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FAMILY TRUSTS



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A Trust is a legal tool that reduces the chances of a person losing what assets they already have, and those they accumulate in the future.

Assets are placed in a Trust by a Settlor, and they are managed under the control of Trustee(s) who must deal with the assets for the benefit of other people called Beneficiaries. An individual person may be the Settlor, a Trustee and a Beneficiary of a Trust. This is very common.

A Family Trust helps to separate personal and business activities and protects assets in case of matrimonial or relationship problems. This is especially important since the introduction of the Property (Relationships) Amendment Act 2001 and the Civil Union Act 2004.

A Family Trust also helps a person to hold on to their hard-earned assets so that their later years aren't spent in poverty, which can be the case if they are forced to sell property and other assets in order to pay for rest home care.

There are many other advantages to be gained by establishing a Family Trust.

By knowing what a Trust is for, and by obeying trust law the entire process of establishing one can be straightforward and fairly inexpensive.



Who Is Involved in A Family Trust?

The Settlor

The person who sets up the Family Trust is called the Settlor. It is very common for a husband and wife to both be Settlers of a new Family Trust.

The Settlor will typically be the person who owns the property that will be transferred into the trust. It is the Settlor who sets out in the Trust Deed who will be responsible for the assets of the Trust (Trustees) and who will be eligible to receive any benefit from the Trust (Beneficiaries).

A Settlor will usually (but not always) appoint themselves as a Trustee and also as a Beneficiary of the Family Trust.

A Settlor must have a genuine reason for setting up a Family Trust, they must sign a carefully-written Trust Deed (usually drawn up with the help of a Trust Expert) and they must appoint the Trustee(s).

A Settlor cannot be the sole Beneficiary of the Family Trust. If they were, then a Court would surely deem that no actual Trust exists.

Trustees

The Trustees are people who own and control the assets that are placed in the Family Trust. As Trustees of the Family Trust they now have legal ownership of the property, but they must act in the interests of the Beneficiaries.

There is no specified number of Trustees that a Trust can or can't have.

All Trustees must be consulted before any decisions are made regarding the Trust or its assets. Therefore independent Trustees must be at least as available as the other Trustees.

Trustees are obliged to sign minutes outlining Trust decisions. There must be no suspicion of absent Trustees 'rubber stamping' decisions once they have been made. This will place the credibility of the Trust in doubt.

Beneficiaries

The Beneficiaries are the people that the Settlor(s) wish to benefit from assets in the Trust.

At the establishment of the Trust, the Settlor(s) elect who they wish to benefit from the Trust. Beneficiaries named at this point are usually the Settlers, their spouse or partner and close blood relatives. In other words, people for whom the Settlor has 'natural love and affection'. The term 'natural love and affection' is used in Trust and Tax laws to identify those people who can be Beneficiaries of a Trust.

The Trust Deed may allow for more Beneficiaries to be added later. For example, you may wish to add a particular individual or you may provide that new Beneficiaries be added when they come into existence. This may be in the case of a new grandchild being born; the Trust Deed could provide that the grandchild would automatically become a Beneficiary.

All benefits paid to Beneficiaries are usually made at the absolute discretion of the Trustees.



Why Do People Put Their Assets in a Family Trust and How Is It Done?

There are many reasons that people choose to move their major assets into a Family Trust. Most commonly it is done to either avoid unwanted parties (such as children's ex-partners) getting their hands on the family assets or to avoid the assets having to be sold to pay for rest-home care when the person becomes elderly.

A Trust can purchase and hold any type of asset. Typically, people will move their family home, other property, shares, life insurance and other major assets (including items such as heirloom jewellery) into their Family Trust.

The golden rule for deciding which assets should be moved into your Family Trust is as follows; All assets which are appreciating (increasing) in value should be moved into the Family Trust. Assets that are decreasing in value (i.e.: vehicles, household appliances etc) should be kept outside of the Trust.

Assets are transferred from a person to a Family Trust in the same way as they would be transferred between two people; the Trust purchases the assets from their previous owner(s). A suitable (independent) valuation is established, and the correct sale & purchase documentation is drawn up and signed. The debt that is owed by the Trust to the person who sold the asset (Settlor) is recorded and then forgiven by the Settlor.



When a Family Trust is established, most of the asset transfers will be completed immediately, for the following simple reason: As time passes, your key assets gain value and your business, if you have one, gains shareholders equity. Therefore, the longer you hold the assets personally, the longer and potentially more expensive the process of forgiving the debt will be.

It may take many years for your assets to be debt-free inside your Family Trust, when being considered for the purposes of assessing Rest-Home Subsidy etc. This time-delay should be considered like medicine which you must take for neglecting to set up your Trust at the earliest possible time, before you accumulate all the expensive assets!

Unfortunately, there is no legal way to avoid this medicine.

Remember that each day that goes by without your Trust owning your major assets, the longer and potentially more expensive it will be to secure those assets for your children and other future generations of your family.



Should I put my company into my Family Trust?

Given that the overall purpose of a Family Trust is to reduce your personal wealth, whilst securing your assets for your own use and for future generations, there is a simple golden rule when considering what to put into a Trust and what to leave out.

If an asset is likely to appreciate (rise) in value over time and if it is something that you may like to pass on to your children, it should be placed in your Family Trust. Assets such as your family home, public shares, life insurance policies, family heirlooms and antique jewellery fall squarely within this category.

If an asset is likely to depreciate (fall) in value over time and if it is something that is likely to have a relatively short lifespan, it should be kept out of your Family Trust. Into this category fall such items as household appliances, clothing, personal effects and vehicles (unless you own an original Ford Model T!).

If you are self-employed, the shares you own in your business are likely to appreciate in value (after all, that should be the key goal of your business). For that reason alone, your company shares should be put into your Family Trust as soon as possible.

But there are other, equally compelling reasons for transferring the ownership of your company into your Family Trust. For example, if your business fails, even if this is caused by factors beyond your control, you may gain additional personal protection from having the company owned by your Family Trust. This is particularly true if you find yourself having to declare bankruptcy.

But a word of caution; The New Zealand courts have the power to overturn certain recent transfers of assets into a Trust if they have been done in order to avoid tax or other financial liability. Therefore the message is crystal clear, as is always the case with Family Trusts, the sooner you act, the sooner the Trust will begin offering you protection.

Why Do I Need a New Will When My Family Trust Is Formed?

Family Trusts form a critical part of any sound asset-protection plan. The key purpose of a Family Trust is to ensure your major family assets are protected for future generations. This is done by arranging for the Trust to be wealthy, while the person(s) who set it up (the Settlers) become 'poor'.

There are some similarities between a Family Trust and a Will. A Family Trust is sometimes called a "living will". This is because, like a Will, it describes who can benefit from the family assets (usually children, grandchildren and other close relatives) and who should not benefit (usually the Government, ex-spouses and other disassociated parties).

The difference between the two is that a Family Trust protects your assets while you are alive.

If the Government tries to get their hands on your assets when you enter a rest home, or when creditors try to take them if your business gets into financial difficulty, your Family Trust will protect the assets, so you can keep on enjoying them, as can your family. Of course, this can only occur if the assets are freehold inside your Family Trust, which can take a few years to achieve; so it is always a good idea to form your Family Trust sooner rather than later.

It is important that you sign a new Will when your Family Trust is formed. Both your Family Trust Deed and your Will need to be in concert; meaning that there should be no contradiction of either document by the other.

Essentially your Will determines how you want the assets held outside of your Trust distributed when you die. Most importantly, your Will serves to ensure that any assets not yet transferred to the Family Trust are bequeathed to the Family Trust if you want this to happen. This includes debts owed to you by the Trust at the time of your death.

It is also important that the Wills of other family members are altered if they intend to leave any of their assets to you when they die. Their assets should be left to your Trust, not you personally if you are to achieve the goal of a wealthy Trust and remain 'poor' yourself.

Fortunately, Wills are not difficult to write and/or alter nowadays. A reputable Trust Formation company will include the writing of a new Will(s) in their costs for setting up a new Family Trust.



How Do I Administer My Family Trust?

There are two common questions raised by our clients when they are considering the formation of their Family Trust; (1) Does a Family Trust need to be administered by a lawyer and/or accountant? and (2) Aren't there significant ongoing costs associated with administering the Family Trust?

We are always delighted to inform them the answers to those questions are No and No.

A Family Trust that has been thoughtfully documented, with templates for ongoing actions and instructions for administration will generally not require the services of an accountant or lawyer. If the Trustees are competent and diligent, a Family Trust can be administered year after year at no cost whatsoever.

As with a business, if there are major transactions such as property sale & purchases taking place, or if the Trust has significant income, an accountant or lawyer may be needed to complete certain tasks. However, even then, the amount of input required by the accountant or lawyer should be minimal if the Trustees have correctly documented the transactions themselves.

Historically, accountants and lawyers have done a fine job of lining their own pockets by convincing people that they should be intimately involved with the Family Trust administration. This is not only generally untrue, but it has also added to the view that Family Trusts are only for the rich to enjoy. As thousands of New Zealanders have now discovered, with the right guidance, most people are able to administer their own Family Trusts.

A Family Trust is similar to a company when it comes to record-keeping, with the Trustees having many of the same responsibilities as company directors.

Let's look at some of the key tasks involved with Trust administration:

The Trustees are required to write minutes concerning their decisions and keep these and other Trust documents in a safe place for future reference.

The Trustees must carefully maintain the Trust bank account(s) and copies of the bank statements should be kept with the Trust documents. Details of all payments made by the Trust along with all income received by the Trust must be documented.

Details of the Trust assets must be recorded, along with any debts owed by the Trust for their purchase.

Most importantly, the Trustees must at all times act within the rules laid down by the Trust Deed, which commonly includes instructions about the way in which Beneficiaries are to be treated and how the Trustees can exercise their powers when making Trust decisions.

There are annual Tax returns to complete if the Family Trust is registered with the Tax Department, along with annual Revenue Authority Gifting Forms if the Trust owes a debt to the Settlers. However, there are usually no Goods and Services Tax (GST), Fringe Benefits Tax (FBT) or PAYE returns to worry about.

And that's about all there is to it. The administration of a Family Trust should generally be less onerous than the administration of a small business, which is great news for those considering a Family trust to protect their family assets for future generations.



The scribe Coach Edwin Tsvere is a known sales productivity and management expert with 34 years of experience in banking, insurance, Training and High Net worth Distribution. Over the years he has trained, coached, and mentored 5000 sales professionals across markets in Africa, Asia, Australia, Europe, and the UK. His High Net worth experience includes being Head of Distribution & Training (Zimnat Life Assurance) Business Relationship Manager (Zimnat Life Assurance in Association with Sanlam), Training and Development Consultant (Sanlam Life Insurance Zambia), Co-Founder of the SanlamAllianz Training Community and now he is the Channels Director for Diaspora Insurance. Edwin is a John Maxwell Team Member and Certified Leadership Coach, Personal Development Coach, and Retirement & Financial Wellness Coach anointed to activate potential. Edwin is a Transformational author and speaker. A Certified Professional Life Coach accredited by the International Coaching & Mentoring Foundation (ICMF).

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