



# Family Trusts

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# Family Trusts

One of the few certainties in life is change. Although change can be exciting, it can also create significant financial risks for you and your family. Establishing a family trust can help to protect you and your family from these financial risks.

The aim of this booklet is to provide you with the information you need to make the following three decisions:

1. whether establishing a family trust is appropriate for you and your family;
2. how to establish your own family trust; and
3. how to administer your family trust after you have set it up.

A family trust should be designed to protect you and your family. As everybody's situation is different, family trust arrangements need to be tailored to your particular situation. The information in this booklet provides a general guideline but cannot replace the detailed legal advice you will receive from your Lawlink lawyer. If you decide to establish a family trust, your Lawlink lawyer will ensure that the trust arrangements you put in place are tailored to meet the needs and aspirations of you and your family.

You will note that a number of terms throughout the document are printed in bold type. These terms are particularly significant and you can find a useful explanation of them at the end of the booklet.

Should  
you have  
a Family  
Trust?

# What is a Family Trust?

A trust exists whenever one person, a **settlor**, gives property to another person, a **trustee**, to hold for the benefit of a third person, a **beneficiary**. A family trust is therefore a relationship amongst:

1. The **settlor**, who creates the trust and decides what goes into the **trust deed**; and
2. The **trustees**, who hold title to the trust assets in their own names and deal with them as instructed in the **trust deed**; and
3. The **beneficiaries**, who receive the benefits from the trust. They may include:
  - a. discretionary **beneficiaries**, who may receive a benefit from the trust at the discretion of the **trustees**;
  - b. final **beneficiaries**, who are entitled to whatever funds are still left in the trust when it is wound up; and
  - c. primary **beneficiaries**, who are discretionary **beneficiaries** given some sort of priority ahead of the other **beneficiaries**.

For most purposes, a trust is treated like a separate legal person. Income and assets owned by a family trust are not owned outright by either the **trustees** or the **beneficiaries**. Trust assets only become the property of the **beneficiaries** when **trustees** transfer the assets from the trust to the **beneficiaries** personally. As a result, trusts can be used to achieve a number of objectives, including those summarised on the following pages.

# What are the advantages of Family Trusts?

## Creditor protection

Assets in a trust are usually protected from any creditors of the **beneficiaries** or the **trustees** personally. This is because neither the **beneficiaries** nor the **trustees** own the trust assets for themselves, but under the relationships established by the **trust deed**.

## Protection against relationship property claims

If you give personal assets to your children during your life or in your **will**, those assets may, in certain circumstances, become available to their partners under the Property (Relationships) Act 1976 (see page 18). However, if your assets are owned by your trust, or are given to your trust on your death, your children can continue to receive the benefit of those assets but the assets do not form part of their personal property, and therefore cannot be subject to claims by your children's partners.

If you transfer your assets into a family trust before you enter a relationship, your new partner will not usually have any claim against those trust assets if you separate. This issue is explored in more detail on page 18.

## Protecting property from spendthrift beneficiaries

During your life, or in your **will**, you can simply give your assets to your children. However, you may be reluctant to do this if you have concerns about the ability of your children to manage their financial affairs. If you give your assets to a family trust then the trust can provide your children with income and/or capital to meet their cash requirements as they arise. This can protect the long-term value of your family's assets.

## Protecting children with special needs

Family trusts offer possible protection against means testing of Government benefits such as sickness or invalid benefits. A family trust may also protect a child with special needs from other family members who may assume control of family assets when you die.

## Protecting assets for future generations from potential tax law changes

Family trusts may provide protection against various forms of wealth tax that may be introduced in the future, such as death duties or inheritance tax.

## Possible protection of eligibility for income or asset tested benefits

Government benefits such as the widows' benefit and long stay residential or hospital care subsidies are subject to asset testing. Assets held in a family trust may be excluded from asset testing applied by various government agencies, provided certain conditions have been met. Your Lawlink lawyer will be able to advise how the rules may apply to your family property.

## Trusts make an excellent final beneficiary under a will

You can leave your personal assets to a trust rather than directly to named family members when you die. This gives much greater flexibility than a conventional **will**. The **trustees** of a trust can decide when to make payments to the trust **beneficiaries** and even whether to make such payments available at all.

As an alternative, you can leave your estate to trusts established by your children. Your children can benefit from this type of arrangement, particularly where significant assets are involved, as it allows your assets to be transferred directly into trust without the risks associated with **absolute gifts**.

## Reducing or preventing claims against your estate

The Court can effectively rewrite your **will** under the Family Protection Act 1955 if it considers that members of your family have been disadvantaged by its provisions. However, the Court cannot rewrite your trust for Family Protection Act purposes.

## General flexibility to deal with changes in the law

Modern **trust deeds** normally allow limited rights of variation to deal with changes in the law.

## Tax saving on beneficiaries' income

Trusts are a separate entity for tax purposes and must file a return if they receive income. **Trust income** is taxed in the following ways:

- "**Beneficiaries'** income": this applies where the trustees pay income to the **beneficiaries** and the income is then treated as if the **beneficiaries** had earned it themselves. The **beneficiaries'** income will be added to their other income and they will, in most cases, be taxed in the usual way. If the **beneficiaries** are not already receiving a significant income they may be able to take advantage of the lower rates of tax available to them.

- **"Trustees' income"**: this applies where the **trustees** elect to retain the income and results in a flat tax rate of 33%.

Taxation issues are dealt with in more detail on page 16.

### **Confidentiality**

Family trusts are not publicly registered and the details of your family trust arrangements can therefore be kept confidential.

## **What are the disadvantages of family trusts?**

### **Loss of ownership of assets**

If you transfer your personal assets to a trust then the **trustees** of that trust will control the assets. Although you can retain some control by holding the power to appoint and/or remove trustees, or even by being a **trustee** yourself, it is important to remember that assets you transfer to a trust are no longer your own. If you continue to treat the assets as your own then the trust could be open to challenge as a **sham**.

### **Additional administration**

If you establish a trust you need to allow for the time and cost involved with meeting the trust's annual accounting and administrative requirements. These requirements are explained in page 14 of this booklet.

### **Cost of formation of the trust/transfer of assets**

There are costs involved with establishing a family trust. These will depend on the complexity of your trust and the nature of the assets to be transferred.

### **Future law changes**

Possible changes to legislation or trust law may remove or affect some of the original objectives for the trust formation.

## **Is a family trust appropriate for you?**

In some cases an immediate financial benefit can be achieved by establishing a family trust. However, most family trusts are formed to reduce the impact of changes which may or may not occur such as:

- claims from business creditors;
- the need to apply for asset tested benefits such as residential care subsidies; or
- relationship breakdowns.



In these cases a trust can be compared with insurance against sickness where an insurance premium is paid but no benefits arise if the insured does not get sick. For a family trust the initial set up cost and ongoing annual costs can be regarded as a sort of insurance premium.

A trust may not provide any benefits if the risks protected against:

- never arise;
- arise too soon (because new trusts are more vulnerable to legal challenge, particularly by creditors); or
- arise after the law has been changed so that the protection originally offered by the family trust structure is no longer available.

## Are there limits to the protection offered by a family trust structure?

There are limits to the protections offered by a family trust arrangement. For example:

- A family trust cannot be used to avoid current and legitimate claims by the IRD, business creditors or relationship partners. If you are already subject to such claims then setting up a family trust now will not protect you or your family.
- If you become technically insolvent as a result of setting up your trust, the trust structure could be set aside by the Courts. When setting up your trust, you therefore need to ensure that you retain enough assets to meet all of your potential liabilities (including liabilities under guarantees).
- Asset testing applied by Government agencies for various benefit applications may treat trust-owned assets differently from usual legal rules. This may result in the trust ownership providing you with little or no benefit.

Your Lawlink lawyer will be able to help you work through these **issues**.

## What will it cost?

### Establishing your family trust

Your Lawlink lawyer will be able to provide you with an estimate of the fees you should budget for to establish your family trust. The fee estimate should cover:

- meeting with you to discuss your intentions and requirements;
- preparing a **trust deed** to match your particular situation;

- preparing a **memorandum of wishes**;
- preparing new **wills** and **enduring powers of attorney**;
- discussing asset transfer options with you;
- completing the transfer of your assets; and
- if required, arranging for the restructure of your financial arrangements (such as the lending secured over any property to be transferred to the trust).

### Ongoing costs

Depending on the nature of your trust and its assets, you will also need to budget for the legal and accounting work required to administer your trust.

## Should you have a family trust?

In deciding whether you should establish a family trust you need to weigh the advantages against the disadvantages. Your Lawlink lawyer can assist you with this process. If the advantages outweigh the disadvantages in your particular situation then you should consider establishing a family trust. The next part of this booklet explains the major decisions you will need to make if you decide to establish a trust.

### An example

Roger and Marie have two children and run their own manufacturing business. Although their business is successful and trading well they recognise that if their business experiences a significant downturn they may be exposed to personal risk from creditors of the company. One of their children, David, has Down syndrome and is likely to need professional care throughout his life.

Roger and Marie want to protect their family assets for their retirement and for the benefit of both their children. To protect their family, Roger and Marie decide to establish a family trust and

they transfer their family home and some other investments to the new trust. Roger and Marie ensure that they keep enough assets to meet their current financial obligations. The assets they transfer to the trust will, in most cases, be protected from claims by business creditors if their business fails. When they die, the trustees of the trust will be able to provide long-term benefits both to David and to Roger and Marie's other son, Michael, as needs arise. In particular, the trustees will have the flexibility to provide for David's long term residential care needs.

# Establishing a Trust

## Important Decisions

Establishing a family trust is a decision that can have a significant impact on the benefits you and your family can receive from your family assets.

It is therefore very important that the trust is established in such a way that it will meet the needs of you and your family. For this reason, trusts should not be established thoughtlessly using standardised documents. There are a number of particularly important decisions which you need to make in establishing a family trust. Your Lawlink lawyer is trained to identify and discuss these issues with you and to ensure that the family trust you establish will meet your particular needs.

The six major decisions that you need to make in establishing a family trust are:

1. Who will be the **trustees**?
2. Who will be the **beneficiaries**?
3. Should you establish one or more trusts?
4. How should you structure the **trust deed**?
5. What other documents will you need to prepare to complete your estate plan?
6. What assets should you transfer to the new trust?

## Decision 1:

### Who will be the trustees?

**Trustees** hold title to trust assets in their own names and have the power, subject to the **trust deed**, to deal with those assets as they see fit. Given the power that **trustees** have to control trust assets it is particularly important that you choose **trustees** you can trust to manage the trust affairs in a way that will provide the maximum benefits possible to the **beneficiaries**. **Trustees** must be mentally capable and over 20 years of age. You can be a **trustee** and a **beneficiary** of a trust you establish.

If you decide that you will be a **trustee** of your own trust, we generally recommend that you also appoint an **independent trustee**; this can help to protect the trust from claims that it is a **sham**. You can appoint anyone you trust who is mentally capable and over 20 years of age to be an **independent trustee**. For example, you could appoint a friend or a trusted professional advisor. Many professionals also run trust management companies which can be appointed as **trustees**.

Your **trust deed** should give at least one person the power to appoint additional **trustees** and to remove any **trustee** from office. If you set up the trust you would usually have this power of appointment and removal.

## Decision 2:

### Who will be the beneficiaries?

Anybody can be a **beneficiary** of a trust. It is important to remember that discretionary **beneficiaries** do not have an automatic right to receive benefits from the trust; they only have a right to be considered by the **trustees** when the **trustees** decide to make benefits available. This means that the group of **beneficiaries** you choose should be wide enough to include people whom you may want to benefit from the trust, but not so wide that the **trustees** have to consider the needs of a large, disparate group.

The most common groups of **beneficiaries** are relatives, close friends, charities and other trusts established for the benefit of these **beneficiaries**. We generally include a power for you to add further **beneficiaries** to the trust once it has been established, so that the trust can be changed to meet the future needs of your family.

If you set up a trust, you can be a **beneficiary** as well as a **trustee**.

## Decision 3:

### Should you establish one or more trusts?

In certain circumstances, we recommend establishing more than one trust to protect the interests of a single family. This arrangement is particularly suitable:

- where there is a particular need to separate the ownership of a family's business assets from its lifestyle assets, such as the family home; or
- for couples where one or both members have their own children (as setting up one trust for each partner ensures that the interests of their own children will be protected).

Your Lawlink lawyer can discuss with you your particular needs.

## Decision 4:

### How should you structure the trust deed?

The **trust deed** records how the trust will be administered. It is the most important document you will sign to establish your trust. The **trust deed** needs to be as flexible as possible, while at the same time reflecting your intentions in setting up the trust. Changing a **trust deed** once it has been signed is not a simple matter. It is therefore very important to ensure that the **trust deed** is prepared correctly at the outset.

Amongst other things, the **trust deed** will specify the name for the trust. You should choose a name that will help you to maintain the distinction between your personal affairs and the trust's affairs.

## Decision 5:

### What other documents do you need to prepare to complete your estate plan?

You should view your family trust as the central pillar of your estate plan. It should be accompanied by:

- a **will** dealing with your personal estate including any debt owed to you by the trust;
- a **memorandum of wishes**; and
- **enduring powers of attorney** documents.

When you establish your trust you should complete a new **will** to deal with:

- your personal chattels;
- the debt owed to you by your trust, if any;
- the balance of your estate (which is generally left to the trust); and
- your powers to appoint **trustees** and **beneficiaries** under the **trust deed**.

We also recommend that you prepare a **memorandum of wishes** to accompany your **trust deed** when you establish your trust. This memorandum should set out in detail all of your intentions for the trust and in particular cover such matters as:

- how the **trustees** should deal with the trust assets;
- how benefits should be made available to the **beneficiaries**; and
- how you would like the trust to operate after your death.

A **memorandum of wishes** provides useful guidance for the **trustees** who will operate the trust after you have died. However, such a memorandum is not binding on those **trustees**.

You should also consider signing **enduring powers of attorney** covering both your personal property and your personal care and welfare. These documents give a third person, the attorney, power to act on your behalf in relation to your property and your personal care and welfare if you are out of the country or mentally incapable. The word "property" in this context is used in a wide sense to cover all of your personal assets. It will apply to any land and buildings you own, as well as to bank accounts, vehicles and any other form of personal property.

## Decision 6:

### What assets should you transfer to the new trust?

Once you have decided on the structure of the **trust deed** you can begin the process of transferring assets to your new trust. Although you can transfer any asset to your trust, we generally recommend only transferring assets that are likely to increase in value.

If you are considering transferring an investment asset such as a rental property to your new trust, you should obtain advice from a taxation specialist on the effects of such a transfer. For example, if you have been claiming depreciation on your rental property, you may become liable for depreciation recovered if you transfer the property to your new trust.

When you have decided which assets you want to transfer to your trust, you then need to consider whether to transfer those assets by gift or by sale.

You can give assets of any value to your trust without incurring any gift duty (as gift duty was repealed with effect from 1 October 2011). However, there are a number of issues that you need to consider. These include:

- whether you will be solvent after you make the gift;
- the wider taxation implications of making the gift;
- how much direct access you need to the asset you intend to transfer; and
- what effect the gift will have on your potential eligibility for asset-tested benefits.

Giving assets to a trust can sometimes have negative consequences. If that is the case for you, you could sell your assets to your trust rather than transferring them by gift. Any sale should take place at current market value. Transfers for less than market value could be challenged by creditors and result in the trust or sale being set aside. If the trust does not have the financial resources to purchase your assets, the sale price can be recorded as a debt that the trust owes to you. This debt will be your personal asset and will be available to your personal creditors.

Under a sale arrangement, the only assets protected by the trust are:

- the increase in value, if any, of assets sold to the trust over their original market value at the time of sale;

- the amount of any **gifts** made to the trust (including any partial forgiveness of the debt created by the original sale); and
- any income earned by the trust that has not been distributed to **beneficiaries**.

Whether you give or sell your assets to your trust you need to ensure that you do not become technically insolvent as a result of the transfer. You need to have sufficient resources, after transferring your assets, to pay all of your debts (including contingent debts like personal guarantees). Any gift which leaves you insolvent could be challenged by your personal creditors and the trust may then offer little or no protection.



# Administering a Trust

## The importance of proper administration

Once your trust has been established it is very important that it is administered properly. Your trust achieves its objectives by separating ownership of your family's assets from you personally. If the trust is not administered properly to make this separation of ownership clear then the trust could be challenged as a **sham**. Such a challenge could be made by a business creditor, relationship partner, the IRD or Work and Income New Zealand. If such a challenge is successful then the trust assets could be treated as your own personal assets and the benefits available through the trust structure will be lost.

## General administrative requirements

When establishing your family trust, your Lawlink lawyer will discuss with you the requirements for administering your trust properly. They will also be able to assist with the ongoing administrative requirements for the trust if required.

In general, **trustees** of a family trust should:

- meet on a regular basis, at least annually, to review the trust investments and the needs of the **beneficiaries**;
- be involved in all trust decisions and record their decisions in writing;
- ensure that they comply with the legal obligations imposed on **trustees**; and
- ensure that the trust meets its income tax obligations such as filing a tax return if the trust receives an income.

## Trustee obligations

Under the Trustee Act 1956, **trustees** have a duty to invest prudently and to "exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of others". Although many modern **trust deeds** exclude or reduce these obligations, all **trustees** are still expected to exercise a reasonable level of responsibility and prudence in carrying out their responsibilities. The Trustee Act therefore provides a useful guideline for any **trustee** making decisions.

As a guideline, **trustees** should have regard to the following matters:

1. the desirability of diversifying trust investments;
2. the nature of existing trust investments and other trust property;
3. the need to maintain the real value of the capital or income of the trust;
4. the risk of capital loss or depreciation;
5. the potential for capital appreciation;
6. the likely income return;
7. the length of the term of the proposed investment;
8. the probable duration of the trust;
9. the marketability of the proposed investment during, and on the determination of, the term of the proposed investment;
10. the aggregate value of the trust assets;
11. the effect of the proposed investment in relation to the tax liability of the trust; and
12. the likelihood of inflation affecting the value of the proposed investment or other trust property.

Although not all of these matters will necessarily be relevant in all circumstances, they do provide a useful guideline for any **trustee** making an investment decision.

A passive **trustee** who merely rubber stamps the decisions of co-trustees could be exposed to claims by **beneficiaries** for losses incurred by the trust.

## Trustee liability

**Trustees** are personally liable for all debts incurred by the trust including tax liabilities. Where loans are arranged from banks or similar lending institutions, it is customary for the liability of **independent trustees** to be specifically excluded. It is also quite reasonable for **independent trustees** to request a **settlor** to personally indemnify them for any losses they incur as a result of their **trusteeship**.

## Taxation obligations

Taxation obligations will vary between trusts and, where appropriate, **trustees** should take specialist accounting advice to ensure that they comply with their trust's taxation obligations. One issue which is often overlooked is the need for **trustees** to resolve how any income earned by the trust will be treated. The **trust income** can be:

- distributed to, or applied for the future benefit of, all or some of the **beneficiaries** and taxed at their tax rate (there are some limitations for distributions to children aged under 16); or
- treated as **trust income** and taxed at the **trustee** rate (currently 33%); or
- divided using a mixture of these two options.

If a resolution is not passed within an appropriate time frame, the income will be treated as **trust income** and taxed at the 33% tax rate. This could mean that potential tax savings are lost.

## How long can your trust last?

The law permits trusts to operate only for limited periods. The usual maximum period is 80 years. However, a shorter period can be stipulated in the **trust deed** if required. Usually, **trust deeds** provide that the **trustees** can bring forward the date of winding up.

## How can you access trust income?

Distribution of **trust income** is totally at the discretion of the **trustees**. They may do any of the following:

- accumulate and retain all or any part of the **trust's income** within the trust;
- make **distributions** of income to any one or more of the **beneficiaries** in any proportions; or
- credit income to the current account of any **beneficiary** with the trust (the income will then be taxed as **beneficiaries'** income and will be payable to the **beneficiary** on demand).

## How can you access trust capital?

Before the trust is wound up any **distribution** of capital is usually at the discretion of the **trustees**. Capital can usually be paid to any one or more of the discretionary **beneficiaries**. If you are a **beneficiary** of the trust you can therefore receive **distributions** of capital if the **trustees** decide to make such a payment. Alternatively, if you are owed money by the trust, you may be able to access the trust capital by demanding repayment of all or part of the outstanding loan (subject to the terms of the loan agreement).

## Can you use a house owned by your family trust?

If your family trust owns a house then the trust can make the house available to you and your family to live in, provided that you are **beneficiaries** of the trust. The trust can allow you to live in the house on the basis that you pay the rates, insurance premiums and other day to day outgoings in lieu of rent. This decision of the **trustees** should be recorded in writing and should be reviewed regularly as part of the **trustees'** regular review of the trust's investment policy.

## Can a trust carry on business and invest?

Most trusts effectively give the **trustees** an unrestricted power to act as if the trust were a natural person, with no limitation on what the **trustees** can or cannot do. Trusts can therefore conduct a business in the same way as a natural person. However, some care needs to be taken where a trust is conducting a business as particular legal, taxation and risk management issues can arise. Your Lawlink lawyer can discuss these with you if you intend to use your trust to operate a business.

## How do trustees make decisions?

The **trust deed** can provide:

- that the decisions of the **trustees** will be unanimous; or
- that a decision of a majority of the **trustees** will be binding.

If the **trust deed** does not make either provision, the **trustees'** decisions must be unanimous. Most **trust deeds** also provide that **trustees'** decisions must be made or ratified in writing.

# Relationship property issues

If you are currently living in a married, de facto or civil union relationship then it is likely that all or a significant part of your assets will be relationship property. If you and your partner separate at any point in the future that relationship property must, except in certain limited circumstances, be divided equally between both of you. However, assets held by a trust are trust assets, not your personal assets, and as a result are not subject to this relationship property division. Transferring family assets to a family trust therefore has a significant impact on your relationship property rights. Your Lawlink lawyer will discuss these issues with you when you transfer family assets to a trust.

It is particularly important for you to understand the effects of the relationship property legislation on your family trust arrangements because:

- in some cases, transferring assets to a trust will remove relationship property rights you would otherwise have been entitled to; and
- in certain circumstances, where inappropriate dispositions have been made to a family trust, courts have the power to make compensatory judgments to a partner who has been disadvantaged by the trust arrangement.

## Important terms

A **beneficiary** is a person, company or other entity who can receive benefits from a trust.

A **distribution** is a payment from a trust to a **beneficiary**.

Under an **enduring power of attorney** document you appoint another person to act on your behalf if you are out of the country or become mentally incapable. This power can apply to your personal property, your personal care and welfare or to both areas.

You make a **gift** when you transfer a personal asset to another entity and receive nothing (or less than market value) in return. You can make **gifts** to a trust by either directly transferring assets, or by **forgiving** all or part of a debt the trust owes to you.

An **independent trustee** is a **trustee** who is not a **beneficiary**.

A **memorandum of wishes** is a written summary of your goals and objectives for your family trust.

A **settlor** is a person who creates a trust by transferring assets to **trustees** subject to the provisions of a **trust deed** they have prepared.

A **sham** trust arises where a **trust deed** has been signed and assets have supposedly been transferred to the new trust but the **settlor** and **trustees** **did not intend to create a real trust and** have continued to treat all of the assets supposedly owned by the trust as the **settlor's** personal assets.

A **trust deed** is the set of rules for the operation of a trust.

A **trustee** is a person appointed by a **settlor** to hold legal title to trust assets for the benefit of some **beneficiaries**. A **trustee** has legal control of the trust assets.

**Trust income** is the money a trust makes from the investment of its capital. It can include interest, rent and share dividends.

**Trust capital** comprises the assets of the trust and can include real estate, term deposits and share investments.

A **will** is a legal document which specifies how you want your personal assets to be administered and distributed after your death.

## Where to from here?

If you have any questions or would like to begin the process of establishing a family trust to protect your family, please contact your Lawlink lawyer.

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