

FAMILY TRUSTS



WHAT IS A FAMILY TRUST?

A Trust, in simple terms, is when a person (*settlor*) allocates property to another person (*Trustee*) for the purpose of that person holding onto that property for a third person (*beneficiary*). A Trust is treated, usually, as a separate legal person that purchases and holds any type of assets.

A Trust, in simple terms, is when a person (*settlor*) transfers legal ownership of some property to another person (*Trustee*), who holds it for the benefit of a third person (*beneficiary*). A Trust is treated as a separate legal person, making it able to purchase and hold any type of asset in its own name, much like you and me.

Family Trusts are commonly set up to protect one's assets and benefit members of one's family beyond their lifetime. They are often used to keep assets protected within the immediate family and ensures that assets within the Trust are passed down to the settlor's children.

There are two types of Trusts:

1. **Discretionary Trust:** a discretionary Trust is more common in New Zealand than a fixed Trust. With this type of Trust, it allows the Trustee to have full discretion about who is a beneficiary of the Trust and the allocation of shares to the beneficiaries.
2. **Fixed Trust:** a fixed Trust is a Trust where there are fixed entitlements to the income and capital that may be in the Trust. The Trustee is obligated to distribute the contents of the Trust in a fixed manner that is set out in the Trust deed.

It is important to note that Trusts can often have both discretionary and fixed aspects.

For the purpose of this guide, the parties involved in the formation of Trusts are defined as:

Settlor: a settlor is usually the person that owns the property in which they would like to put in a Trust for the benefit of another person/s.

Trustee: a Trustee is a person that administers the Trust/ holds onto the property with the legal obligation to do this considering the purposes specified in the deed document.

Beneficiary: a beneficiary is the person/s that the Trust was created for. A beneficiary will benefit from the Trust by receiving capital or income. There are three types of beneficiaries:

- A **discretionary beneficiary** means that this beneficiary may receive the benefit from the Trust, but the Trustee has discretion over this.
- A **final beneficiary** is when the beneficiary will be the benefit of whatever is leftover in the Trust when the Trust is wound up.
- **Primary beneficiaries** are beneficiaries that are given priority over the other beneficiaries of the Trust.

WHO SHOULD HAVE A FAMILY TRUST

You may be asking yourself if having a family Trust is a good idea for your family. This is largely dependent on personal circumstances and it is recommended that you consult with your lawyer. New Zealand Trust law is reasonably unpredictable so the reason for having a Trust can change when the law changes. Your lawyer will be able to tell you about the pros and cons of having a family Trust and whether this is a good idea for you and your family.

Benefits of a Trust

- A family Trust is designed to protect assets. When you put an asset into a Trust you no longer have legal ownership over it. One of the major benefits of this is that a family Trust can protect a family home from a failed business adventure, or from unwanted claims over your property.
- A family Trust can also protect you from relationship property claims, although in some cases the Courts can take into consideration the value of your assets when dividing your assets.

- Often parents with disabled children create family Trusts in order to ensure that they are protected; whether this is via income or having a house that they can live in.
- One of the biggest drawbacks for people, when they are thinking of creating a family Trust, is the idea of protecting assets for the future generation. You can protect your children by ensuring that they are taken care of or even protect them from potential tax law changes that may affect your assets.

Disadvantages of a Trust

- When you transfer assets into a Trust it is important to remember you no longer legally own that property.
- Creating a Trust costs money, and it will likely continue to cost money so long as you have the Trust.
- There are some risks in having a Trust. It is important that you talk to your lawyer about the specific risks that are relevant to your specific situation.

ESTABLISHING A TRUST

The formation of a Trust involves a series of relatively hard and big decisions. When establishing a Trust, you are forming a legal document called a 'Trust deed'. This Trust deed is what controls and delegates power to a Trustee and assets to a beneficiary. A Trust deed needs to be carefully and meticulously written to ensure that 1) it is a valid Trust and 2) the Trust is unlikely to cause you drama.

When forming a Trust, as stated previously, you will need to make a series of decisions. These may include:

- Who will be the Trustee?
- Who will be the beneficiaries?
- Do you need more than one family Trust?
- Should your Trust be discretionary or fixed?
- What is the structure of your Trust?

Deciding who will be your Trustee?

It is important when choosing your Trustee that you choose someone you know and Trust to look after your assets with your intentions at heart. There are a few legal requirements that you will also need to meet when choosing a Trustee.

The person needs/can be:

- Trustees must be mentally capable
- Trustees must be over 20 years of age
- A Trustee may also be a beneficiary under the Trust – these are not mutually exclusive
- You may choose to have a Trusted professional as a Trustee, such as a lawyer or corporate Trustee

Deciding who will be beneficiaries?

Any person can be a beneficiary. The most common people who become beneficiaries are children, relatives, charities and close friends. But, if you set up a Trust you can make yourself a beneficiary of that Trust too. It is important to remember that if you have formed a discretionary Trust that it will ultimately be up to the Trustee to decide what beneficiaries have the right to receive benefits of the Trust.

Do you need more than one Trust?

You don't need more than one Trust, but sometimes it is logical to have more than one. The circumstances you might have two Trusts are generally when there is a need to separate property between personal and business. Often people create two Trusts when they are in a relationship with someone and they both have kids to different people. Having more than one Trust is particularly useful to protect the interests of both partner's children when each partner forms their own Trust.

The structure of your Trust

The structure of your Trust refers to the Trust deed and how you intend it to be administered. This is an important document and is hard to change once it's established. Your lawyer will help you make a Trust deed that is both flexible and firm in your intentions.

What should be included in the Trust deed?

- The extent of powers and duties of the Trustee/s
- The Trustees' power to invest Trust assets
- The purpose of the Trust
- The parties involved in the Trust
- The requirements for a Trustee to make a decision

ASSET TRANSFER

You may be asking what assets you should be transferring to your Trust? The first thing you should be doing is seeking advice from both a lawyer and a taxation specialist; there can be effects on your assets when you transfer the property that you should be aware of. The second thing you should be doing is deciding what assets you would like to be in a Trust. A family home is the most common thing to put in a Trust, but things like shares, artwork, and cash can be put into a Trust too.

In most cases, when you form a Trust, you will gift away the asset. Previously you could not gift more than \$27,000 in assets before you had to pay a tax called 'gift duty'. This has now been abolished which enables the gifting of assets to be a practical

and easy way to transfer assets to a Trust. It is important to note that gifts of more than \$27,000 are included in your assessment to receive Residential Care Subsidy.

In some circumstances, it will be best that you sell your assets to a Trust. Your Trust, if it can afford to, will purchase the assets. But, in the case that the Trust can't take on this cost, the Trust can take it on as a debt.

There are a number of issues you will need to consider; it is best that you instruct a lawyer that will help you navigate these issues.

ESTATE PLANNING

A family Trust is often one part of a wider estate plan. This really meaning that the Trust should be accompanied by a few other documents. These may include:

- Enduring powers of attorney document (covering both your personal property and personal care)
- A will (dealing with your personal assets)
- A memorandum of wishes

It is important to note that a memorandum of wishes, although an important document, is not a binding document. This meaning really meaning that the document provided some guidance to the Trustee about your intentions for the administration of the Trust, but the Trustee does not have to do as the memorandum states.

Will

As state previously, when you make your will you should ensure it deals with your personal chattels, your powers to appoint Trustees and beneficiaries under the Trust deed, whether there s any debt owed to you by your Trust, and the balance of your estate.

For some useful guidance on Wills, refer to our document on creating a Will.

Memorandum of wishes

A memorandum of wishes is a document in which the settlor provides some guidance to the Trustees of a Trust as to how they want the Trust to be managed, particularly after their death. It is an important document to ensure that the Trustee knows how to administer the Trust upon you dying. As mentioned previously, it is important to remember that the memorandum is not legally binding to the Trustee.

Enduring power of attorney

For a more in-depth understanding of creating and enduring powers of attorney refer to our article on Powers of Attorney.

It is highly recommended that you have an Enduring Powers of Attorney in your estate plan. This Powers of Attorney should cover both personal property and care matters. Your Powers of Attorney will act on your behalf, and take care of your affairs, in the case that you are unable to; e.g. you have a severe brain injury or any other life-limiting ailment.

ADMINISTERING A TRUST

The first thing you may be asking is how long does a Trust last? This will likely be stipulated in your Trust deed, although the law states that your Trust can last for a maximum of 80 years. It is important to note that your Trust must specify an end date.

When you establish a Trust your lawyer will likely discuss with you the general administrative requirements, like:

- Trustees of the family Trust should meet regularly. These meetings should have minutes taken, and there should be a general discussion about the Trust's investments and the beneficiaries.
- Trustees are required to make sure that they are meeting all their legal obligations, including tax obligations.

The biggest burden when creating a Trust is, they can be costly to form and administer. They are also legally complex and take up a lot of time to keep going. When appointing a Trustee, you should remember that this person needs to have the time capability to administer the Trust. It is also important that there needs to be someone appointed to take over the role of appointing and removing Trustees after the initial person dies.

The administration of a Trust is difficult to distill down to a short(ish) article. It is important that you talk to your lawyer and make sure that you are doing everything correctly (most importantly, legally!).

AMENDING YOUR TRUST

There are many things that may change in the lifetime of your Trust. Anything from personal circumstances and law changes is likely to lead you to want to amend your Trust deed. It is important that when you form the Trust deed that you include an amendment clause that allows for alterations to the Trust deed.

It may also be worth thinking about a re-settlement clause which will allow for the assets in your Trust to be re-settled into a new Trust.

CONCLUSION

The formation and administration of a Trust can be time-consuming, costly and complicated. The importance of instructing a lawyer to help you navigate this process cannot be stressed enough. The good thing is, here at GML Lawyers we have an abundance of experience and are ready to help you and your family at any time.



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