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## Extend the Life of Your Trust

The life of a trust (the “perpetuity period”) can be extended so long as the perpetuity period does not exceed the period provided for by the Perpetuities Act 1976, which is 80 years.

### Extending the Perpetuity Period

In *Re an Application by Andrews* (High Court, Christchurch M 5/02, 21 June 2002, Panckhurst J) the Court held that the trustees of the commercial trust in question could use the power of variation provided in the Trust Deed to extend the perpetuity period of the trust.

It is our opinion that the decision in the *Andrews* case also applies to non-commercial trusts so that it is permissible for a broad power of variation in a Trust Deed to be exercised to extend the perpetuity period of a trust where the new perpetuity period is 80 years or less from the starting date of the original trust’s perpetuity period (the date of the original trust’s Trust Deed).

### Resettlement

The ability to extend a trust’s perpetuity period is particularly useful in a resettlement. Parents often want to resettle some or all of the assets of their family trust onto a child’s trust. However, this is often thought to be unachievable because of the Court’s decision in the famous case *Pilkington v Inland Revenue Commissioner* [1962] 3 All ER 622 (HL) which makes it clear that a resettlement to a trust that will not vest within the perpetuity period of the original trust will be invalid as it will infringe the Perpetuities Act 1964.

For example, the original Trust Deed for David’s family trust (the David Trust) is dated 28 February 1970 and has a perpetuity period of 40 years and a vesting date of 28 February 2010. The final beneficiaries of the David Trust are David’s daughters, Kelly and Kim. For estate planning reasons, Kelly does not want her half share in the David Trust to vest in her personally and would prefer that her half share passes directly to her family trust. However, Kelly’s family trust has a perpetuity period of 80 years from the date of the Trust Deed of 1 January 2000 and therefore the traditional method of resettling Kelly’s half share in the David Trust on Kelly’s Trust cannot occur because it will infringe the law of perpetuities as provided in *Pilkington’s* case.

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## Resettlement Example

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On the basis of the *Andrews* case, and on the basis of our opinion that the decision in the *Andrews* case relates to non-commercial trusts, we believe it is feasible to proceed as follows in order to achieve the resettlement contemplated by the example above:

- ▶ Create a new trust for the benefit of Kelly and her issue (the Kelly Trust 2) with a perpetuity period expiring on 28 February 2010 so that the perpetuity period of the Kelly Trust 2 does **not** exceed the perpetuity period of David's Trust.
- ▶ The Trust Deed of the Kelly Trust 2 must contain a clause allowing its Trust Deed to be varied in the usual form, ie the trustees can resolve to vary the trust deed in any way they like so long as such power of variation is not exercised to add or delete from the class of beneficiaries or affect anything already done specifically for a beneficiary.
- ▶ The resettlement clause in the Trust Deed for the David Trust is then used to resettle Kelly's half share in the David Trust onto the new Kelly Trust 2 before 27 February 2010.
- ▶ On or prior to 27 February 2010 the trustees of the Kelly Trust 2 will then exercise their new power of varying the Trust Deed to extend the perpetuity period of the Kelly Trust 2 until 27 February 2050, ie one day less than 80 years from the start date of the perpetuity period of the David Trust (which was 28 February 1970).

We believe it is preferable that the resettlement of Kelly's half share in the David Trust onto the new Kelly Trust 2, and the subsequent variation of the Trust Deed of the Kelly Trust 2 should not occur simultaneously, but should occur a period of at least days apart.

Further, we believe it is preferable for there to be no overlap between the trustees of the Kelly Trust 2 and the trustees of the David Trust, so that there would be no appearance of collusion between the two sets of trustees. Therefore, it is important the Kelly Trust 2 is set up with completely different trustees to the current trustees of the David Trust.

## Moral of the Story

The perpetuity period of a trust can be extended so long as the extended perpetuity period does not exceed 80 years.

The ability to extend a trust's perpetuity period is particularly useful in resettlements where the trust on which the assets are to be resettled has a perpetuity period that exceeds perpetuity period of the original trust.

If you would like to discuss the above in more detail, please feel free to contact the writer or Dennis King.

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