



FAMILY TRUSTS

A family trust has proven to be a popular, flexible and enduring structure with which to organise and manage succession planning affairs. It is for this reason an estimated one in every ten people in New Zealand have a trust.

Throughout our lives we work to accumulate assets for ourselves and our loved ones. However, even with the best of intentions, situations can arise which may place these assets at risk. A tailored trust can be a useful structure to help protect assets long term and enables the organised and tailored distribution to specific beneficiaries.

WHAT IS A TRUST?

A trust exists where one or more people (**'trustees'**) hold and own property for the benefit of another person or persons (**'beneficiaries'**). A family trust is a trust set up to benefit particular members of a family.

SETTING UP A TRUST

The trust deed is the founding document of a trust. The powers of the trustees stem from the trust deed, which sets out the trustees' duties, powers and obligations in respect of the trust property. It also provides for the operation and management of the trust. It is therefore very important to carefully consider your objectives for establishing a trust, and who you wish to include in its administration, to ensure the trust deed accurately reflects this.

The roles essential to establishing a trust are:

- ◆ **The settlor(s)**, who are the person(s) who transfer (settle) some of their personal funds or assets to the trust. At the time of the establishment of the trust, this is usually just a nominal sum of \$100. However, this is usually followed up with the settlement of more significant assets — such as a family home, company shares, debt forgiveness, etc;
- ◆ **The trustees**, who become the legal owners of the trust assets and are responsible for administering the trust, in accordance with the trust deed;
- ◆ **The beneficiaries**, who are intended to benefit from the trust; and
- ◆ **The appointer(s)**, who hold the power to appoint and remove trustees and beneficiaries.

It is common for the settlor(s) to also hold the power of appointment, and in many circumstances they will also wish to be appointed to a trustee and a beneficiary. However, there are certain circumstances where this may not be advisable and these should be explored further with your lawyer.

BENEFITS OF HAVING A TRUST:

- ◆ Providing a credible, professional and independent structure for future administration and distribution of your estate to loved ones;
- ◆ Preserving assets for the continued use and enjoyment of family (eg. the family home), and the ability to cater for any special needs of a loved one (eg. a child with a disability);
- ◆ Confidentiality and anonymity regarding ownership of assets, as family trusts are not publicly registered and therefore can be kept confidential;
- ◆ Possible tax planning benefits;
- ◆ Adding complexity to the structure of your affairs, making it more difficult for any future claimant to access certain assets and providing protection from any future relationship property and creditor claims; and
- ◆ General flexibility to deal with law changes such as protection against various forms of wealth tax that may be introduced in the future eg. death duties or inheritance tax.

ADMINISTERING YOUR TRUST

Creating a trust and transferring assets to the trust is only the first step in forming a flexible vehicle for the administration and protection of your assets. If you wish to maintain the integrity of your trust and continue to benefit from the asset protection that it can offer, then it is imperative that your trust is properly administered at all times. Responsibility for administering the trust lies with the trustees and failure to do so is one of the most common reasons that the Courts will 'look behind' a trust structure and 'attack' its assets.

To help maintain the integrity of the trust, it is recommended that the trustees at least do the following:

- ◆ Meet annually to review the trust's affairs and assets and to consider the needs of the beneficiaries;
- ◆ Consider whether there have been any further advances or gifts made to the trust — such as:
 - the transfer of personal funds to the trust to fund the purchase of trust assets; or
 - the cost of any improvements (eg. alterations, additions, renovations, landscaping, etc) made to a trust asset and paid for out of personal funds;
- ◆ Record any such further advances or gifts;
- ◆ Ensure all trust transactions are duly authorised by appropriate trustees' resolutions, and that all such resolutions are kept in a trust manual or minute book; and
- ◆ Prepare any necessary annual financial statements for the trust.

DISADVANTAGES OF HAVING A TRUST:

For most people, the benefits of establishing a trust outweigh the disadvantages. However, you will need to determine this balance in light of your own circumstances.

By placing assets in a trust, they are no longer your own and you must cease dealing with them as such. It is this transfer of ownership that protects the assets against any future claims against you or against other beneficiaries of the trust. Continuing to deal with the assets as if they were still your own will undermine this protection.

Establishing a trust and transferring assets into it is not a simple exercise. To do it properly requires thoughtful consideration of your personal circumstances and objectives, and it may also require the restructuring of existing mortgage financing. The cost to do this is not insignificant.

Moreover, there are ongoing administrative responsibilities and associated costs — the extent of which will depend on the complexity of the trust's affairs.

A final consideration is that, unfortunately, there is no crystal ball with which to view the future (which is exactly why you may be looking at establishing a trust). There may be possible future legislative changes which diminish the protections afforded by a trust. It is therefore important to obtain regular professional advice from your lawyer to ensure that your objectives for establishing the trust continue to be met.

MORE INFORMATION

Should you have any questions regarding the establishment or administration of a trust, we would be happy to discuss these further with you. Give us a call or send us an email for more information.

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