

TRUSTS

What is a Trust?

- When a person (the “settlor”) places assets under the control of a person or persons (the “trustee/s”) for the benefit of some other person or persons (the “beneficiaries”) or for a specified purpose, this creates a trust.
- When a settlor transfers assets to the trustees, the beneficiaries get the benefit of any increase in the value of the assets (and any income produced), instead of the settlor.
- The trustees may be directed to make decisions about the distribution of capital and income on terms laid down by the settlor in the Deed which creates the trust (for example, what is to happen if the settlor dies or if beneficiaries reach a certain age).
- The most common form of family trust is the discretionary trust. This is where the trustees are given the power to select potential beneficiaries from a list (for example, from all the children and grandchildren of the settlor). The trustees also decide how much a beneficiary is to receive and when. Being named as a beneficiary does not give that person any right to income or capital of the trust unless the trustees exercise their discretion in their favour.

Why should you have a Trust?

Trusts are established for various reasons, and it will depend on your circumstances whether all or any of these will apply to you, and whether you should consider forming a trust.

Common reasons can be:

- Reducing the risk of assets being claimed by future creditors;
- Putting a structure in place for passing assets from one generation to the next, with decisions being able to be decided by the circumstances of the time;
- Protecting assets from potential relationship property claims;

Because forming a trust and transferring assets into it can significantly affect rights, and is sometimes a complex and reasonably costly process, specific advice should be sought on the merits.

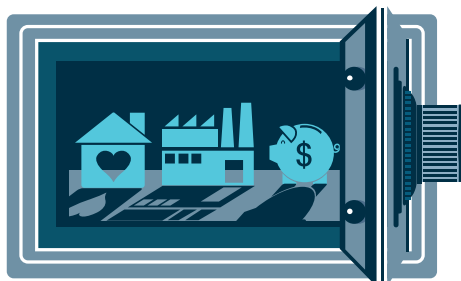
Who should be your trustees?

The Trustees are the people who legally own and control the property. It is advisable that any settlor who wishes to be a trustee should be accompanied by a co-trustee, who should be ‘independent’ (meaning that they are not listed as a beneficiary and nor do they receive a benefit from it). You could appoint a close friend or use a professional trustee. Being a trustee imposes very real duties and is not to be taken lightly.

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Disclaimer: the content of this document is general in nature and not intended as a substitute for specific professional advice on any matter and should not be relied upon for that purpose.

It will be appreciated that this is a broad overview of some of the matters relating to the rights and obligations of trustees and is not a substitute for specific advice.



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Who should be the beneficiaries?

Beneficiaries can be specifically named individuals or be a class of persons (such as 'the settlor's children'). For a family trust, these would usually include:

- Primary beneficiary (being the person for whom the trust has been initially established – this is usually the settlor or settlors)
- All children present and future
- All grandchildren present and future.

Beneficiaries can receive income or capital or both from the trust (as the trustees decide) unless the trust deed limits this. (For example, the deed could specify that a particular person will receive part of the capital of the trust but only if/when it is being wound up).

Putting assets into a trust

- The two most common ways of putting property (e.g. house, investments) into a trust are
 - Selling them to the trust – the purchase price is owed to the settlor, and then gifted off. Before gift duty was abolished in 2011, this was the most common approach, and the debt was gifted at \$27,000 per annum so as to avoid gift duty.
 - Gifting it to the trust – with gift duty no longer applying, assets can be gifted immediately.
- There are advantages and disadvantages to both methods so specific advice should be sought on what gifting programme is appropriate in the circumstances and we can discuss with you.

Decisions made by Trustees

In a discretionary trust the trustees decide whether the beneficiaries receive anything at all, what they receive, and how they receive it. If the trustees don't make any decision, then when the trust is wound up, the trust deed has default provisions. These usually provide for the assets to be shared between surviving children equally (or if a child has died, their share goes to their children, if they had any).

Every beneficiary has a right to be considered by the trustees when they are making their decisions. The Court can be asked to review a trustees decision if a beneficiary thinks the trustees have acted improperly. It is not sufficient simply that the trustee has not made the decision that the beneficiary wanted.

Income Tax

Under general law the trust is not a separate legal entity as it acts through the trustees. Under tax law, however, the trust is a separate legal entity from the trustees. Trusts are taxed according to, first, whether income is distributed to beneficiaries (beneficiaries' income) or retained by the trustees (trustees' income) and, secondly, if retained by trustees and subsequently distributed to a beneficiary, the type of trust which is making the distribution.

It is necessary for income producing trusts to file annual accounts and a return of income with the Inland Revenue Department.

