

What happens when the last surviving trustee dies?

Mary being the sole individual trustee of her trust has recently passed away. Her daughter Sarah is her executor.

Because Mary was the sole individual trustee of the trust this raises the issue of whether the trust has automatically vested on her death. If the trust has vested this could be very unfavourable from a tax and transfer duty point of view. Vesting will occur if any of the three basic elements of a trust are absent.

The three essential elements which give rise to a trust relationship are:

- a) the legal ownership of the trust property is held by and in the name of the trustee
- b) that trustee holds the trust property on behalf of and for the benefit of a beneficiary
- c) that trustee has personal duties in respect of the property and breach of those duties can make the trustee personally liable to that beneficiary and sometimes others.

So, it boils down to whether or not there is a trustee of the trust following Mary's death and if so who.

The first place to look is the trust deed that set up the trust or that now regulates the trust. Most trust deeds contain provisions that set out the change of trustee process and how to deal with the death of a trustee particularly where the last surviving trustee has died.

Depending on the provisions of the trust deed, the power to appoint a replacement trustee where the last surviving trustee has died, may lie with the so-called "appointor" of the trust.

But if that "appointor" is not able or willing to exercise their power of appointment to appoint a replacement trustee, we move to the next two possibilities.

The second place to look is the Will of the deceased. Trust deeds often permit the trustee to appoint their successor in their Will. Mary may have done that.

The third place to look is the local State or Territory Trustee Act. In NSW, the power to appoint a new trustee may be exercised by the executor or the administrator of the last surviving trustee's Will under s.6 of the NSW Trustee Act. There are likely equivalent sections in other States and Territories.

Section 6 of the NSW Trustee Act can also be relied upon to appoint a new trustee in other cases such as:

- where a trustee remains outside of NSW for more than 1 year without having properly delegated the execution of the trust;
- where a trustee remains outside of NSW for more than 2 years;
- where a trustee wants to be discharged from all or any of the trusts or powers conferred on the trustee;
- where a trustee refuses or is unfit to act as a trustee (e.g. all adult trustees pass away simultaneously and the sole surviving trustee is a minor);
- where a trustee is removed under a power contained in the instrument creating the trust; and
- where a trustee being a corporation is dissolved.

As Mary has passed away a replacement trustee will need to be appointed as trustee of Mary's trust as soon as practicable as any assets of Mary's trust will not form part of Mary's estate nor can they be dealt with by her Will. Instead, the assets of Mary's trust must be transferred from her as a deceased trustee to the replacement trustee.

In Mary's case Sarah is Mary's legal representative (executor) and is willing and able to act as a trustee. Under the Trustee Act, Sarah may appoint herself as a trustee however for Sarah's appointment to be effective and valid the appointment should be made under a deed and the deed must be registered on the NSW General Register.

This means that Sarah is permitted to deal with the assets of the trust which may be transferred from the deceased trustee to herself as the new trustee of the trust.

Special care needs to be taken when transferring the assets of the trust from the deceased trustee to the new trustee to avoid transfer duty. Sarah must also be mindful of the anti-avoidance section 54(3) of *the Duties Act 1997*(NSW) which may inadvertently catch the transfer.

If, on the other hand, Mary was the sole director of the corporate trustee of her trust then the passing away of Mary as the sole director is not necessarily cause for alarm as the corporate trustee will continue.

Generally, the shareholders of a company have the power to appoint a new director. Where matters can get tricky is if Mary was also the sole shareholder of the corporate trustee. In such cases, s.201F of the Corporations Act permits Mary's executor or administrator to appoint the new director of the company, including themselves.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.