elsewhere.

The term "proper purpose" is not defined in the Act but its meaning is well established elsewhere in trust law: see, in particular, the Privy Council's decision in *Grand View Private Trust Co Ltd v Wong* [2022] UKPC 47.

- Section 45(h) which provides that a memorandum of wishes has the status of a "core trust document". This section elevates a settlor's intentions for a trust he or she has created to the status of a core trust document and, by doing so, shows Parliament's intention that trustees must give appropriate emphasis to a settlor's intentions as expressed in such documents or indeed elsewhere.
- Section 59(1)(a) which provides that a trustee, when exercising a power to invest, must "have regard to ... the objectives of the trust and the permitted purpose of the trust". This section, together with ss 4(a) and 21, uses the word "objectives" of a trust, being a clear pointer to the objectives that a settlor intends a trust to achieve.
- Section 94 which provides that when a person exercises a power to remove or appoint a trustee, the person must exercise the power "for a proper purpose" – ie, for the purpose for which it was conferred by the settlor.
- Section 124(4)(c) which provides that when a court is asked to approve the termination, variation, or re-settlement of a trust, it "must take into account ... the intentions of the settlor of the trust in settling the trust, if it is practicable to ascertain those intentions".

- Section 125(3)(c) which provides that, when a judge is asked to waive the requirement of consent to the termination, variation or resettlement of a trust, he or she must "take into account... the intentions of the settlor in settling the trust, if it is practicable to ascertain those intentions".

It should be noted that none of these provisions says trustees and judges must *implement* the intentions of the settlor.

But it is implicit in the many references to the need to consider the settlor's intentions and that both trustees and the courts should strive to implement them unless there are compelling reasons not to do so.

Potential challenges

The focus in the Act on the need for trustees and judges to consider the intentions of a settlor for his or her trust is bound to give rise to a substantial body of new case law.

If trustees make decisions without referring to a settlor's intentions, it can be anticipated that the decisions may be challenged. Similarly, if reference is made to the settlor's intentions but the decisions of the trustees and the courts substantially ignore them, it can be anticipated that those decisions may be challenged.

If trustees have a checklist of factors to take into account when making decisions, it may be appropriate to record their assessment of the settlor's intentions for the trust and perhaps say whether they consider their decision accords with them, although keeping a record of this nature, if it is given to beneficiaries, will potentially expose their decision to criticism and may run counter to the general principle that trustees do not have to give reasons for their decisions.

If trustees decide on balance that it is best not to give such details to beneficiaries, they must nevertheless be prepared to inform the court of their understanding of the settlor's intentions and how they believe they have given effect to them. Or, if they have made a decision that differs from the settlor's intentions, why they believe it was appropriate to do so.

Overall, the emphasis in the new Act on trying to implement a settlor's intentions is sound.

A settlor will always hope the trustees whom he or she appointed, and their successors, will make the kind of decisions the settlor would have made if the settlor were able to do so.

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