



# Trust that Trust

**A Practical Guide to Family Trusts in New Zealand**



# Table of Contents

## Foreword

About Parry Field Lawyers

## Chapter 1 - Introduction to Family Trusts in New Zealand

History of Trusts

What is a Trust?

Who are the parties to a Trust?

## Chapter 2 - Trustees

Appointment, Removal and Replacement of Trustees

Trustees' Duties, Powers and Obligations

Liabilities of Trustees

## Chapter 3 - Beneficiaries

Types of Beneficiaries

Beneficiaries' Rights to Trust Information

## Chapter 4 - Advantages in having a Family Trust

Succession Planning

Protection from aggrieved family member or family associate

Protection from Creditors

Relationship Property Claims - where relationship property law and trust law overlap

Reducing Tax Liability

Special Purpose Trusts

Trading and Development

Registered Charities and Charitable Purposes

Confidentiality

Reacting to Changes in the Law

## Chapter 5 - Sham Trusts

## Chapter 6 - Are there any disadvantages in having a Family Trust?

## Chapter 7 - Winding up your Family Trust

What are the reasons for an early winding up (termination) of a family trust?

How can a family trust be wound up?

## Chapter 8 - Your Succession Plan

Relationship Property Agreements

Wills

Enduring Power of Attorneys

Advance Care Plans



# Foreword

For hundreds of years people have had the strong desire to ensure their family's assets are protected by placing them in a trust for safe keeping.

The popularity of family trusts in recent years is as much a testament to this basic human need as it is to the ever increasing complexity in our personal and business lives and the myriad of new laws that provide others with legal access to these assets. With the more litigious psychology of society in general, those who want such protection for their family assets must now be far more vigilant in how their trust is created and with its on-going administration by the trustees they choose.

In view of such mounting threats this booklet has been pitched at a level I believe is needed for you to understand what a trust is and the extent to which you can ensure it is, or remains, a fortress for your family assets. Hopefully, despite the degree of your familiarity with trusts, you will feel more informed and confident after reading this booklet and better equipped to discuss with us the best options to achieve desirable outcomes for you and your family in the future.

A family trust may not be the best option for your family for many reasons. Every situation has its unique features and differences. However, for many families wanting to protect and grow their family wealth a trust structure remains the best solution to safeguard their assets for current and future generations.

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# About Parry Field Lawyers

Serving you since 1948

## What makes us Unique

We are not the biggest or smallest! Our team of around 45 staff work closely together in the areas of Property, Advisory and Disputes. We think that gives us unique advantages as we can be fast moving and nimble. Having the size to deal with major transactions, our rates are more competitive than larger operators.

## Our Vision

*Heart:* Provide practical legal guidance while integrating our core values into our practice

*Team:* Implement a team environment that unleashes and empowers every individual.

*Growth:* Develop new and enduring relationships. Explore innovative approaches to legal practice

## “To the heart of what matters”

Our tagline was developed just before the Canterbury earthquakes in 2011. We see the client in a rounded way and want to help them with ‘what really matters’, for legal services and beyond, if appropriate.

**Disputes:** We act for both individuals and organisations, providing comprehensive, well-reasoned legal advice, combined with pro-active and creative solutions. Our aim is not just to provide sound legal advice but resolutions which deliver the best practical outcome for clients.

**Commerce:** We support those involved in business, whether big or small, and whether at the early stages in forming a company or entering into a joint venture, ongoing support and compliance, raising capital, or assisting with the sale of the business to a purchaser. We come alongside business owners and seek to fully understand your market and industry so we can provide the best advice possible.

**Property:** Our property specialists offer comprehensive advice on matters of all sizes. At the end of the day you are not just another client. We want to personally help you achieve your property goals, whether big or small, with confidence.

## Charity, Not for Profit and Social Enterprises

We specialise in the representation of non-profit, tax-exempt organisations, including charities, charitable trusts, private foundations, social enterprises, social welfare organisations, public and private schools, (whether company-sponsored or family-endowed), tertiary institutions, churches and religious organisations as well as organisations that support this sector.

## Taking an Innovative Approach

Gaining a better understanding of the business of our clients and solidifying relationships with them is a priority for us. Sometimes things call for a different approach. We are also a tech focussed law firm who enjoy working with start-ups, tech companies and other new businesses seeking angel investors. In fact, ask us about our own start-up focussing on AI powered chat bots for the legal industry! We help our clients to get their legal structures right from the beginning. We enjoy being focussed tech lawyers who challenge the way law firms traditionally work with their clients.



# Chapter 1

## INTRODUCTION TO FAMILY TRUSTS IN NEW ZEALAND

### History of Trusts

#### *How did Trusts Start?*

A traditional trust, legally known as an inter-vivos express discretionary trust, first appeared in England in the 11<sup>th</sup> century. During the Crusades, which commenced in the 11<sup>th</sup> century, many English Knights would travel abroad to fight for the restoration of significant holy sites to Christian control. These Knights required reliable family members and servants to remain at home protecting and securing their castle estates. These estates were left to their trusted family members and servants on “trust” to protect for the Knights when they returned from the Crusades.

#### *Trusts in New Zealand*

Australasia is known to have a love affair with trusts. It is thought that New Zealand has the most number of trusts per capita of any country in the world - approximately one for every 10-15 people. Accordingly, they are integral to the fabric of not only our economy, but also of our society and have many uses as we will see.

### What is a Trust?

A trust is created when assets (for example: an amount in cash; the family home; or shares) are transferred from their owners (called settlors) to other persons (called trustees) for the benefit of third parties (called beneficiaries).

From a legal perspective, a trust, which must be in writing if it is an express trust, will only exist if the following three elements are present:

- Certainty of intention to create a trust for the benefit of others. There have been some cases before the Courts where a person has claimed a family trust is a **sham**. The 2016 Supreme Court case of *Clayton v Clayton* made it clear that a “sham” argument is very hard to prove. If it is though, it will mean the trust was never created because the settlor always intended to retain complete control over the assets for themselves, not for the trust’s beneficiaries;
- Certainty of objects (where “objects” are the people who may benefit from the trust namely, the beneficiaries;
- Certainty of subject-matter. This requires all parties to know what assets are actually owned by the trust.

The most topical of these elements today is the settlor’s intention to create a trust for the benefit of others. Now, more than ever, those wanting to access trust assets, such as estranged spouses, creditors and the Official Assignee, have in their armoury the claim that a trust is a sham or that the settlor has retained too much control. The potential effects of such claims being successful can be

devastating for a settlor and their family and will be explored more fully in Chapters 4 and 5.

## Who are the parties to a Trust?

### Settlor

Settlors play a pivotal role in the creation of a trust because they choose its first trustees. The settlor has some discretion about which rights and obligations the trustees will have in carrying out the wishes of the settlor. Examples of these are the duties and powers about investments trustees may make in the future on behalf of the beneficiaries, conflicts between their position as trustee and possibly also as a beneficiary, and the extent to which trustees may be remunerated for their expenses out of trust assets.

#### *How many “hats” can a settlor wear?*

A settlor can be both a trustee and a discretionary beneficiary of their trust. A trustee can be, and is often, a discretionary beneficiary of a trust, but as mentioned below, it is best practice that at least one of the trustees is not, and will never be, a beneficiary.

#### *The settlor’s influence*

It is common for the trust deed, which is the document creating the family trust, to give the settlor some control through “reserved powers”. Examples of these will be the power to appoint and remove trustees and also to appoint and remove beneficiaries during the lifetime of the trust. Furthermore, the settlor’s consent could be a pre-requisite to any future changes to the trust deed, as it is in our trust deed precedent. However, as we will see, the Supreme Court in the case of *Clayton v Clayton* said it is important that settlors do not reserve too many powers for themselves and ignore the trust beneficiaries altogether.

Finally, as the trust is primarily established for the benefit of the settlor and ultimately, for the settlor’s family, trustees must take into account the settlor’s wishes. These wishes are set out in a document known as a Memorandum of Guidance or Letter of Wishes, which is usually signed when the trust is created.

Such a Memorandum or Letter of Wishes is not legally binding on the trustees. However, as the courts give them much significance, trustees ignore them at their peril when managing the affairs of the trust, unless they have good reasons to do so. The importance of such a document has now been recognised in the new Trusts Act, which requires a court to take into account the settlors’ original intentions on setting up their trust, when considering on behalf of a beneficiary the winding up, variation, or resettlement of a trust.

The Memorandum or Letter of Wishes tells the trustees which beneficiaries are to be given priority when trust assets and income are to be distributed, how the distribution should be made and for what purpose. An example of this would be assisting certain beneficiaries with their education costs and the purchase of their first home.

### Trustees

Legally, there is no requirement for a minimum number of trustees. It is common for a trust to have at least two trustees, one of whom will commonly be known as an “independent trustee”. An independent trustee is an individual or a company, which is not a beneficiary of the trust and never will be. They can help to ensure that the trust is administered and

managed properly and that the trust property is kept separate from the settlor's personal property, which is "outside" the trust.

### *Companies as "independent trustees"*

It is less common in New Zealand now for an independent trustee to be a professional advisor personally, such as a lawyer or accountant. Often, such a trustee will be incorporated under the Companies Act by the professional advisor's firm, specifically to offer trusteeship services for client trusts. The company's directors and shareholders usually will be the firm's partners.

Today, there are an increasing number of liabilities directors of such companies may face, as we will soon see. Therefore, there is a growing preference for these director positions to be held by the clients, their family members or their friends, rather than by the client's legal or accounting advisors personally. In this scenario, the advisor's own professional company itself often will be the new corporate trustee's sole shareholder. As such, it has total control over who the corporate trustee's directors will be.

What is appropriate will depend on your situation. We suggest you discuss this with your lawyer, or us, if you wish.

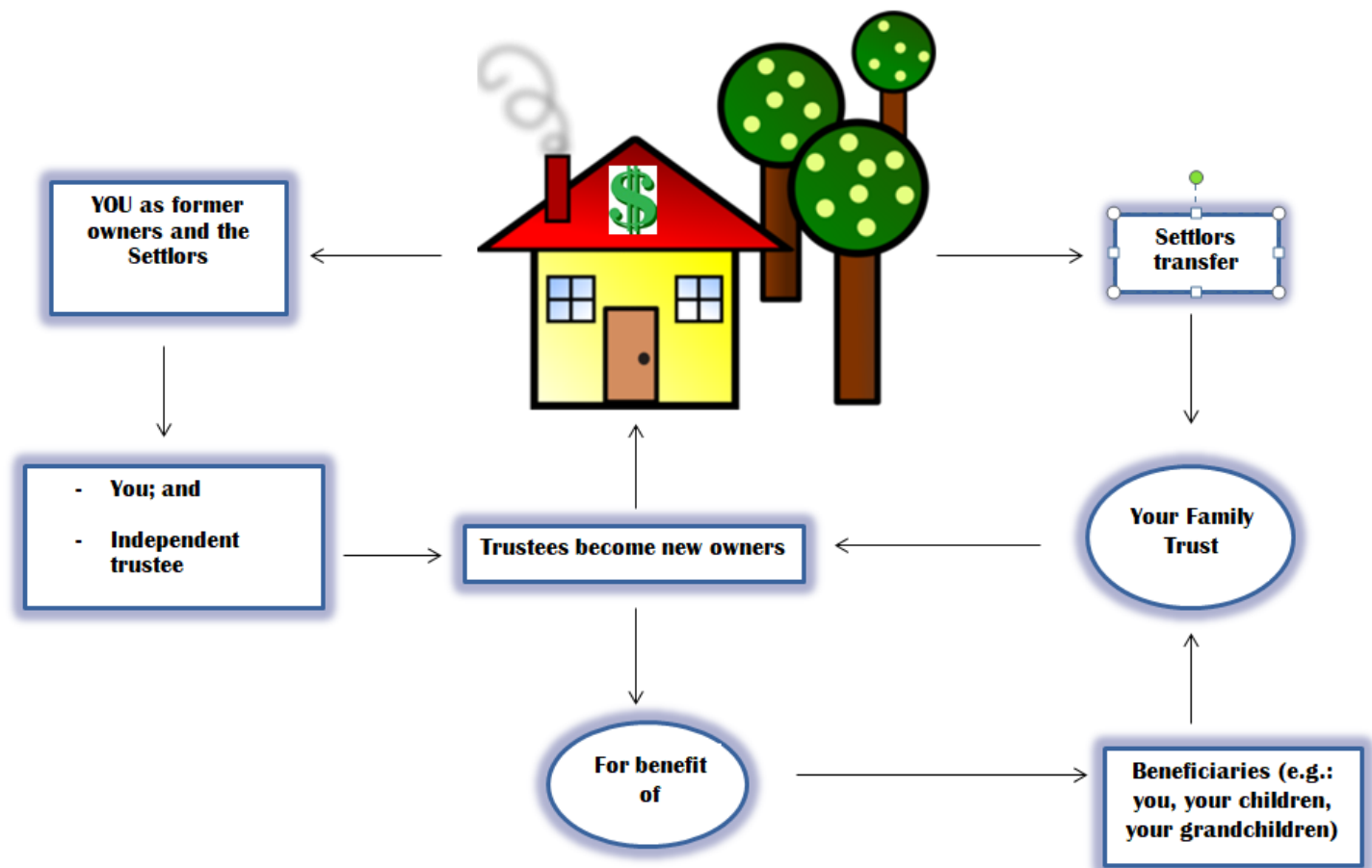
### **Beneficiaries**

Just as settlors will choose the first trustees of the trust, they will, through the trust deed, decide who the initial beneficiaries are to be. Usually, the settlors' close family relatives will be beneficiaries, but other examples include charities and perhaps even trusts of which the beneficiaries are themselves also beneficiaries.

The flowchart on the next page shows the relationship between the above three parties to a family trust.







# Chapter 2

## TRUSTEES

### New Trusts Act

A new Trusts Act for New Zealand was passed into law on 30 July 2019. This Act replaces the current Trustee Act which has been in force for the past 63 years. Its purpose is to make trust law more accessible for everyone by dealing with various practical problems that have arisen over recent years as trusts have proliferated. Although the bulk of the new Act will not become operative for 18 months (ie until 30 January 2021), the rest of this booklet will, where needed, address its relevance to the topics discussed.

As some trusts will not comply with certain provisions of the new Act the transitional 18 month period will provide an opportunity to ensure their trust deeds and administration practices will comply when the Act becomes fully operative. Likewise, legal advisors may need to update their own trust deed precedents, as well as those of some of their client trusts, during this “grace period”.

### **Appointment, Removal and Replacement of Trustees**

#### *Who may be appointed as a trustee of your trust?*

Currently, any person can be appointed a trustee of a trust by the settlor on the creation of the trust, by the person who the trust deed nominates, or by the Courts. However, under the new Trusts Act the following are disqualified from holding this position if they are:

- A person under 18 years of age;
- An undischarged bankrupt who hasn't received the Court's consent to be a trustee;
- Someone who doesn't have the mental capacity to perform the functions of a trustee. This will be the case with a person who has either a Property Manager or a Trustee Corporation appointed to look after their affairs under the Protection of Personal and Property Rights Act (1988); or
- The person (which legally includes a company) is insolvent because they are unable to pay their debts.

Currently, the rule is that if 2 individual trustees were appointed first and a trustee company replaces one of them, the replaced trustee is not properly released from any future liability unless they are joined by a second individual.

Under the proposed new Trusts Act, this will no longer be the case and a second individual will not have to be appointed unless the trust deed requires it. Even if the trust deed does insist on 2 trustees, this can be ignored if a statutory trustee (eg Public Trust or Perpetual Guardian) is appointed as sole trustee.

## *How can a Trustee cease to be a Trustee under the new Trusts Act?*

The most obvious way in which a trustee may cease to hold office is, of course, by their death, but they may also choose to retire or be removed by others.

Let's investigate these methods in a bit more detail below.

### **Retirement of Trustee**

If trustees express in writing a wish to retire from the family trust, they can be discharged by the following people:

- (a) The person who has the power to remove trustees under the trust deed, who will often be the settlor or some other third party referred to as the appointor. (It is not uncommon for the settlor and the appointor to be the same person); or
- (b) If there is no such person who has the power to remove trustees or they are unable or unwilling to do so, then the task falls to the remaining trustees; or
- (c) If no one has the power of removal and there are no remaining trustees prepared to exercise the power to remove, then it can be exercised by the retiring trustee and another trustee of their choice if one is needed to restore the number of trustees to the minimum required under the trust deed; or
- (d) By the retiring trustee alone if no one above is willing or able to act and there is still a minimum number of 2 trustees needed.

### **Death of Trustee**

The duties of a deceased trustee can be performed by any surviving trustee until a replacement trustee is appointed. Likewise, the personal representative of a deceased sole trustee, such as an executor under their Will, can act on their behalf, but only for a reasonable period. This is a temporary measure until a replacement trustee is appointed.

### **Removal of Trustee**

#### **Compulsory removal**

A settlor or appointor who has the power to remove and appoint trustees will have no option but to remove a trustee if they lose the capacity to act as a trustee - for example, by losing mental capacity. Under the new Trusts Act trustees will have to take this action because if an incapacitated trustee cannot carry out an action which they have approved, then both that trustee's decisions and their actions may be invalid. Also, whether trustee decision-making is on a unanimous or majority basis, all trustees need to participate fully in the discussion and following decision.

Under the current law trustees have the option to remove and replace such a trustee provided the trust deed allows for that.

#### **Optional removal**

A person with the power to remove and appoint trustees can remove a trustee if that is needed to ensure the proper administration of the family trust. However, the trustee must have refused repeatedly to act as a trustee or just failed to do so, become an undischarged



bankrupt or simply no longer be suitable to remain as a trustee because of their conduct or their personal circumstances.

### *Is doing nothing an option?*

No it isn't. A possibly incapacitated trustee could seriously jeopardise the smooth running of the trust and cause financial loss. If so, the person with the power to remove the trustee may be liable to the beneficiaries for that loss.

There are many examples where a trustee will no longer be suitable for office and some obvious examples are where they may have been convicted of a dishonesty offence, have not invested trust funds wisely or have wrongly benefitted themselves from trust assets.

The trustee must be given notice of their removal and they have the option of applying to the court for an order preventing their removal. If the matter does end up in court, then the applicant (the trustee being removed) must raise an arguable case that the decision to remove them was not reasonable in the circumstances. If successful, then the onus moves to the settlor or appointor to show that their decision was indeed reasonable and justified.

Inland Revenue needs to be informed of the trustee's retirement or replacement. Receipt of an acknowledgment from the Department will ensure that trustee is not liable for any future tax liabilities the trust may incur.

## **Replacement of Trustees**

The settlor or appointor who has the power to remove and appoint trustees must appoint a replacement for any trustee who retires, is removed, or who dies while in office if the trust deed requires it.

## **Trustees' Duties, Powers and Obligations**

The new Trusts Act imposes on trustees the following duties, many of which are already imposed under the current Trustee Act and by case law:

### **Mandatory duties:**

These duties, as the name suggests, must be performed by the trustees. When the new Trusts Act is fully operative, these duties cannot be excluded by trust deeds and even if they are absent, trustees must still comply with them.

- *The duty to know the terms of the Trust*

It is important that as a trustee you know the trust deed thoroughly. This means that a trustee must know the nature of the trust and they need to know what they are required to do with the trust property. If there is a Letter of Wishes or Memorandum of Guidance, the trustees must seriously consider its content when dealing with trust assets;

- *The duty to act in accordance with the terms of the Trust*

All decisions of the trustees must be made in accordance with the purpose of the trust deed and for the benefit of the beneficiaries. Ultimately, the trustees are to carry out the wishes of the settlor(s). This duty is fundamental, as it provides future guidance for the actions of the trustees. If the trustees decide to give a trust asset to someone who is not named as a beneficiary, then they have breached this duty and acted

unlawfully. The repercussions can be severe, as many trustees have found out to their financial displeasure;

- *The duty to act honestly and in good faith*

This means to act in accordance with the terms of the trust, for the benefit of the beneficiaries and with clear and proper motive. The trustees, when making decisions, must consider all relevant factors, take professional legal advice where necessary and most importantly must ensure that they are properly informed before making any decisions. By recording all decisions in trustees' resolutions or annual minutes, the trustees can show that they did take these factors into consideration and acted honestly and in good faith;

- *The duty to act for the benefit of beneficiaries or to further the permitted purposes of the trust*

Again, this is based on the idea that the trustees must act in accordance with the terms of the trust when dealing with trust property. They must not act in a way that is contrary to, or outside of, these strict parameters;

- *The duty to exercise the powers of a trustee for a proper purpose*

It is important that each time a new decision is made it is recorded in the trustees' resolution or a minute. It is also advisable for the trustees to keep a record of these resolutions in a minute book (for example, in a ring binder) for easy and full access in the future.

#### **Default duties:**

Trustees must act in ways that accord with the following duties, unless they have been excluded or altered by the trust deed:

- *The general duty of care*

This means trustees must act with a reasonable standard of care and skill for the well-being of the beneficiaries, again in accordance with the trust deed. The standard of care and skill expected of a trustee will be higher where they have special knowledge or experience in trust-related matters;

- *The duty to invest prudently*

Trustees must do their best to make wise decisions when dealing with trust money. It is strongly advisable to obtain professional advice before committing to any investment programme;

- *The duty not to exercise any power directly or indirectly for the trustees' own benefit*

Trustees must not use their powers for their own benefit. Where they are beneficiaries and do benefit from the trust, it must be shown that all other beneficiaries were taken into consideration at the time of the meeting to decide on the action to be taken;

- *The duty to actively and regularly consider the exercise of the trustees' powers*

Trustees need to be considering all decisions made regarding trust money and property, and must be recording these decisions whenever made. This keeps them accountable for their duties and ensures that they are acting in accordance with the terms of the trust;

- *The duty not to bind or commit trustees to future actions*

For example, when deciding on a distribution of trust money, the trustees together must consider the issue at the time and should not pre-determine the meeting's outcome by discussions or correspondence among themselves or others beforehand;

- *The duty to avoid a conflict of interest*

Where a trustee is also a beneficiary and they expect to receive a low interest or no-interest loan to assist with a vehicle purchase, there is an obvious tension between their roles. In this instance, the trustee cannot both argue their case as a deserving beneficiary on the one hand and discharge their trustee's duty to act in the best interests of all beneficiaries, on the other. They are conflicted and should remove themselves from the decision-making process;

- *The duty of impartiality*

A trustee must act impartially toward the beneficiaries and not unfairly favour one above another. However, this rule does not require a trustee to treat all beneficiaries equally. To do so would be to severely limit a trustee's discretion to choose which beneficiaries to benefit and the terms that benefit should take;

- *The duty not to make a profit from the trustee's position as trustee & the duty to act for no reward*

These 2 duties mean that trustees are not to receive any personal gain or profit from their role as trustee. Where a trustee is also a beneficiary all other beneficiaries and their personal circumstances must be taken into consideration when a possible distribution of trust funds or some other benefit is to be decided. An example of this not occurring is where a trustee's construction business receives building construction work from the trust, but without any other tenders having been sought to ensure transparency of process and cost-effectiveness.

However, a trustee has the right to be reimbursed for their legitimate expenses incurred when acting for the trust.

- *The duty to act unanimously*

All trustees must agree to all decisions about trust assets. As noted above, decisions are to be recorded in either the trustees' resolution or in an annual minute.

Under the new Trusts Act default duties may be modified or excluded by the settlor when the trust deed is prepared, and in that sense, they are not essential. This, again, highlights the need for trustees to know and understand the terms of the trust deed so that they can be sure of meeting their obligations and duties to the beneficiaries.

As in the 11<sup>th</sup> century and like the minders of the estates of the "Crusading" English Knights, all trustees are required to manage the trust's family assets entirely in the best interests of its beneficiaries.





## Liabilities of Trustees

There are 3 sources of liability of which trustees need to be aware:

### *Liability to Third Parties*

Trustees are personally liable for the debts they incur with third parties on the trust's behalf. Most significantly for trustees, this includes income tax and GST.

Although trustees can contract out of some of a trust's liabilities, other liabilities (shc as income tax, GST and property rates) cannot be.

### ***Selkirk v McIntyre***

In this 2013 High Court case Mr Selkirk, the trust's independent trustee, was held personally liable for the Trust's GST liability of \$200,000 on the sale of a commercial property, which his co-trustee did not pay to IRD. The court said his liability could be limited, but only to \$100,000, by him seeking from his co-trustee who dealt with the company's day to day administration, a contribution and indemnity of \$100,000. This case clearly established that in trust law there is no such thing as a "passive" trustee.

When borrowing funds from banks or other lenders the trust's lawyer should ensure that all loan documentation clearly limits the liability of independent trustees to the net assets of the trust, at any time. This gives independent trustees the comfort of knowing that their personal assets are not able to be accessed by the bank should there be a default in loan payments by the trust.

For greater comfort, trustees may ask the settlor for a personal indemnity against any losses the trustees incur from their trusteeship.

Another means of limiting trustee liability is by having a company act as the trust's sole trustee. In fact, this is strongly recommended if the trust is GST-registered, or is a trading or development trust. This is discussed further in chapter 4.

### *Liability arising from Co-Trustees' Action or Inaction*

Trustees cannot avoid making decisions, or at least consider the consequences of their actions, and then plead ignorance to avoid liability. This is the case even where unanimity among all trustees is required by the trust deed, which is more common now.

Professional independent trustees who do not ask their co-trustees about the trust's property sales and their tax implications are very likely to be as liable to IRD for unpaid income tax and GST as the "controlling" co-trustees. Recent court cases bear this out.

### *Liability to Beneficiaries arising from Breach of Trust*

The common breaches of trust by not complying with trustee duties include:

- Failing to correctly identify the trust's true beneficiaries by distributing assets to someone who doesn't fit into any of the classes of beneficiaries in the trust deed (This is a breach of the above second mandatory duty and as such, is serious);
- Failing to separate trustee duties from personal interests;
- Failing to act impartially between beneficiaries;
- Failing to preserve trust property for the beneficiaries;
- Profiting from their trusteeship.

# Chapter 3

## BENEFICIARIES

### Types of Beneficiaries

The term “**discretionary**” describes the majority of family trusts in existence in New Zealand today. In discretionary family trusts there are two types of beneficiaries - discretionary and final.

**Discretionary beneficiaries** have no right to demand that any trust assets be distributed to them. The reason for this is that, as the name suggests, the trustees have sole discretion as to which discretionary beneficiaries listed in the trust deed are to receive any assets or income, and if so, the extent of that distribution and its timing.

It is for this reason that when they learn they are discretionary beneficiaries of a family trust they are well advised to “fly below the radar” when dealing with the trustees and endeavour not to unduly “upset” them, given it is they who decide who receives what assets or income and when. However, under the Trusts Act there is a new procedure available to a beneficiary to ask the Court to review any act, omission or decision of a trustee, even one that is only proposed to occur.

Trustees must take account of all discretionary beneficiaries’ personal and financial circumstances when deciding at a trustees’ meeting whether, and to whom, any asset or income distributions are to be made. As we will see later, discretionary beneficiaries will, under the new Trusts Act, have greater rights to make the trustees accountable for their actions and to ensure the proper administration of the family trust.

#### *What can a discretionary beneficiary expect?*

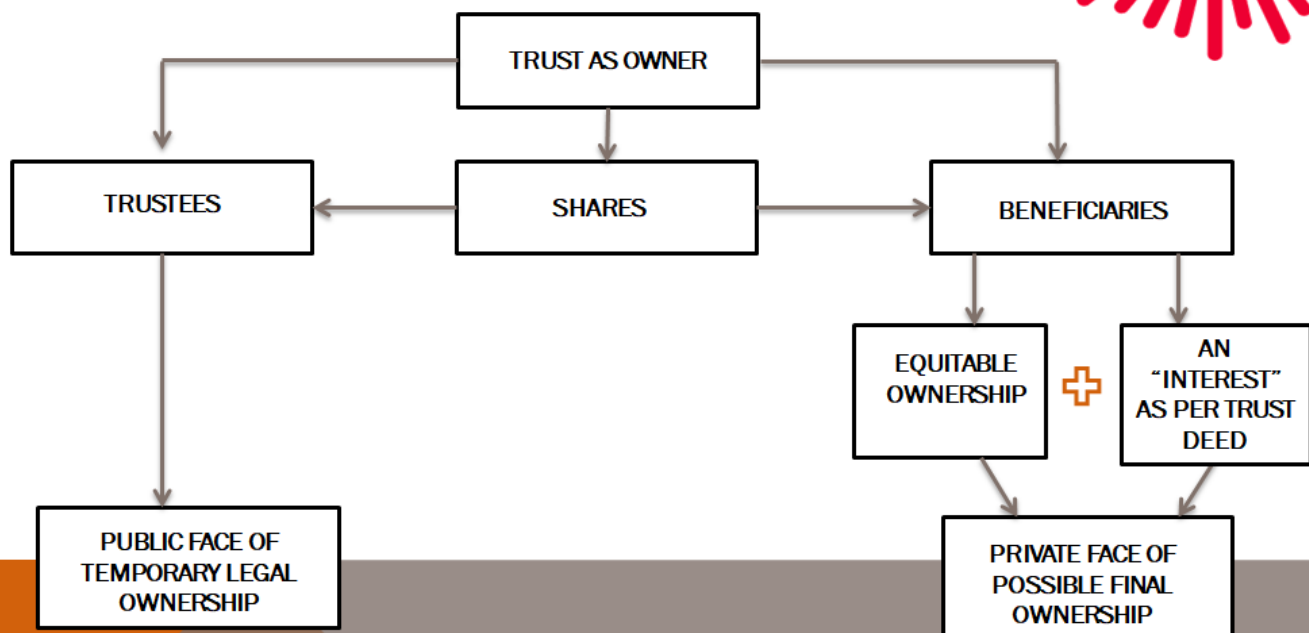
Discretionary beneficiaries merely have an expectation or “expectancy” that they will be considered by the trustees when making such distribution decisions. They have no legal right to any trust assets as do final beneficiaries on the winding up of the trust, when all remaining assets are shared among them.

On the next page there is a flowchart that describes this ownership difference with shares owned by a trust.





## HOW ASSETS ARE HELD BY YOUR FAMILY TRUST USING SHARES AS AN EXAMPLE



**Final Beneficiaries** are those named in the trust deed as those who will benefit only on the date that the trust is wound up, unless the trust assets have already been fully distributed to one or more of the discretionary beneficiaries. Invariably, the final beneficiaries will be the settlor's children, but should not include you, if you're a settlor of the trust.

## Beneficiaries' Rights to Trust Information

In the past, it has often been the case that only the trustees knew about the family trust "secret". The new Trusts Act dramatically changes this from 30 January 2021 by developing further the current legal principles established in the following 2 cases:

### *Erceg v Erceg - Confrontational Beneficiary Misses Out*

This 2016 Supreme Court case involved the estate of Michael Erceg, a beer magnate who died in a helicopter accident. The Court said that the trustees of a trust must give beneficiaries certain basic trust documents on request to ensure that a trust is administered properly and the trustees are held accountable for their actions. Ultimately, the ability to see trust information is based on the status and motives of the beneficiary applying to the Court. In this case the Court refused to grant Ivan Erceg's request for trust information because his conduct toward the other beneficiaries was confrontational and "he was on a fishing expedition". However, as a primary beneficiary of the Accorn Foundation Trust, he would otherwise have had a good case for receiving basic trust documents (the trust deed, any variations to it, financial statements and possibly minutes of meetings/resolutions, but with reasons deleted).

### *Addleman v Lambie Trustee Limited - Beneficiary Entitled to Trust Information*

In this 2019 Court of Appeal case Mrs Addleman was both a discretionary and a final beneficiary of her father's Lambie Trust, along with her estranged sister, whose company Lambie Trustee Limited was the Trust's sole trustee. Mrs Addleman only became aware of the Trust's existence when she received 4.25 million as a "full distribution of funds" from the Trust. Wanting to know more, she initially requested comprehensive information about the Trust from its inception 12 years earlier.

Applying the principles established in *Erceg* above, the Court said that as a close beneficiary of the Trust Mrs Addleman was entitled to see trust documents, albeit within a narrower category than those she initially requested, and that she should receive the following:

- Financial Statements;
- Minutes of Meetings, but without reasons for trustee decisions; and
- Any legal opinions and other advice obtained by the trustees which was funded by the Trust

The Court of Appeal's reasons/comments supporting their decision were:

- Although a beneficiary does not have an absolute right to a Trust's accounts, which Trustees have a fundamental duty to maintain and be available for inspection by beneficiaries, a close beneficiary such as Mrs Addleman should not be denied access to them;
- Mrs Addleman and her husband were the only other beneficiaries who could scrutinize the trust's administration and hold the trustee (the sister's company) to account;
- As the Trust paid for the legal opinions and other advice which were for all beneficiaries' benefit, they are regarded as trust documents available for disclosure to all beneficiaries;
- Any information in the disclosed documents of a personal and private nature about the sister may be removed before disclosure. This dealt with the confidentiality objection by the sister;
- Contrary to the trust deed, the sister believed the trust was hers to administer for her sole benefit, as she saw fit;
- The remaining trust fund appeared to far exceed the 4.25 million Mrs Addleman had received.

### *New Trust Act Changes*

The new Trusts Act significantly changes the rights of beneficiaries to trust information.

While trusts were once allowed to more easily remain a secret, under the new Trusts Act trustees must disclose **basic information to at least one beneficiary without a request being made**. This is the *Presumption of Notification*.

It is important to note that there is a second presumption created by the new Trusts Act, which requires a trustee **to provide trust information within a reasonable time to a beneficiary who requests it**. This is the *Presumption of Disclosure*.

### *What is "basic trust information" under the new Trusts Act?*

Basic trust information is the information that tells you about the trust - what its purpose is, who the parties to the trust are, etc. It includes:

- The fact that you are a beneficiary;
- The names and contact details of trustees;
- Details of each appointment, removal and retirement of a trustee as it occurs; and
- The right to request a copy of the trust deed and trust information about the trust's administration and its assets (but not reasons for trustees' decisions).

However, as can be seen from the following, these two presumptions may be totally or partially ignored. Trustees can rely on numerous factors to deny beneficiaries this basic trust information, such as:



- The nature and interests in the trust held by the beneficiary and the other beneficiaries of the trust. This can include the degree and extent of the beneficiary's interest in the trust and the likelihood of the beneficiary receiving trust property in the future;
- Whether the information is personally or commercially confidential;
- The expectations and intentions of the settlor at the time of the creation of the trust (if known) as to whether the beneficiaries as a whole, and the beneficiary in particular, would be given information;
- The age and circumstances of the beneficiary;
- The age and circumstances of the other beneficiaries of the trust;
- The effect on the trustees, other beneficiaries of the trust, and third parties of giving the basic information sought;
- In the case of a family trust, the effect of giving information on:
  - The relationships within the family; and
  - The relationship between the trustees and some or all of the beneficiaries to the detriment of the beneficiaries as a whole;
- In a trust that has a large number of beneficiaries, the practicality of giving information to all of them;
- 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 edited form;
- If a beneficiary has requested information, the nature and context of the request;
- Any other factor that the trustee reasonably considers.

### *Differences between the current Erceg approach and the new Trusts Act*

In the Erceg case, the Court said that although a primary or close beneficiary can ask for, and expect to receive, basic trust information on request, they're not automatically entitled to it. Disclosure will depend on the wider interests of all beneficiaries as a whole. So currently, there is no *Presumption of Disclosure*.

However, the Trusts Act goes further than the Erceg case and ensures that **at least one beneficiary must receive basic trust information on request** (*Presumption of Disclosure*), **but also, even if none has been requested** (*Presumption of Notification*). This is to ensure that the trustees are kept accountable and are discharging their obligations to the beneficiaries properly.

If the trustees believe that one or more of the above 12 factors justifies their denying such information from all beneficiaries for more than 12 months, then they must apply to the High Court for directions. The Court then decides if the trustees' decision is reasonable and if so, how they can otherwise be held accountable for their actions if none of the beneficiaries are advised of their status or informed of basic trust information.

If you are a beneficiary, the Trusts Act will mean that you can expect to see the trust deed, names of the current trustees and some financial information. This is, of course, unless the trustees make a successful application to the High Court, as discussed above.

When the new Act is fully operative, be aware that the obligations of trustees, and in particular the rights of beneficiaries, are set to dramatically change, as might the dynamics of some family relationships.



# Chapter 4

## ADVANTAGES IN HAVING A FAMILY TRUST

Historically, when estate duty existed, there were major advantages in establishing a family trust. This tax duty resulted in 40 per cent of an estate's value over \$400,000.00 going to the Inland Revenue as a "death tax". Although this estate duty is no longer claimed by Inland Revenue, it could easily be reintroduced into their tax "armoury".

Also, in previous years it was thought by many settlors that establishing a family trust and selling their major assets to it would assist them with future eligibility for a Residential Care Subsidy and perhaps other government-funded assistance. In recent years, both the Ministry of Social Development ("MSD") supported by the Court of Appeal decisions of *Bridgford v MSD* in 2013 and *MSD v Broadbent* in 2019, have made it clear that this is no longer the case. This will be discussed further in Chapter 7.

However, there remain very good reasons to establish family trusts. They have been recognised by the laws of Commonwealth countries for hundreds of years and continue to this day to operate in a tried and tested legal framework.

### Succession Planning

One of the primary reasons for establishing a trust is intergenerational protection of family assets. Indeed, the new Trusts Act will extend the maximum "lifetime" of a family trust to 125 years. Currently, it is only 80 years.

New Zealand is one of the best countries in the world for the growth of trust wealth free from any substantial capital gains-like taxes. Generally, trustees are able to make tax-free distributions of trust assets to beneficiaries.

The exceptions to this general rule are where the asset:

- is real estate (not a family home), which is sold by the trust within 5 years of its purchase;
- has had past deductions for depreciation, which will be recovered by IRD;
- attracts GST payable to the IRD on sale;
- is sold by the family trust when it is not complying with New Zealand's tax laws and is therefore a non-complying trust.

#### *Significance of being a Complying Trust*

A trust becomes "non-complying" when either it has not satisfied its tax obligations or it is no longer a foreign trust.

When the settlor of a foreign trust becomes a New Zealand tax resident the trust would generally become a non-complying trust, unless an election is made to treat the trust as a "complying trust". This will affect the rate at which certain distributions from the trust are taxed in the hands of a New Zealand resident beneficiary.



The settlor usually has 12 months to make the election from when they become a New Zealand tax resident, or if the settlor is a transitional resident, the 12 month period does not begin until the settlor ceases to be a transitional resident.

Any asset distributed to a beneficiary from a non-complying trust will attract a capital gains-like tax liability of 45 per cent of its increased value while in the trust. The reason is that the increase is not regarded as the trust's capital, but profit and is therefore taxable. For example, a \$45,000.00 tax liability will follow from a beneficiary receiving a farm whose value has increased \$100,000.00 while still owned by the non-complying trust.

In the case of foreign trusts and non-complying trusts, certain “*ordering rules*” are applied to assess whether or not the distributed funds are taxable. These rules dictate from which source of trust funds a distribution is made - for example, current year income, retained income or asset sale proceeds. Therefore, it's not up to you or your advisors to decide that certain funds paid to a beneficiary from any of the 5 tax categories is not taxable.

Early discovery of the problem, full disclosure to IRD and prompt satisfaction of all tax defaults will usually ensure a satisfactory result. However, if the trust's lawyer has not advised the accountant, or the accountant has missed the tax implication, then a tax audit years later could result in an even larger tax bill, as cumulative penalties will be involved.

The key is to first get your structures right - from the start.

### *An Ideal Succession Planning Tool. But why?*

The trustees' sole discretion to choose which discretionary beneficiaries receive any assets at all, is the defining flexibility trustees have in carrying out the settlor's wishes to benefit preferred beneficiaries well after the settlor's death. This feature, in conjunction with the trustees' legal ownership of trust assets, is the hallmark of the family trust and a prerequisite to successful succession planning.

The deferral of full ownership in trust property being given to an intended beneficiary until they become responsible in the eyes of the settlors or trustees is the defining benefit of this trustee discretion. It prevents the dissipation of trust assets and enhances the retention of family inheritance for successive generations.

## **Protection from Aggrieved Family Member or Family Associate**

Any assets that the settlor has transferred to the family trust will, from that date, be owned by the trustees of the family trust and not by the settlor. Therefore, when the settlor dies, their Will does not apply to those assets. The result is that a settlor's estate will have fewer assets that can be subject to a claim by family members under either of the following 2 Acts:

### *Family Protection Act 1955*

Under this Act a spouse, partner, child, grandchild or any other close family relative may bring a claim against your estate if they believe they've been unfairly treated under your Will. Such a claim will be successful only if the person convinces the court that you have failed in your moral duty to provide for them.

This is far easier for a spouse or partner and a financially dependent child to prove than it may be for a 50 year old child who runs a successful business. Generally, unless the person making the claim has physically assaulted you in the past, then the courts expect their membership of your family to be acknowledged in your Will by their receiving something. However, the

amount or share they receive may not need to be the same as other more deserving family members.

### ***Law Reform (Testamentary Promises) Act 1949***

Claims under this Act may be brought by a person for whom in return for services performed or work done, the deceased promised to leave something in their Will. To be successful, not only must the claimant prove that this was the case, but also that the deceased never paid the person for the services or work performed.



## **Protection from Creditors**

Many people, whether because they carry on a business or because they undertake other activity involving a level of risk, prefer to hold their personal assets in a family trust. The reason for this is to protect those assets from “attack” by third parties such as creditors. This is often achieved because those assets are owned by the trustees of the family trust and not by the settlor, who is the person incurring the risk.

A family trust can own shares in a company, which itself operates a business and so limit risk and liability the trustees would otherwise have had as directors of the company. Although the company and possibly the directors’ personal assets may be successfully “attacked” by the company’s creditors, the trust’s own assets cannot be.

### ***How many family trusts are needed?***

Most people’s personal and business lives are such that they need only one family trust to hold their “family” assets, such as the family home, a holiday home, boat and trailer, an investment portfolio, term deposits etc. However, if you want to use a family trust to own and run a business (a *trading trust*), it is preferable to isolate your “family” assets and place them in a separate trust, which may not be as easily accessed by creditors of the business.

### *Care still needed*

There are certain laws (Insolvency Act 2006 and Property Law Act 2007) which provide assistance to creditors in some circumstances trying to recover assets from a family trust. The relevant provisions of these Acts are known as the “clawback” remedies.

To avoid breaching these laws it is best that when a settlor transfers any significant asset to a family trust it is done while the settlor is solvent and without there being any existing obligations to creditors or knowledge that such obligations may possibly occur in the future. An example of a future obligation would be the bank calling up a settlor trustee’s personal guarantee on their trust’s purchase of a business because it is struggling several years later to pay the mortgage.



## **Relationship Property Claims - Where Relationship Property Law and Trust Law Overlap and Collide.**

Often, trusts are used to help avoid a successful claim by a former spouse or partner against the other’s assets in that trust. Such a claim may be to access trust assets that had been set aside for the children of a partner’s first marriage.

### *What is Relationship Property?*

Under the Property (Relationships) Act 1976 (“the Act”) generally all property (from furniture and bank accounts to real estate) owned by either or both of the partners in a relationship that has lasted for more than 3 years and in some cases less, is regarded as **relationship property** (the parties’ common or joint property). The main exception is if the property is the **separate property** of one of the partners.

Relationship property is all property purchased during the course of the relationship by either party and includes the family home and all chattels in the home. Even if an item of property, such as the family home, is legally owned by one spouse/partner before the relationship commences, it is still likely to be regarded as relationship property and will be divided equally between them on separation. This outcome will be different only if the relationship has lasted

less than 3 years, if there is a “*prenuptial*” agreement to say otherwise or if the Law Commissions recent review of the PRA and its recommendations appear in the new act.

If the relationship is less than 3 years then it is regarded as one of “*short duration*” under the Act. If it is, different rules about financial contributions and division of assets apply.

Generally, all relationship property is shared equally between the parties when a relationship ends by separation or death, while all separate property continues to belong to the person who owns it. However, often separate property becomes relationship property. The most common example of this is when one party’s inheritance or proceeds from the sale of their separate property is used to pay off a joint mortgage on a future home. This is called intermingling.

There are special rules that apply on the death of a spouse or partner and where there are multiple claims against a deceased person’s estate by second or subsequent partners. If this situation applies to you then please contact us for further advice, as this is a highly complex area.

### *Can the Act be used by a former spouse or partner against a family trust?*

The Act says nothing about how assets owned by a family trust should be dealt with on the separation or death of the settlor because the trustees, rather than spouses or partners, own the trust assets.

Before 2001, the Act provided much protection to trustees from claims by a partner on separation or death. However, the Act was amended in 2001 to strengthen remedies for aggrieved spouses and partners who believe they have a legitimate claim to a family asset transferred to a trust. As the remedies in this Act often do not provide much solace to a claimant, other remedies have been developed and the following 2016 Supreme Court case looms large in this regard.

### *Clayton v Clayton and the “nuptial trust” argument*

*Mr Clayton was a very successful timber supply magnate, whose multi-million dollar saw-milling business was owned mainly by the Claymark Trust. Mrs Clayton and her children were among the beneficiaries of the Trust. When their 17 year marriage ended, Mrs Clayton went to court for a share of the Trust’s property, even though there was a prenuptial agreement between them in which Mrs Clayton agreed that she had no right to the business assets upon a separation.*

*The Supreme Court said because the Trust was set up during the marriage it was a “nuptial trust” under section 182 of the Family Proceedings Act 1980. The Court then decided to exercise their discretion in Mrs Clayton’s favour because there was a clear difference between her financial position under the Trust had the marriage continued and her financial position after the marriage was dissolved.*

*Where dependent children are involved, as here, the Court was entitled under subsection 6 of section 182 to ignore the parties’ pre-nuptial agreement, in the children’s interests.*



### *Clayton v Clayton and the “too much control” argument*

Settled by Mr Clayton 13 years into his marriage, the Vaughan Road Property Trust was the other major asset-owning trust to which Mrs Clayton claimed access. The trust was far from conventional because Mr Clayton was the sole settlor, the sole trustee, one of the beneficiaries with his wife and daughters and also he had the power to appoint and remove trustees and all beneficiaries.

He could deal with the trust’s property for his sole benefit, as if he were entitled to them and without challenge by the other beneficiaries.

The Supreme Court decided that as Mr Clayton had such extraordinarily wide powers he could take back any of the trust property at any time he wanted to. They said that this general power of appointment in his favour was relationship property under the Property (Relationships) Act, whose value equalled that of the trust fund and which should be shared equally with his wife.

If a relationship has already commenced then the safest course of action is to have your partner or spouse sign a **contracting out agreement** under the Act within 3 years of the relationship commencing. Such an agreement is used to ensure that upon a separation or death the assets you owned before the relationship began (your separate property) do not have to be shared with your former spouse or partner. They can then be retained intact within the trust structure for your chosen beneficiaries in the future.

#### *Review of the PRA to enable easier access to trust assets*

A 5 year review of the PRA by the Law Commission has now been completed and their recommendations are with the Government for consideration.

The report concluded that neither the Act nor current case law adequately assists a spouse or partner, upon their separation, to access assets (including the family home), which the other has transferred to a family trust. Where the person can show that they contributed to the purchase, improvement or maintenance of the assets in question, it is likely that they will be accessible to them. This would be by their receiving either ownership of a trust asset/s, or through a compensation payment from the trustees or from the other spouse or partner personally.

In this scenario, it is irrelevant whether the asset transferred to the trust is relationship property or separate property.

Please seek advice about such matters before any action is taken because, as can be seen by the Clayton case above and the impending PRA reforms affecting trusts, many factors need considering in this difficult area.

## **Reducing Tax Liability**

Often, reducing your tax is a reason to establish a family trust. However, if there is likely to be a tax saving, it must only be an incidental benefit, rather than the main purpose of the trust.

## ***Penny & Hooper v Inland Revenue***

In this 2011 Supreme Court case two surgeons (Penny and Hooper) each transferred their businesses into a company, whose shares were owned by a family trust. The companies paid the “employed” surgeons far less than what they were previously earning and the residual earnings were channelled through their shareholder trusts to their beneficiaries who were on a lower tax rate. The IRD took the surgeons to court in a classic tax case by invoking the anti-avoidance rule in the Income Tax Act 2007. The Court agreed with the IRD and said that while the company and trust structure was valid, Penny and Hooper had to pay tax on what they personally earned through their efforts, not just on their salary from the company.

Tax savings can still be made by trustees distributing income to certain beneficiaries at their own personal tax rate, which may be lower than the trustee rate of 33 per cent. All decisions about income allocations need to be made within 12 months of the trust’s balance date, but only after appropriate accountancy advice has been given.

### **Special Purpose Trusts**

Parents will often have a wish to safeguard assets for a child who has special needs due to a disability or disease. This can be done by placing assets in a trust for their benefit and giving the trustees powers to advance capital and income to that child as and when needed for legitimate expenses and purchases.

Wayward children are another reason for such trusts, which can be used for their benefit not only financially, but as a form of guidance and as a “sounding board” for their life choices.

Another use of trusts is to specifically assist certain children or grandchildren fund their future education costs. These trusts may contain very specific funding amounts for certain levels of education.

### **Trading and Development**

In New Zealand, business is conducted either by a sole trader, or through a partnership, company or trust. If a trust structure is used, it is commonly referred to as a “*trading trust*” or a “*development trust*”.

If a trading trust structure is preferred, it will be used to own business assets directly. Its trustees will be the official “face” of the business in its dealings with customers, suppliers and creditors. If the trustees are individuals they will be personally liable for any liabilities the trust incurs in the course of its business activities.

For this reason, a trading trust often has a company as its sole trustee (a corporate trustee). Generally, the liabilities of the trust are limited to what business assets the corporate trustee owns. The personal assets of the company’s shareholders, who are usually the trust’s settlors or their professional advisors, are safe from attack. This is a process known as “ring-fencing” personal assets from attack by creditors, who will have to concentrate solely on accessing the trust’s business assets owned by the company, if they are able.

***But, Directors Beware!***

Directors of companies, whether as a trust's sole trustee or not, can still have personal liability to the following parties under certain legislation:

TO THIRD PARTIES under:

### **The Companies Act 1993**

- Section 131 requires the director to act in good faith and in the best interests of the company;
- Section 133 deals with a director's failure to exercise powers other than for a proper purpose;
- Section 135 forbids a director from carrying on a business in a manner likely to create serious loss to the company's creditors. (The more obvious business-owning trusts or trading trusts are usually avoided by professional/corporate trustees);
- Section 136 deals with a director's failure to act in good faith and in the best interests of the company. Directors cannot incur obligations unless they reasonably believe the company can perform them;
- Section 137 deals with a director's failure to exercise the care, diligence and skill of a reasonable director.

### ***Vance v Lamb - Concerns for Corporate Trustees***

In this 2008 case a corporate trustee was appointed sole trustee to protect natural person trustees from personal liability for the sale of a developed property, which would provide inadequate funds to meet all related costs. One former trustee was the corporate trustee's director and the other, its shareholder. On sale, the corporate trustee was unable to meet the Trust's GST obligations and the IRD filed proceedings. The High Court said the director failed to act in the company's best interests by failing to ensure the company fulfilled its duty as trustee to obtain the best sale price for the trust's assets. The director had to pay the GST the trust was unable to pay.

A beneficiary may be able to take action against the trustee company for its failure to obtain the best price. However, if the director is in breach of their obligations under the Companies Act they are personally liable to third party creditors, such as the IRD, for their failure to act in the company's best interests.

Where a transaction leaves the corporate trustee unable to meet liabilities, irrespective of whether they were incurred as a trustee, the director is responsible for the harm done to the company. The director cannot claim as a defence that the action was that of the company acting as a trustee.

### **Resource Management Act 1991**

Under section 340 of this Act a director can be liable for an offence committed by their company's agent (for example, a tree-felling contractor working on the trust's farm property)

as if the director had personally committed the offence. This is provided they have authorised or consented to the act, could reasonably be expected to have known an offence was imminent and failed to take all reasonable steps to prevent it.

### **Health and Safety at Work Act 2015**

Under this legislation, directors of a company can be prosecuted if the company fails to provide safe working conditions (for example, to employees on a farm which is owned or leased by the trust). Under the Act, a Person Conducting a Business or Undertaking (“PCBU”) has the primary duty to ensure the health and safety of its workers and others, so far as is reasonably possible.

If directors of a corporate trustee, as its “officers” under the Act, fail to exercise due diligence in ensuring the trustee (PCBU) carries out its duties, significant penalties may be imposed on the directors.

### **TO THE BENEFICIARIES**

As stated earlier, it is generally accepted directors owe duties only to the company and not to anyone dealing with the company, or even to a beneficiary of a trust of which the company is a co-trustee.

However, there are some exceptions.

The most likely way directors will be found personally liable to beneficiaries is where the directors knew about the breach, willfully shut their eyes to the obvious or intentionally failed to make reasonable and honest inquiries.

### ***Tax Implications for Trading Trusts***

Special tax rules cover land sales and “associated persons”. Anyone “associated” with a property dealer or developer can be taxed as if they too were a property dealer or developer. The definition of “associated persons” in the Income Tax Act is very wide and often “captures” family members, much to their dismay!

Profit may become taxable when a property is sold by the trust. However, if you can avoid being regarded as “associated” and if the property is retained for 5 years, you may not have to pay tax on any future profit.

As the structures that are needed to avoid such outcomes are complex, both your lawyer and your accountant should be jointly advising you.

## **Registered Charities and Charitable Purposes**

One of the main features of charitable trusts and foundations is that they must be registered in order to obtain their tax-exempt status. This tax status remains a powerful incentive to those who wish to donate funds to their chosen social goal. Not only will they receive on average a tax rebate of one third of their donations from IRD at the end of the financial year, but they know that 100 per cent of their donations will be available to the trust for their social enterprise endeavours.

All charities registered in New Zealand under the Charities Act 2005 appear on the Charities Register. The trustees of a charitable trust may also (and often do) decide to register as a board under the Charitable Trusts Act 1957 provided their purpose is to promote education, religion, poverty or other purposes of benefit to the community. These are charitable purposes under the Act.

### ***Relevance to family trusts***

Your family trust is able to include named charities or charitable purposes as discretionary beneficiaries. Provided this is done, your trustees can make payments to charities without their own trust having to register with Charities Services as a charitable trust. However, trustees may decide to register their trust as a charity because they wish to solicit donations for their own particular charitable purpose or purposes.



## Confidentiality

Currently, there is no public register of trusts in New Zealand on which trusts must appear as soon as they have been created. Therefore, trusts remain a private affair among their settlors, trustees and beneficiaries and are not open to public scrutiny as are companies registered on the Companies Register.

## Reacting to Changes in the Law

Changes to trust law under the new Trusts Act will affect the duties of trustees to beneficiaries and possibly even the settlor's original objectives when the trust was set up.

It is therefore vital that the modern trust deed has the degree of flexibility needed to allow its terms to be altered to comply with the current law. Usually, this flexibility is provided by the trustees' power to vary the trust deed and may look like the following clause, which is in our trust deed precedent:

### *Changes to trust terms*

- *The trustees may at any time or times prior to the distribution day by further deed vary, cancel or add to all or any of the provisions of this deed.*
- *Any such further deed must have the written consent of the appointor.*
- *The deed must not affect the vested interest of any beneficiary in the trust fund or any part of it or any income from it.*
- *The deed must not extend the distribution day beyond what is permitted by law at that time.*

Although such changes to trust law are inevitable, as they are in all areas of law, much comfort can be gained in the knowledge that the basic structure of a trust has remained intact for hundreds of years.

As we will see below, this is expected to continue for the foreseeable future.

## Will the Government continue to support the Trust concept?

The New Zealand government remains emphatically in favour of inter-generational asset protection through family trusts. This is clear not only by the proposed extension of a trust's maximum duration from 80 years to 125 years under the new Trusts Act, but also because:

- The Government is a "wealth distributor" not a "wealth creator". The taxation of New Zealanders' wealth enables wealth distribution through government benefits and services. As the tax-base is dwindling, but the need for benefits and services is increasing, the government is promoting wealth retention in trusts for longer to reduce reliance on such benefits and services;
- The Government has still not introduced the taxing of asset distributions from trusts to its beneficiaries by way of a capital gains tax, as Australia has;



- New Zealand still has no inheritance or estate duty tax;
- Gift duty (a tax on gifts over \$27,000.00) was fully abolished in 2011. This enables the full and immediate transfer of substantial family assets to a trust without the need for a lengthy gifting programme of a mere \$27,000.00 per year per person.





# Chapter 5

## SHAM TRUSTS

*What are they?*

A trust is a sham if it is a pretence about the ownership of its assets. The terms of its trust deed do not reflect that the settlor really intended not to set up a valid operating trust at all and therefore has been deceitful.

Some settlors choose to take such a risk so as to retain effective control of the assets for themselves and ensure the trustees can never give those assets to any other beneficiary named in the trust deed. Such cases are rare because it must be shown that the settlor intended to deceive others about the true nature of the trust from its inception.

### *Clayton v Clayton - No Sham*

In the Clayton case it was decided that Mr Clayton genuinely intended his Vaughan Road Property Trust to be valid for legitimate business purposes and that there was no intention to deceive others. However, the Court did say such a finding did not stop them from deciding that the attempt to create a valid trust had failed. This they didn't do because Mrs Clayton had successfully argued on the relationship property basis mentioned earlier.

Occasionally, a trust is found to be a sham, but such cases remain the exception, not the rule.

### *Rosebud Corporate Trustee Limited v Bublitz - Sham argument proven*

In this 2014 High Court case Mr Nielson, a property developer and while bankrupt, created the Rosebud Trust, which was a blind trust because he and his wife were not named as the true beneficiaries until later. Payment-flows from a new business interest acquired by the trust were accessed solely by Mrs Nielsen and Mr Nielsen controlled the trust to the extent that the corporate trustee never refused any of his requests.

There was almost a complete absence of any trust resolutions passed by the trustees on any key issues. There were no proper financial accounts and key documents were back-dated.

The court decided the Trust was a sham, no doubt due to Mr Nielsen's deceit from the outset and his intention not to create a valid trust at all.

The pressure has returned to trustees to fully commit to their role to act in the interests of all beneficiaries, not just the one who is also the settlor. If that is too difficult because of the tension it causes then that trustee needs to consider retiring.

If trustees are unable to ignore the will of the settlor and manage the trust's assets as expected, although this isn't necessarily evidence of a sham, there could be an actionable breach of the trustee's duties. This could result in the trustees being taken to court by the beneficiaries, reprimanded and held personally accountable for any loss suffered by them.

In these circumstances, the "guilty" trustees may be unable to access trust assets to compensate themselves for any court-imposed financial penalty.





# Chapter 6

## ARE THERE ANY DISADVANTAGES IN HAVING A FAMILY TRUST?

As with any asset-owning structure there are advantages and disadvantages. In this regard, trusts are no different to companies and partnerships.

The following may be regarded as disadvantages, depending on your view and on your personal and financial circumstances:

- Settlers are giving up legal ownership and therefore full control over what were their personal assets, in favour of the trustees of their trust. Even though the settlor is likely to be one of the trustees, the unanimity rule requires all trustees to agree on the administration of the trust and therefore what happens to its assets;
- The trustee tax-rate for trust income is 33 cents in the dollar, rather than 28 cents in the dollar for a company;
- The trustees' tax losses cannot be utilised by beneficiaries in respect of their own taxable income, which they can do as a shareholder of a *Look-Through Company* (previously called a Loss Attributing Qualifying Company);
- Tax losses and imputation credits of any company in which the trust holds shares will be forfeited if 49 per cent continuity of shareholding ownership (for tax losses) and 66 per cent continuity of shareholding ownership (for imputation credits) is not maintained;
- Trustees are personally liable for the trust's tax to Inland Revenue and for other liabilities. However, trustees are usually able to rely on an indemnity clause in the standard trust deed, which gives them access to trust assets for compensation purposes should they be sued. (Under the new Trusts Act this indemnity is not available to any trustee if the breach of trust arises from their dishonesty, gross negligence or wilful misconduct);
- Some extra cost and administration is involved, the extent of which will depend on the nature and value of the trust's assets and the type of trustee - corporate or individual, and professional or not;
- The Courts are finding more creative ways for third parties to access trust assets to which they are deemed entitled. This is no clearer than in the area of marriage/relationship breakdown as we have seen with the *Clayton* case in Chapter 4, which the imminent changes to the Property Relationships Act 1976 are designed to address in a more predictable and structured way;
- Having your family home owned by a trust can result in a future application to the Ministry of Social Development (MSD) for a residential care subsidy failing either their asset test or income test, or both. (Refer to our further comments in Chapter 7 "Winding-Up Your Family Trust").

# Chapter 7

## WINDING UP YOUR FAMILY TRUST

### What are the reasons for an early winding up (termination) of a family trust?

If you have a family trust, the original reasons for its creation should be reviewed by you or your legal advisor on a regular basis. Occasionally, it becomes evident that those reasons, or at least some of them, are no longer relevant to your circumstances. You need to consider whether or not to wind up your trust if it is no longer serving the purpose originally intended.

#### Residential Care Subsidy (RCS) Eligibility

Although rarely documented at the time of creating a family trust, one of the primary motivations for settlors to legally divest themselves of assets was to increase the likelihood of their being eligible for a RCS in advancing years, if that became necessary.

The usual procedure was and still is the sale of, say, the family home to a family trust at market value. The trustees would sign a deed acknowledging their indebtedness to the settlors for the home's market value, followed by regular gifting (reduction) of that debt by the settlors on an annual basis.

However, a 2013 New Zealand Court of Appeal decision in the case of *Bridgford v MSD* caused significant waves in this area of the law.

This case confirmed that an applicant for the RCS, along with their spouse or partner, could gift a **total of \$27,000.00 per couple per year only**, and that any gifting beyond that amount was regarded as deprivation of assets by Ministry of Social Development (MSD). Unfortunately, up until the *Bridgford* decision, most couples and their advisors believed the maximum annual permissible gifting was \$27,000.00 for each of them (\$54,000.00). Indeed it was, under the gifting legislation, but not under the Social Security Act's regulations (2005).

This case has resulted in many gifting programmes becoming much longer and therefore, inefficient, for completely transferring assets into a family trust and for excluding those assets from MSD's means assessment.

#### *The Asset Test*

The *Bridgford* "revelation" had two immediate effects. The first is that many settlors, when applying for a RCS, are now left with a larger debt owing to them by their trust's trustees, which MSD will treat as the applicant's personal asset for inclusion in any means assessment. The second, is that if a couple has exceeded their allowable annual gifting by \$27,000.00 for say, ten years, a sum of \$270,000.00, as excess gifting, would also be treated by MSD as the couple's asset and as if it were actually in their bank account. Unfortunately, the \$270,000.00 on its own would exceed the current RCS option A threshold of \$224,654.00, which must be met before an applicant can pass the asset-test hurdle.

By "unwinding" the trust and transferring the family home back to the applicant they may be able to come within the option B threshold of \$126,224.00 and so qualify for a subsidy. This is

because under this option, which is only available if the applicant's spouse or partner is still living in the family home, its value is excluded from the means assessment.

We are aware that MSD has, on occasions, chosen to ignore a trust as owner of the family home and grant the RCS to an applicant who would have qualified "but for" their trust. However, this was because the value of all other personal assets was below the asset threshold.

It is essential to first check with MSD or your lawyer to ensure there is merit in embarking on this trust "unwinding".

### *The Income Test*

Even if MSD's asset test is passed, the applicant must also pass the MSD's income test. Recent cases brought by MSD indicate an increasingly rigorous attitude by the Department to the transfer of assets to family trusts. They also indicate MSD's wish to focus on the novel concept of **notional income** (potential rather than actual income) from those assets for the purposes of the income means assessment. This concept is similar to what MSD already applies to Working for Families Tax Credits and Student Allowances.

#### **MSD v Broadbent and "Notional Income"**

Mrs Broadbent and her late husband sold most of their properties for fair value to their two trusts. They were trustees and or discretionary beneficiaries of both trusts.

The trusts acknowledged debts back to the Broadbents for these properties, which were repayable on demand. By 2013 the entire debt had been forgiven by the Broadbents under the usual debt forgiveness programme at no more than \$27,000.00 per year.

MSD argued it was entitled to impose notional income calculations on the Broadbents' properties although the original debt had been fully forgiven within the allowable limit of \$27,000.00 per year.

But, the High Court said MSD could not count back into the Broadbents' assessment notional income from the properties because they were validly gifted to their trusts.

MSD appealed the High Court decision to the Court of Appeal, which held:

- MSD cannot treat the trusts' income as if it is Mrs Broadbent's income because the gifting programme related not to the trusts' assets, but to the reduction to zero of the resulting debt back;
- Where a property is sold to a trust at fair price, potential (notional) income deprivation will occur, but only on the steadily decreasing loan principal at no more than \$27,000.00 per year, owed by the trust to the settlors (Broadbents) if they have not claimed interest on it. The Broadbents, like most in their circumstances, hadn't done so;
- MSD will be able to calculate that notional reducing income stream and treat it as actual income earned and available as a contribution to Mrs Broadbent's long-term residential care.

Future eligibility for Government subsidies, such as long-term residential care, should never be a major reason to establish a family trust. However, such “conversations” will have occurred.

The Court of Appeal decision in *Broadbent* renders such a rationale even more suspect than before. While the decision does not widen the asset test net, its redefining of MSD’s income test is likely to see more successful applicants having to make a higher contribution to their residential care subsidy payments.

## **Insolvency**

There have been recent cases in which corporate (company) trustees of family trusts have been held liable for overdue tax incurred by the trusts. In one case this led to the professional corporate trustee having a substantial monetary order made against them. This resulted in its insolvency because it had no assets other than those of the trust, which it owned only as a co-trustee, and not personally. There were major implications for the firm because their corporate trustee was a trustee for many other client trusts, resulting in expensive and time-consuming changes to the ownership of their clients’ properties and bank mortgage restructuring.

There has been recent judicial comment that directors of asset-less corporate trustees should be held more accountable for the actions of their companies. This has resulted in many professionals either limiting their services in this regard, or charging substantially more annually for the risk involved in such services.

## **Poor Management**

If a family trust has not been properly administered by its trustees, the integrity of the trust and its continued existence may become an issue. If proper decision-making does not take place, such as decisions not being recorded in trustee resolutions or if trustees have carelessly suggested to a beneficiary or their spouse that they will receive a particular trust asset in the future, then the trustees are not properly administering the trust. Such beneficiaries and spouses have successfully argued in court that a “*constructive trust*” has been created in their favour by the trustees’ actions, resulting in a decision that a trust asset or monetary amount be given to them.

Poor management of a trust often leads to problems for the trustees, for some of which a resolution can only be through the courts. Given the expense of court action and the uncertainty as to whether or not the trustees will be personally liable for any decision a court makes against them, better trust management and communications with beneficiaries is a far more preferable option.

## **Business/Creditor Protection**

The original risk to personal assets due to a business venture may no longer exist because that business has been sold and you are no longer a business operator. In this instance, unless there are on-going liabilities, there ceases to be any need for the “ring-fencing” of personal assets from attack by business creditors, as there once was.

## **Tax Obligations and Reporting - Unexpected Surprises!**

This is an area of concern for many trustees and beneficiaries. Most trusts are regarded as a “*complying*” trust. These Trusts are created by a New Zealand tax-resident or immigrant settlor, have at least one New Zealand-resident trustee and that trustee has satisfied all of the trust’s income tax liabilities. Its capital (assets), any capital gains and accumulated trustee

income can be distributed to beneficiaries tax-free. This is one of the major benefits of a complying family trust.

However, if a settlor of a family trust ceases to be a New Zealand tax resident, then unless certain criteria can be established, the trust will become known as a “*non-complying*” trust. The result is that double taxation may arise for both trustee and beneficiary income from the trust and there is likely to be a 45 per cent tax on any asset distributions to beneficiaries while the trust has a non-complying status.

## **International Tax Treaties (FATCA and CRS )**

We refer you to the article on our website [www.parryfield.com](http://www.parryfield.com), “**What is FATCA & CRS and how does it affect you?**” posted on 29 November 2017. By way of summary though, if your family trust is regarded as a Foreign Financial Institution (FFI) under FATCA or a Financial Institution (FI) under CRS, then there may be unexpected and unwelcome obligations on its trustees. The immigrating of a settlor, trustee and possibly even a discretionary beneficiary of the trust to New Zealand or their emigrating elsewhere, may activate an obligation to report that person’s new residential information and their financial interest in the family trust to the IRS in the United States or to our own Inland Revenue.

## **Relationship Breakdown**

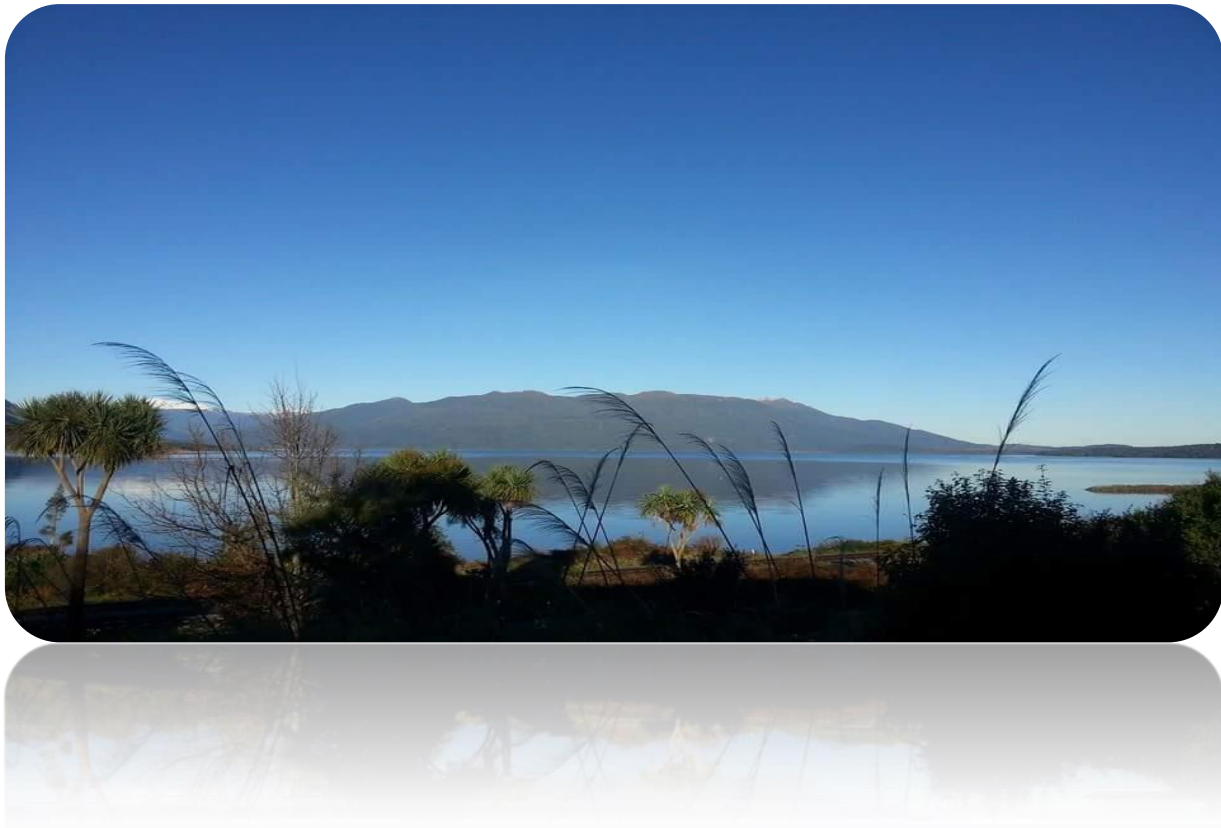
If the settlors’ relationship has ended, both parties will, no doubt, wish to separate their interests in the trust assets as quickly and amicably as they can. Provided all trustees agree (and usually the settlor partners will also be trustees) then the winding up of the trust and distribution of its assets to both partners equally can be actioned easily.

## **Succession Planning Changes**

If the settlor parents have died and the adult beneficiaries (children) want to set up their own trusts, or if they want to have access to their respective shares of the trust’s assets, then the ongoing need for succession planning ceases to exist.

Even if the trustees disagree with what the beneficiaries want to do, all adult beneficiaries (18 years under the new Act) who are entitled to the trust assets among themselves can demand their share of them. This can occur only where such beneficiaries have a vested (fixed and certain) right to those assets.





## How can a family trust be wound up?

There are a number of ways by which a family trust can come to an end. Your legal advisor will need to review the trust deed to see what options are available to the trustees of your family trust. This is determined by the powers the trustees have and whether or not they can be exercised in favour of discretionary beneficiaries or the final beneficiaries.

Let's now have a look at the ways a family trust can be wound up:

### Power of Appointment

Many family trusts are brought to an end by the trustees exercising their power of appointment. This allows them to pay the income and distribute capital (assets) of the family trust to any one or more of the discretionary beneficiaries. This is done by the trustees passing a resolution at a meeting. Below are examples of standard power of appointment clauses in our firm's trust deed precedent, which are known as "sprinkler" clauses:

#### *Payments from income*

*The trustees may distribute any of the income to any or all of the discretionary beneficiaries or use it for their maintenance, education, advancement or benefit. The trustees may make payments to or for one or more of them, and need not ensure that each receives the same amount or benefit.*

*If any income of any income year is not paid, applied or retained within 12 months from the end of that income year, the trustees must add it to capital so that it becomes part of the capital of the trust fund and is held on the same trusts.*

### *Payments from capital*

*Until the final distribution day, the trustees may distribute as much of the capital of the trust fund as the trustees think fit for the maintenance, education, advancement or benefit of the discretionary beneficiaries.*

*Prior to the final distribution day, the trustees may make distributions from capital for one or more of the discretionary beneficiaries, and need not ensure that each receives the same amount or benefit.*

*These distributions may be made on any terms and conditions the trustees think fit.*

The legal term for the above power of appointment is dispositive because it is the power by which the trustees can dispose of some or all of the trust's income and/or capital at any time to any one or more of the discretionary beneficiaries. However, care must be exercised by the trustees because if this "sprinkler" clause is used to pay all trust income and all trust assets to certain chosen beneficiaries, then the trust automatically ceases to exist because it no longer holds any assets.

As we will see below under the heading "Power to Bring the Distribution Date Forward", this can cause major concerns for trustees.

### **Power of Advancement**

A second way by which trustees can distribute trust assets (the trust fund) is by using the power of advancement. This power, which is also known as a depository power, enables the trustees to transfer the trust fund (but capital only, not income) to the family trust's final beneficiaries.

The major difference between this power and the power of appointment discussed above, is that here, the final (not discretionary) beneficiaries are not yet entitled to the trust fund, but are merely receiving their share or a part of their share early. A common example of the use of this power is where the trustees want to pay for a final beneficiary's tertiary education costs, but because the person is only 17 years old, their share of the entire trust fund does not legally belong to them (vest) until they reach 20 years of age.

Again, the trustees have to be very careful when exercising this particular power because section 41 of the current Trustee Act limits the share of funds that can be paid to a final beneficiary in these circumstances to \$15,000.00, unless that section has been clearly excluded in the trust deed, or modified by it.

This monetary limitation has not been carried over into the new Trusts Act.

### **Power to Bring the Distribution Date Forward**

Trustees also have the power to bring forward the trust fund's date of distribution to beneficiaries. Unlike the two preceding powers, this one is known as an administrative power, but can be used together with the above power of appointment, depending on the trust deed's clauses about the distribution date.

If these powers are used together, the timing of their exercise is critical for the trustees to avoid a firm rebuke, or even court action, by certain disgruntled beneficiaries.

### ***How it can so easily go wrong!***

Provided the trust deed gives the trustees the discretion to appoint who the final preferred beneficiaries will be, and the trustees want to exercise that power, then they must first decide how they will distribute the trust assets and appoint those beneficiaries. This must be

done **before bringing the distribution date forward** and winding up the trust on that date. If the trustees do not exercise their power of appointment this way then the default final beneficiaries mentioned in the trust deed (rather than the preferred discretionary beneficiaries) are entitled to receive the entire trust fund. However, that may be problematic if the assets have already been distributed to other beneficiaries.

This may not be a result some discretionary beneficiaries expected, or what the settlors wanted when they established their family trust.

### **By Unanimous Consent of all Beneficiaries**

Under the current law, a family trust may be wound up by applying what is called the *rule in Saunders v Vautier*. This is a very old case (1841) which said that if all of a trust's beneficiaries agree and are at least 20 years old, then they are able to tell the trustees to terminate the trust and pay out the beneficiaries' respective shares. In this situation, neither the trustees nor the settlor have to agree, as it is a decision made solely by the beneficiaries.

This situation can arise where the settlors are both dead, their remaining adult children are the trust's final beneficiaries and they all want their shares now, not when the trustees decide.

However, if the above scenario is altered by one of the four beneficiaries not having reached 20 years of age, then the family trust cannot be wound up until the child reaches that age. Only then can the trustees distribute to all beneficiaries their respective shares in the trust fund.

If they wish, trustees could apply to the High Court for consent to wind up the trust on behalf of the minor child and to distribute to that child and their other three siblings their shares of the trust fund. But without High Court consent, the trustees have to wait until that minor child reaches the age of 20 years.

*What if all the beneficiaries don't want to end the trust?*

Under the *Saunders v Vautier* rule, the trustees will not be able to wind up the trust if that is not the wish of all of the beneficiaries and until all outstanding issues have been resolved between the parties.

There are two limitations to the application of the rule in *Saunders v Vautier*, which are as follows:

- The Courts are against a division of real estate, as a trust asset, on a partial basis because a share of that property has far less value than the sale of the whole property on the market, and
- The distribution of trust property could be detrimental to those beneficiaries who want that property to remain in the family trust.

This rule is not only codified by the new Trusts Act, but qualified by the Act allowing the Court to waive (dispense with) the consent of a beneficiary to a proposed winding up, variation of a trust, or resettlement of assets (transfer) onto another trust, that they oppose.

### **The Power of the High Court of New Zealand**

The High Court of New Zealand has the power to wind up trusts. The High Court will use its inherent power to wind up a trust and distribute trust funds to nominated beneficiaries where trustees are unable to properly administer the trust and there is no logical alternative.

The High Court is prepared to make orders for the winding up of a family trust and the distribution of its assets if its trustees fail to do this effectively themselves. The Court is prepared to step into the shoes of trustees and decide how much each of the beneficiaries should receive from the trust fund.

This power, which includes the variation of a trust, has not only been included in the new Trusts Act, but extended to apply also to the resettlement of assets onto another trust.

## **Resettlement**

Almost all modern trust deeds give trustees the power to resettle (transfer) a trust's assets onto another trust, provided the resettlement is for the benefit of at least one of the discretionary beneficiaries of the original trust. If all of the first trust's assets are resettled on the new trust, the first trust can be wound up. However, if only one or two assets of the original trust are resettled onto the new trust, then the original trust will continue for the benefit of its discretionary beneficiaries.

When exercising their power to resettle assets from one trust to another, it is imperative that the trustees are certain it is in the best interests of the beneficiaries. In coming to such a conclusion the trustees can only take into account relevant considerations, including the personal and financial circumstances of the beneficiaries and not irrelevant ones such as their choice of partner or other lifestyle decisions.

# Chapter 8

## YOUR SUCCESSION PLAN

Your family trust is only one of several documents that should comprise your succession plan, or at least be considered.

These additional documents, some of which must align with your trust, are briefly described below.

**Relationship Property Agreement** (also known as a contracting out agreement or a pre/post nuptial agreement)

As mentioned earlier in this booklet, such an agreement is advisable if you want to transfer to a trust assets that could be regarded as relationship property (both partners' common or joint property). Provided your partner is willing to sign the agreement, you have far greater certainty that in the event of a separation, they will be unable to claim the asset is still relationship property and divisible equally between you both.

### Your Will

A new Will should, in addition to the usual matters of burial or cremation, naming executors/trustees and giving assets to beneficiaries, include provisions about:

- Any debt owed to you by trustees on your transfer of assets to a family trust, which is often forgiven (gifted). If it isn't, it becomes an asset in the administration of your estate. Beneficiaries then have the right to demand the debt's repayment by your trustees, which may force the sale of trust assets to satisfy that demand. This may mean the sale of the family home if that is the trust's only asset - a result that could cause regret and recriminations within the family;
- The transfer to a reliable person of your very important power to appoint and remove trustees under the trust deed. In a split family, this ensures that the deceased party's power is given to a trusted friend or family member who can represent the interests of the deceased's children from a former relationship. That trusted person, or their appointee, will then administer the trust and its assets jointly with the surviving partner.

### Enduring Power of Attorneys ("EPAs")

These documents, which are created under, and governed by, the Protection of Personal and Property Rights Act 1988 ("PPPR Act"), are discussed in more detail in articles on our website [www.parryfield.com](http://www.parryfield.com).

There are 2 EPAs that should be signed. One relates solely to your personal assets, but not those you have control over as a trustee of your family trust. Such assets may include a stamp collection, shares, bank accounts, cars and real estate - collectively described as your "property". The attorney or attorneys to whom you entrust control of these assets will, at your option, be able to exercise that control either immediately on signing the EPA, or only if you become mentally incapable of making rational decisions. The choice is yours.

The other EPA gives you the ability to appoint only one attorney to make decisions about your hospitalisation, medical treatment and medications and type of accommodation - collectively described as your "personal care and welfare". Unlike the above EPA as to property, this EPA cannot become operative **unless** you lose mental capacity.



Both forms of EPA allow you, as the donor, to appoint “*successor*” (back-up) attorneys to take the place of your first-choice attorney should they die or otherwise become unable to act. A new feature of these forms is that you can now require certain family members or friends to be consulted, or be given information, by your attorneys whenever they make decisions or take action under these EPAs.

If your cognitive impairment is not too advanced, your attorney is required to discuss with you all decisions and actions they believe are necessary to take.

The attorneys must, at all times, act solely in your best interest and not their own. If they do not, they are likely to be removed by the Family Court on an application brought by a genuinely concerned friend or family member.

### **Advance Care Plans (aka Living Wills, Advance Statements, Advance Agreements, Advance Decisions, Future Treatment Plans and Advance Directives)**

In New Zealand there are thousands of ACPs scanned in patients’ health records and 82% of doctors currently support them.

Some of the more salient points about such Plans are:

- They enable you to plan, with involvement from family and your doctor/s, your preferences for future health treatments, care options and end of life;
- ACPs benefit people with conditions both limiting their life and those that are of a cognitive deterioration nature and gives them peace of mind. This is especially the case where such conditions are expected to reduce the person’s competence to make rational and anxiety-free decisions about their future health and end of life care;
- They are provided for by regulation 7 of the Health and Disability Commissioner Regulations 1996 (The *Code of Patient’s Rights* or the *Code*) under the 1994 Act of the same name. This confirms that an ACP is valid and legally binding, provided it meets the Regulation’s requirements and the common law’s that: the person has capacity; intends it to apply to the circumstances; it wasn’t made under undue influence of others; and is obviously valid;
- They are supported also by our Bill of Rights Act 1990 and the 2006 Convention on the Rights of Persons with Disabilities (CRPD), the latter of which has been ratified under our Disability Act 2008;
- Article 12 of the CRPD says that a person who has lost capacity has the right to equal recognition before the law, and the ability to enjoy legal capacity on an equal basis as do others in all aspects of life - including the legal capacity to plan their preferred treatment options in advance;
- The duty of an attorney under an **enduring power of attorney for Personal Care and Welfare** to do everything necessary to save the donor’s life is secondary to the overarching Article 12, which is supported by the PPPR Act. The attorney therefore must become an advocate for the donor’s advance directive or their ACP, despite a direction in it not to prolong their life;
- Attorneys must therefore be made aware of any advance directive or ACP you make.

Enduring Powers of Attorneys and Advance Care Plans can and should coexist without conflict. Together they provide clear instructions and structures for your care at a time when you no longer have mental or physical capacity to convey your wishes to others. However, neither is a substitute for a Will, which unlike EPAs and ACPs, is operative only on death.

For more free resources visit [www.parryfield.com](http://www.parryfield.com) where you will find a diverse range of articles and guides on this and other areas of the law.



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