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 risks for you and your family. Establishing a trust for your family can help to protect you and your family from some of these risks.

The aim of this booklet is to provide you with the information you need to:

1. decide whether establishing a trust is appropriate for you and your family;
2. know how to establish your own trust; and
3. understand how to administer a trust.

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 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 creates legal relationships between:

1. the **settlor** or **settlors**, who create the trust and decide 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 or principal **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 trust are not owned outright by either the **trustees** or the **beneficiaries**. Trust assets only become the property of the **beneficiaries** when the **trustees** transfer the assets to the **beneficiaries** personally. As a result, trusts can be used to achieve a number of objectives, including those summarised in the following pages.

What are the advantages of family trusts?

Creditor protection

Assets in a trust are usually protected from claims made against the **settlors**, **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**. However, there are some important limitations to these protections. For example if a **settlor** transfers assets to a trust when they are insolvent or within two years of bankruptcy the transfer may be reversed as part of a bankruptcy process.

Protection against relationship property claims against you

If you transfer your assets into a family trust before you enter a relationship, your partner will not usually have any claim against those trust assets if you separate. This issue is explored in more detail on page 26.

Protection against relationship property claims against your children

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. 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 are less likely to be subject to claims by your children's partners.

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 income 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 trust may also protect a child with special needs by ensuring that assets can be used for their care without giving them control of those assets.

Protecting assets for future generations from potential tax law changes

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

Possible protection of eligibility for income or asset tested benefits

Government benefits such as residential care subsidies (for long-term residential or hospital care) are often subject to asset testing. Assets held in a 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 you about how the rules may apply to you and your family.

Trusts make an excellent final beneficiary under a will

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

As an alternative, you can leave your estate directly to trusts established for your children. Your children can benefit from this type of arrangement, particularly where significant assets are involved. If you leave your assets to your children and they want those assets to be held in a trust, they would then need to transfer their inheritance to their trust. That process can be vulnerable to challenge in some circumstances. Leaving your assets directly to such a trust removes that vulnerability.

Reducing or preventing claims against your estate

Courts can effectively rewrite your **will** under the Family Protection Act 1955 if they consider that members of your family have been disadvantaged by its provisions. However, the courts cannot rewrite your trust for Family Protection Act purposes.

General flexibility to deal with changes in the law

Modern **trust deeds** normally include rights of variation so that the trust can be amended as required to deal with changes in the law to ensure that your assets are managed as effectively as possible even following changes in the law.

Tax saving on beneficiaries' income

A trust is a separate entity for tax purposes and must file a tax return each year unless it has registered as a non-active trust. **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 on all of their income (including income from the trust). 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 income and that income is taxed at a flat tax rate of 33%.

Taxation issues are dealt with in more detail on page 23.

Confidentiality

Family trusts are not publicly registered and the details of your trust arrangements can therefore be kept confidential (subject to the information disclosure obligations to beneficiaries discussed on page 22).

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 influence 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**.

Furthermore, if you are a **trustee** yourself, you cannot deal with the assets as if they were your own; you will be subject to a range of legal duties that place important limits on what you can and cannot do. The nature of those duties is reviewed in more detail on pages 20 and 21.

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.

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.

Information disclosure requirements

The Act imposes obligations on **trustees** to provide basic trust information to **beneficiaries** and **beneficiaries** can seek further information from the **trustees** if they want to do so. **Trustees** can only refuse information requests from **beneficiaries** if they have good reason for doing so. This level of disclosure within a family can be problematic for some families.

Is a family trust appropriate for you?

In some cases immediate benefits can be achieved by establishing a family trust. Those benefits could include financial benefits from prudent planning or the peace of mind that comes from implementing a plan for the management of family assets.

Many family trusts are formed primarily to reduce the potential impact of problems which may or may not occur in future such as:

- claims from business creditors;
- relationship breakdowns; or
- family conflict following the death of one or both parents.

In these cases 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 trust structure is no longer available.

A family trust can therefore 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 analagous to an insurance premium.

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

There are limits to the protections offered by a family trust. 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 trust 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 current 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.

An example

Roger and Marie have two children and run their own tourism 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 a health condition 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 care needs.

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.

Establishing a family 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 your family trust is established in such a way that it will meet your needs and the needs of your family. For this reason, family 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 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** and the Act to deal with those assets as they see fit for the benefit of the **beneficiaries**. 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's affairs in a way that will provide the maximum benefits possible to the **beneficiaries**. A **trustee** must be mentally capable, over 18 years of age and cannot be an undischarged bankrupt. 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, you should consider appointing 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, over 18 years of age, not an undischarged bankrupt and not a beneficiary of the trust 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 **independent trustees**.

Your **trust deed** should give at least one person the power to appoint **trustees** and to remove any **trustee** from office. If you set up the trust you would usually hold 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. However, **beneficiaries** have rights to receive basic trust information and seek further information from the **trustees**. **Beneficiaries** also have rights to be considered by the **trustees** when the **trustees** decide to make benefits available and they can take legal action against **trustees** to hold the **trustees** accountable for their performance. This means that the group of **beneficiaries** you choose should be wide enough to include people you want to benefit from the trust, but not so wide that the **trustees** have to provide information and be accountable to a large, disparate group.

The most common groups of **beneficiaries** are children and grandchildren and other trusts established for the benefit of these **beneficiaries**. You could also include a power for you to add further **beneficiaries** to the trust once it has been established, so that the trust can be changed in future, if required, 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?

For some families, the best option is to set up two or more trusts to protect their interests. 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 your particular needs with you.

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 and meeting the legal requirements for the trust to be valid. Changing a **trust deed** once it has been signed is not necessarily a simple matter. It is therefore 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**;
- a **memorandum of wishes**;
- **enduring powers of attorney** documents; and
- documents nominating who you want to exercise any powers of appointment and removal of **trustees** that you hold, if you die or become incapable.

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; and
- the balance of your estate (which could be left to the trust).

You should also complete a **memorandum of wishes** to accompany your **trust deed** when you establish your trust. This memorandum should set out in detail 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**;
- how you would like the trust to operate after your death; and
- how much information you want the **trustees** to disclose to the trust's **beneficiaries**.

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 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.

If you hold any power to appoint and remove trustees of a trust, you should also nominate who you want to hold these powers if you die or become mentally incapable. This nomination is generally recorded in a document known as a deed vesting power of appointment.

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.

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 recovery 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. 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 reduction of the debt arising from the sale price, either by way of debt repayments from trust income or by debt forgiveness **gifts** made to the trust; and
- any income earned by the trust that has been retained by the trust.

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. There are two key reasons for this.

The first is that **trustees** are subject to a range of legal duties to ensure that the trust is properly managed. For example, trustees generally have a duty (imposed by the Act) to actively and regularly consider the exercise of their powers. **Trustees** who fail to comply with these duties or manage trust assets properly can be sued by **beneficiaries** and face personal liability for any losses suffered by the trust or the **beneficiaries**.

The second reason is that poor administration can threaten the validity of the trust. 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 challenges could be made by a business creditor, relationship partner, the IRD, Work and Income New Zealand or any other party wanting to access the trust's assets to meet your liabilities. If a challenge is successful then the trust assets could be treated as your own personal assets and the benefits available through the trust structure would 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 summary, **trustees** of a family trust should:

- hold a copy of the trust deed and any variations to it;
- ensure that all **beneficiaries** are informed of their status as **beneficiaries**, how the **beneficiaries** can contact the **trustees** and the fact that **beneficiaries** can ask for information about the trust;
- notify **beneficiaries** of any changes of **trustees**;
- meet on a regular basis to review the trust's investments, the needs of the **beneficiaries**, the level of disclosure required and whether the **trustees** should be exercising any of their powers;
- be involved in all trust decisions and record their decisions in writing;

- develop and maintain an investment strategy for the trust;
- 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 required.

Trustee duties

The **Act** imposes a range of duties on trustees. These duties are categorized in the **Act** as either mandatory or default duties.

Mandatory duties are imposed by the **Act** on all **trustees.** They apply regardless of the terms of the **trust deed** and cannot be excluded by the **trust deed.** These mandatory duties are that **trustees** must:

- know the terms of their trust;
- act in accordance with the terms of the documents creating their trust;
- act honestly and in good faith;
- act for the benefit of beneficiaries or the trust's purpose; and
- exercise their powers for a proper purpose.

In contrast to mandatory duties, the default duties imposed by the **Act** only apply if they have not been excluded or modified by the terms of the **trust deed. Trustees** therefore need to ensure that they are familiar with their **trust deed** and have identified which default duties they need to comply with, and which default duties have been excluded or modified by their **trust deed.**

The default duties imposed by the **Act** provide that **trustees** must, unless otherwise provided in their **trust deed**:

- exercise reasonable skill and care;
- invest prudently;
- not exercise their powers for their own benefit;
- consider actively and regularly whether the they should be exercising one or more of their powers;
- not bind **trustees** to a future exercise of discretion;
- avoid conflicts of interest;
- act impartially;

- not profit from their position;
- not act for reward; and
- act unanimously.

These default duties can have significant implications. For example, **trustees** who are also **beneficiaries** will not be able to make distributions to themselves unless the default duty not to exercise powers for their own benefit is modified or excluded in their **trust deed**.

Investment of trust funds

Except where modified by the terms of a **trust deed, trustees** have a duty to invest trust funds "prudently". The **Act** describes this as a duty to "*exercise the care and skill that a prudent person of business would exercise in managing the affairs of others*". To provide some guidance for what this means in practice, the **Act** confirms that **trustees** may consider the following matters when making investment decisions:

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

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.

It is particularly important for **trustees** to have an investment strategy in place. An investment strategy is an important element of prudent investment practice but it also provides some protection for **trustees** facing claims by **beneficiaries** that the **trustees** have breached their duties of prudent investment.

Trust information and disclosure

The **Act** provides that **trustees** must hold a range of important trust documents. In practical terms, one **trustee** may hold all of the trust's important documents but as a minimum all trustees must hold a copy of the **trust deed** and any variations to that deed.

The **Act** also provides that **trustees** have a duty to actively consider what information they will give to beneficiaries. Specifically:

- all **beneficiaries** should be told that they are **beneficiaries**, be given **trustee** contact details and be advised that they have rights to request information; and
- **trustees** should provide information about the trust to **beneficiaries** on request.

Trustees can decide not to provide information to beneficiaries, but they must have good reasons for doing so. The **Act** provides that **trustees** must consider the following things before deciding whether to withhold information from a **beneficiary**:

- the nature of the interests in the trust held by the **beneficiary** including the likelihood of the **beneficiary** receiving trust property in the future;
- whether the information is subject to personal or commercial confidentiality;
- the expectations and intentions of the **settlor** when they created the trust;
- the age and circumstances of the **beneficiary** asking for information;
- the age and circumstances of the other **beneficiaries** of the trust;
- the effect on the **beneficiary** of giving the information;
- the effect on the **trustees**, other **beneficiaries** of the trust, and third parties of giving the information;

- the effect of giving the information on relationships within the family and between the **trustees** and some or all of the **beneficiaries**;
- the practicality of giving information to all **beneficiaries**;
- the practicality of imposing restrictions and other safeguards on the use of the information;
- the practicality of giving some or all of the information to the **beneficiary** in redacted form;
- if a **beneficiary** has requested information, the nature and context of the request; and
- any other factor that the **trustees** reasonably consider to be relevant.

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 limited. 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, provided that they have complied with their obligations as **trustees**.

Although **trustees** can generally use trust assets to meet any liabilities they incur as **trustees,** they cannot do so if they have acted dishonestly or engaged in willful misconduct or gross negligence (in such cases, they will be personally liable).

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 **Act** permits trusts to operate for a maximum period of 125 years. A shorter period can be stipulated in the **trust deed** if required. Older trusts will often specify a maximum period of 80 years, although this can sometimes be extended to 125 years, subject to the terms of the **trust deed**.

How can you access trust income?

Distribution of **trust income** is generally 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 the trust's 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 to you. Alternatively, if you are owed money by the trust, you may be able to access the trust's 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 a **beneficiary** of the trust. The trust could 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, or the trust could pay those expenses itself. 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 investments.

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 few limits on what the **trustees** can or cannot do. Trusts can therefore generally 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 issues 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 live 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 be divided equally between both of you, except in certain limited circumstances.

In contrast, assets held by a trust are trust assets, not your personal assets, and as a result are not generally subject to equal division under relationship property law (although there are a number of important exceptions to this general rule). Transferring family assets to a trust can therefore have a significant impact on relationship property rights. Your Lawlink lawyer will discuss these issues with you if you are considering transferring assets to a trust.

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

- in some cases, transferring assets to a trust will remove relationship property rights you would otherwise have been entitled to;
- a trust set up during a relationship is particularly vulnerable to challenge following the end of a relationship so may not provide the protection against relationship property claims that you intend or hope for; and
- in certain circumstances, where inappropriate dispositions have been made to a trust, courts have the power to make compensatory judgments in favour of a partner who has been disadvantaged by the trust arrangement, either from the trust assets or by providing for an unequal division of other personal assets.

In general, if you are in a relationship and want some certainty about the division of property following the end of your relationship (either as a result of separation or death), you should not rely on a family trust alone, but should sign a contracting out agreement with your partner. Your Lawlink lawyer can discuss this process with you if required..

Important terms

The **Act** is a reference to the Trusts Act 2019 which applies to all trusts in New Zealand from 30 January 2021 (including trusts established before that date).

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. This power can apply to your personal property, your personal care and welfare or to both areas.

You make a **gift** when you transfer an asset you own 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 a trust you have created. It is not legally binding on the **trustees** but provides them with some guidance when making decisions.

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

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.

A **trust deed** is the written 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 specific **beneficiaries**. A **trustee** has legal control of the trust assets and is subject to a range of legal duties.

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.

Lawlink members

Whangarei
WRMK Lawyers
Ph: 09 470 2400
Also at Dargaville and Kerikeri
www.wrmk.co.nz

Warkworth
WRMK Lawyers
Ph: 09 470 2407
www.wrmk.co.nz

Auckland
Hesketh Henry
Ph: 09 375 8700
www.heskethhenry.co.nz

Anderson Lloyd
Ph: 09 338 8300
www.al.nz

Sharp Tudhope Lawyers
Ph: 09 968 2477
www.sharptudhope.co.nz

Wynn Williams
Ph: 09 300 2600
www.wynnwilliams.co.nz

Tauranga
Sharp Tudhope Lawyers
Ph: 07 578 2149
www.sharptudhope.co.nz

Hamilton
Harkness Henry
Ph: 07 838 2399
Also at Paeroa
www.harknesshenry.co.nz

New Plymouth
Auld Brewer Mazengarb & McEwen
Ph: 06 757 5183
www.abmm.co.nz

Ohakune
Treadwell Gordon
Ph: 06 385 8120
www.treadwellgordon.co.nz

Napier
Langley Twigg
Ph: 06 835 8939
www.langleytwigg.co.nz

Hastings
Langley Twigg
Ph: 06 873 8770
www.langleytwigg.co.nz

Whanganui
Treadwell Gordon
Ph: 06 349 0555
www.treadwellgordon.co.nz

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Treadwell Gordon
Ph: 06 388 0612
www.treadwellgordon.co.nz

Waipukurau
Fitzherbert Rowe
Ph: 06 858 8533
www.fitzrowe.co.nz

Feilding
Barltrop Graham
(a division of Fitzherbert Rowe)
www.barltrops.co.nz

Palmerston North
Fitzherbert Rowe
Ph: 06 356 2621
www.fitzrowe.co.nz

The Law Shop
(a division of Fitzherbert Rowe)
Ph: 06 356 9869
www.lawshop.co.nz

Masterton
Gibson Sheat
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www.gibsonsheat.com

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Gibson Sheat
Ph: 04 569 4873
www.gibsonsheat.com

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Gibson Sheat
Ph: 04 496 9990
www.gibsonsheat.com

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Pitt & Moore
Ph: 03 548 8349
www.pittandmoore.co.nz

Richmond
Pitt & Moore
Ph: 03 548 8349
www.pittandmoore.co.nz

Blenheim
Gascoigne Wicks
Ph: 03 578 4229
Also at Kaikoura (Fridays)
www.gascoignewicks.co.nz

Christchurch
Wynn Williams
Ph: 03 379 7622
www.wynnwilliams.co.nz

Anderson Lloyd
Ph:03 379 0037
www.al.nz

Timaru
Timpany Walton
Ph: 03 687 7126
www.timpanywalton.co.nz

Alexandra
AWS Legal
Ph: 03 440 0026
www.awslegal.co.nz

Cromwell
AWS Legal
Ph: 03 445 4111
www.awslegal.co.nz

Queenstown
Anderson Lloyd
Ph: 03 450 0700
www.al.nz

AWS Legal
Ph: 03 441 0616
www.awslegal.co.nz

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www.al.nz

Winton
AWS Legal
Ph: 03 236 7000
www.awslegal.co.nz

Invercargill
AWS Legal
Ph: 03 211 1370
Also at Gore and Te Anau
www.awslegal.co.nz

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