

## TRUSTS

### What is a Trust?

Many centuries ago an adventurer was travelling to a distant land. He said to a friend, "Here is my money, use it to look after my family while I am away". The adventurer (Settlor) had created a family trust. The friend had become a trustee. The family were the beneficiaries. When we talk of a family trust we are doing the same thing as the adventurer did except we usually stay in New Zealand.

Sometimes the settlor would hand some written instructions to the trustee. This document is a trust deed.

After a time people started to consider questions such as :

- Could the settlor be a trustee?
- Could a trustee be a beneficiary?

The answer is anyone can be any of the three, settlor, trustee or beneficiary. Theoretically one person could be all three *so long as* there is at least one person who is a beneficiary and not a trustee or settlor. Many solicitors, but not all, advise their clients to have an independent trustee, someone who is not a beneficiary and maybe not even a close family member.

### Benefits of Trusts:

- 1 Protection from Estate Duty. It could be reintroduced. Under the old laws you would have needed two trusts.
- 2 Protection against claims from creditors, should you go bankrupt.. Anything owned by a trust does not belong to you so cannot be taken away. The trust has to have owned it for two years at the time of your bankruptcy.
- 3 If your income is derived from a trust, your national super is likely to be protected against a super surcharge or other means test.
- 4 Rest home subsidy protection. The government usually reviews all transfers to a trust over the previous five years.
- 5 Asset protection for children and grandchildren.
- 6 Trust can be used as a final beneficiary under wills, reducing the risk of estate duty for a surviving spouse.
- 7 Protect capital against irresponsible children.
- 8 Flexibility to cater for differing beneficiary needs.

- 9 Ease of administration of deceased estate.
- 10 Distributions to beneficiaries can save some tax.
- 11 There can be some protection of assets in the event of a relationship.

### **Some Things To Look For In A Trust Deed**

Solicitors prepare trust deeds, and store them as standard forms in their computers. They personalise to suit the client. Read your trust deed carefully and make sure you understand it and it suits your needs. Also, since a word processor has been used, make sure there are no silly errors like having someone else's family as beneficiaries. It has happened! If you cannot

understand it, ask. Some of the things which we suggest you should ask your solicitor to consider including in a family trust are:-

- Specifically exclude the prudent person requirements contained in the Trustee Amendment Act 1988 to minimise any risk of beneficiaries challenging the actions of trustees at a later date. Further, the prudent person rule will often not suit many small family trusts, particularly, for example, if the intention is to invest in real estate only,.
- If it is a husband and wife family trust make sure the trust deed gives a maximum of power to both to hire and fire trustees. Sometimes trust deeds give the power to the husband only.
- Include an express power to resetttle a trust. That means transfer everything to a new trust.
- Make sure the clause dealing with voting of trustees suits you. i.e. who has power to make decisions?
- Discuss "license to occupy the family home" with the solicitor - if you want to hasten the trust's ownership. It may help you speed the transfer of ownership but there can be disadvantages.
- It is usually best to give the maximum possible powers to your trustees. You may wish to cater for after thoughts by giving trustees the power to add beneficiaries.
- Watch out for any clause excluding a spouse from being a beneficiary if he/she should remarry. These clauses are not uncommon in wills. Do you really want to impose this restriction on your spouse?

### **What should you put in a trust?**

You transfer assets to a trust by selling them at their current value. The trustees record the purchase price as a debt owing to you. Any gain in value (E G Your home) enriches the trust. You can further enrich the trust by making gifts. The maximum gifts anyone is permitted to make in any twelve months period is \$27,000. There are a few minor exceptions such as ordinary presents to the family. If you exceed the maximum, you are required to pay gift duty.

You can sell as many assets to the trust as you like. If your reason for having a trust is to protect assets, as it should be, then sell as many as you can and make yourself poor. The

exceptions to this rule are:

1. If it is tax disadvantageous.
2. If it is going to be significantly more costly to account for the assets in the trust than it would be if you continued to hold them in your own name.

### **Taxation**

Income earned by a trust does not belong to its beneficiaries. While a trust may, it does not have to distribute any income to beneficiaries. A trust is therefore useful as a method of avoiding paying income tax at 39%.

### **Important thing to remember.**

- Always keep trust's finances separate from all others.
- A trust should have a separate bank account.
- Trustees may allocate some or all of the income to beneficiaries but this must be done within 6 months of balance date, usually by 30 September each year. Contact us early.
- Minute all your decisions **and then** carry them out. Otherwise it may be difficult to prove whether a transaction was on behalf of the trust or a beneficiary.
- **ALL** trustees must sign minutes if the trust deed requires this. It is no good getting an "independent" trustee's signature later.
- When distributing to beneficiaries ensure the minute contains the words "having considered the interests of all beneficiaries....." It is important to show their interests were all considered before the decision was made.
- When lending money to your trust, record the loan as being "interest free repayable on demand." Interest free loans, which do not have this qualification can be deemed gifts, possibly subject to gift duty.
- Keep beneficiaries informed. It is recommended you send them copies of the trust's accounts.
- Avoid lots of small transactions to keep the costs of accounting down.

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