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A Family Trust

What is a family trust?

A trust can be created either during your lifetime (by a declaration of trust within a trust deed) or after you have died (in terms of your will).

As the name suggests a family trust is created in order to benefit members of your family.

A trust comprises a settlor, a trustee and at least one beneficiary. A trust will be created when the settlor transfers ownership of property such as a house and money to the trustees to hold on behalf of the beneficiaries. The assets will then be under the legal control of the trustees for the benefit of the beneficiaries. The settlor no longer has any legal interest in assets transferred to trustees.

The Settlor

The settlor is the person who sets up the trust. Usually the settlor will be the person who owns the property and the assets to be transferred into the trust. The settlor will appoint the trustees and provide them with specific powers. The trustees will hold the assets in their own names (in their capacity as trustees) and must deal with them as the trust deed directs. The settlor will also identify the beneficiaries of the trust who may receive benefits from the trust.

The Trustees

The trust deed appoints the trustees. The trustees hold trust property in their own names, but in their capacity as trustees. The trustees must administer the trust in accordance with the powers conferred on them under the trust deed.

The Beneficiaries

The beneficiaries may be “discretionary beneficiaries”, “primary beneficiaries” or “final beneficiaries”.

A discretionary beneficiary is named in the trust deed who may at the discretion of the trustees receive a benefit from the trust.

A primary beneficiary may be given priority over the other beneficiaries if the trust deed so directs.

Final beneficiaries receive the trust assets when it is finally wound up.

What are the advantages of having a family trust?

There are significant benefits in having a family trust, particularly in relation to risk management and asset protection and for family reasons.

Family reasons

Some people set up a family trust so as to protect the assets from claims by children whom they consider to be undeserving. Trusts provide a way for spouses and dependent children and grandchildren to be provided for without the ability to demand money or capital.

When making your will, the law requires that you consider the needs of certain members of your family (see our article on "**Making a will**"). Failure to make adequate provision for those people can mean that they may make an inheritance claim against your estate under the Family Protection Act after you have died (see our article on Inheritance claims). Ordinarily any assets owned by a family trust will not form part of your estate and cannot be subject to such a claim.

A family trust will help reduce the risk of your children's spouses or partners gaining an interest in the family assets in the event their relationships break up.

Trust can also be a means of caring for children of one relationship separately to the children of another relationship.

Significantly a family trust allows for a considerable amount of flexibility so that at different times over a significant period of years (up to 80 years) the needs of the beneficiaries can be looked after.

Relationship property

Sometimes people choose to set up a family trust after their spouse or partner has died or after a divorce or relationship breakup. Typically, assets such as the family home will be transferred into the trust. Usually this will protect those assets from any future claim from a new spouse or partner. However, this is an area where legal advice is required to best manage this risk.

Protection from creditors

A significant advantage of a family trust is that assets held by the trust will usually be protected from creditors. If you are in business or thinking of going into business a family trust is extremely important.

Taxes

A trust can be an important way to enable flexibility in the distribution of income to family members on a lower tax rate. It is also a means to help protect assets from capital gains tax, should it be introduced, or from the reintroduction of inheritance tax, succession tax or estate duty.

Income and means tested benefits

Having your assets (including any income earning assets such as a rental property) in a family trust originally meant your chances of obtaining state benefits such as rest home subsidies are likely to increase. This is a rapidly changing area, and legal advice is required to maximise the prospects of a trust achieving its goals.

Confidentiality

The existence of a family trust is largely confidential. There is no public register of trusts. The existence of a company is a matter of public record and can be easily searched.

Before creating a family trust it is important to get good legal advice. Graeme Withers and Julie Withers of Graeme Withers Law are experienced Solicitors who can assist you with creating a trust, preparing the trust deed and transferring the assets into that trust. Please contact Graeme on (04) 478 4889 (027) 715 5421 or Julie on (04) 478 4888 (027) 478 4888 or by email info@witherslaw.co.nz

This note is intended for general information only. It is not intended to be relied on as a substitute for legal advice which focusses on individual circumstances.