



TRUSTS, WILLS AND ESTATES

EXPERT ADVICE ESSENTIAL FOR VALUABLE ASSET

September 2022

INDEPENDENT, SKILLED ADVICE FOR PEACE OF MIND

We understand the implications of trusts, wills and estates. We can offer independent advice and ensure you and those you choose to support you as trustees, appreciate their duties.

TRUSTS

A trust can be an important and valuable asset for your business and for you personally, but expert advice to guide you through the many facets of trust establishment and maintenance is essential.

Trust Maintenance

Our trust administration is designed for the typical family trust where the sole assets are passive assets (such as the family home or leased land). Moore Markhams can assist with establishing your trust, and for an annual fixed fee, assist with its administration:

- Preparation of annual minutes of the trustees
- Preparation of minutes authorising significant transactions
- Maintenance of the trust records
- Maintenance of the trust register of assets and liabilities.

The proper administration of trusts including the maintenance of records and documents and attending to information requests of beneficiaries, has become increasingly important. This a key area of focus with the changes to the Trusts Act 2019 that came into effect in January 2021.

Each trustee needs to ensure they keep a copy of the trust deed or terms and any variations made to these. Other records including decision-making documents, accounting records and contracts need to be maintained by at least one trustee.

Background information on trusts Characteristics

A trust is a legal relationship normally involving three parties:

The settlor

The settlor establishes the trust and transfers the assets into it. (Assets could simply be an amount of money used to purchase assets.)

The trustees

Typically, there will be at least two trustees, possibly three. These people have the power and duties of operating the trust. As a result of transferring assets into the trust, trustees become the legal owners of the assets and must then administer these assets in accordance with the terms of the Trust Deed (the written document establishing the trust that sets out the way it is to operate). The trustees decide how the property will be invested and who should receive the benefits.

It is becoming increasingly important that at least one of the trustees be an independent person, someone not influenced by the settlor. This person could be a professional advisor. Moore Markhams acts as an Independent Trustee of many clients' trusts.

Under the recent changes to the Trusts Act, there is also a series of codified duties that trustees must now follow. Many of these duties were previously implied but now there is an express requirement that trustees know the terms of the trust and act in accordance with these terms; act honestly and in good faith; act for the benefit of the beneficiaries or to further the express purpose of the trust; and exercise their powers for proper purpose.

Please be aware that where Moore Markhams is to act as an Independent Trustee, we have obligations under the current Anti-Money Laundering legislation (AML/



CFT) that require us to obtain additional information from the other trustees, settlors, and further information about the trust and its beneficiaries. We require this information before we can accept appointment and undertake any duties as an Independent Trustee.

The beneficiaries

These are the people who benefit under the trust. The benefit may be an allocation of annual income, or distribution of assets and capital, or even both. Just how those people may benefit is set out in the Trust Deed.

Types of Trusts

There are three types of trusts for tax purposes:

Complying Trusts

Complying Trusts are the most common type of trust and have a New Zealand resident settlor and New Zealand resident trustees.

Foreign Trusts

Foreign Trusts are trusts that have a non-resident settlor at the time the trust makes a distribution. From February 2017, there have been additional reporting and compliance requirements introduced for Foreign Trusts. All Foreign Trusts are required to register with the Inland Revenue Department and complete a separate annual return and additional disclosure documents each year.

Non-Complying Trusts

Non-Complying Trusts occur when the settlor of a foreign trust becomes a New Zealand tax resident.

Each type of trust has different treatment for income tax purposes including what income is liable for tax and what distributions will be considered taxable.

Benefits of establishing a trust

Flexibility

A discretionary trust allows considerable flexibility in dealing with the changing circumstances of beneficiaries. The trustees decide how much money to distribute to each beneficiary, and this can reflect each beneficiary's personal circumstances.

Protection of assets

Trusts are a means of protecting assets; from creditor claims as well as relationship or family claims. Trusts can also provide certainty in the event of your death. Because the assets held by the trust are not assets held by your Estate, they may be excluded from any dispute over your property.

Duration of trusts

Trusts are ongoing (currently limited to 80 years but will be extended to 125 year for new trusts settled after 30 January 2021). If you die suddenly, the trustees can continue do what's best for those people you nominate to benefit from the trust. It is possible for the trust to continue to exist for as long as is required after your death; for example, until the youngest of your children turns 21.

Tax advantages

The ability to distribute income to a number of different persons, who may be in lower tax brackets, could provide tax savings. (This generally applies to business and investment income rather than salaries and wages.)

Inheritance tax

Estate and death duties are currently charged at the rate of nil. The mechanism for charging these duties remains in place, so they could be reintroduced at any time by the Government of the day. Assets transferred into trusts may avoid such duties.

Disadvantages

The main disadvantage is the actual transference of ownership of assets. While the settlor may still retain influence over the assets, the assets are not freely available for use. Asset use must be determined by a decision of the trustees. This can create difficulties if the settlor is unable to access the assets at a time when he/she needs them, for example, as a security for a loan.

There are additional costs involved in creating a trust and administering it.

There is also the risk that the Government may legislate against some of the benefits currently enjoyed by trusts. An example of this is the introduction of the changes to beneficiaries' tax rates and the income attribution rules.



Gifting

Once the settlor has settled assets on the trust, typically the settlor will take a debt back equal to the value of those assets. Gift duty was abolished from 1 October 2011, so this debt can be forgiven in its entirety without attracting any gift duty.

However, please note that gifting may affect your eligibility for the Residential Care Subsidy. The current subsidy test allows for gifting of up to \$27,000 per couple per annum (this reduces to \$6,500 per couple per annum within the five years immediately prior to applying for the subsidy).

Advice for trustees

Successful challenges in Court of poorly made trustee decisions and the tightening of the Government welfare controls have made it imperative that trustees carry out their duties properly.

Make sure your trustees understand their responsibilities and obligations. Get (and follow) the right advice; the trustees will make the right decisions and you can be comfortable they are doing the best for you.

You can read more about the requirements of the Trusts Act 2019 on our website.

WILLS

Wills deal with the distribution of your assets when you die. You should always have a will; and update it regularly to reflect the changes in your circumstances, especially as children are added to your family.

Trusts ultimately do the same thing as a will, so it is important that your will is updated to reflect the changes brought about by having a trust.

ESTATES

Estates are similar to trusts except:

- they are created when you die
- their purpose is often simply to distribute the assets of the deceased person, and manage the assets between death and distribution
- they usually (but not always) have a short life span.

Estates are created in terms of a will (if there is one) rather than a deed. The distributions are not generally discretionary; the trustees (called 'executors') are guided by the will as to the distribution of assets.