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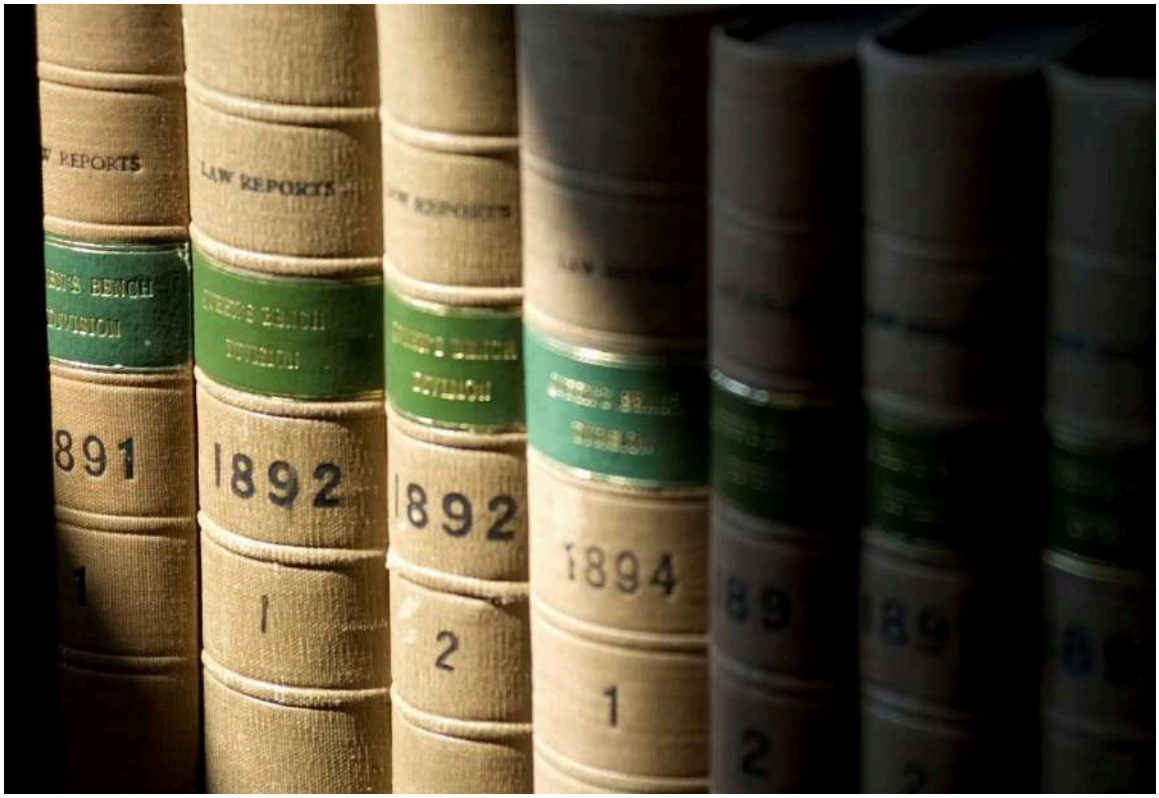
Why all deeds of ratification should be treated with caution

WILLS & TRUSTS OPINION

November 6, 2025 Anthony Grant



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Anthony Grant

The term ‘ratification’ has different meanings in different contexts, and in different areas of the law. As one judge put it: “I do not think that it is necessary, nor do I feel competent to disentangle the many threads of principle in this tangled skein.”

The term is commonly used in trust law and in my experience, it is sometimes used wrongly. Some actions are ratifiable, and some are non-ratifiable and the distinctions between the two are not well understood.

In the context of the law of trusts, the concept of ratification is used in different ways.

When a trustee acts in breach of trust, a trustee will not be liable to a beneficiary if the beneficiary consents to the conduct that constituted the breach. In these circumstances, the beneficiary is said to have ‘ratified’ the transaction that constituted the breach. The word ‘ratification’ in this context is used as a synonym for ‘approved’.

But the term 'ratification' in the law of trusts can also have quite a different meaning. Where there are three trustees and a requirement for unanimity in decision-making, if two trustees approve a transaction but the third takes several weeks longer to do so, it is said that when the third trustee approves the transaction, he or she has 'ratified' it.

In this case, the action of the first two trustees was not a breach of trust. It was a legitimate decision that was not completed until the third trustee notified his or her approval of it.

Defective decisions

When is a resolution non-ratifiable?

Take the case of a three-trustee trust, where two of the trustees have passed a resolution without giving any "real and genuine consideration" to the interests of some beneficiaries (for the significance of the term "real and genuine consideration", see *Owies v JJA Nominees Pty Ltd* [2022] VSCA 142). If the third trustee later purports to ratify the decision, the ratification will not be effective since the decision of the two trustees constituted a breach of trust.

Or take the case where in a three-trustee trust, two of the trustees make a decision in ignorance of an

important factor concerning the trust or some of its beneficiaries. If the third trustee subsequently purports to ratify the decision, the ratification will have no effect since the original decision constituted a breach of trust.

This does not mean that trustees are unable to review a defective decision and start again. If they give "real and genuine consideration" to the relevant factors when they make a new decision, this new decision will not constitute a ratification of the earlier decision. It will be a new decision that has been properly made after appropriate consideration.

In some cases, this will create problems since the timing of the original resolution will be important for some reason and the trustees will want to hold on to the date of that decision. In these circumstances, trustees are sometimes tempted to prepare a deed of ratification in the hope that no one will challenge its legitimacy. Trustees will sometimes go further and record false statements in such a deed in the hope that the deed, with its formality and apparent legitimacy, will not be challenged.

In this way I recently saw a "deed of ratification" which purported to ratify a non-ratifiable decision, and which recorded in a recital that "all distributions to the settlor were for the benefit of the

beneficiaries", a statement that was completely untrue.

A lesson to be learned from this may be to treat deeds of ratification with caution.

Barrister Anthony Grant is an adviser and litigator on the laws concerning trusts and estates. He is a member of The Law Association's Trust Law Committee