



GUIDE TO FAMILY TRUSTS

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WHY SHOULD I CONSIDER A DISCRETIONARY TRUST?

Quite simply a Trust is a legally enforceable arrangement where named Trustees hold assets and property for the benefit of a defined range of people (the beneficiaries) in accordance with the wishes of the Settlor who creates the Trust. Family Trusts can be set up easily and can be flexible to operate. They may allow you to have the benefit, use and control some of your assets without being penalised for owning them.

HOW IS A TRUST CREATED AND HOW DOES IT WORK?

- The person or people wanting to create the Trust (the Settlor) settles (transfers) property to named Trustees. Often two or three Trustees are appointed.
- The choice of Trustees is very important. The Trustees should be reliable individuals or Trust Companies. All Trustees are bound to follow the terms of the Trust. It is important in our opinion to have at least one independent Trustee who is not named as a beneficiary. Trustees have to act prudently. More particulars are provided on page 4.
- The terms of the Trust should be recorded in a written document known as the Trust Deed.
- In our trusts, the Settlor has the power to hire and fire Trustees to ensure the terms of the Trust Deed are followed.
- Family Trusts may last for a maximum of eighty years from their date of creation.
- In New Zealand the Trustee Act may in some cases provide implied duties on Trustees when investing as well as, defining the general powers of Trustees and the process of hiring and firing Trustees.

HOW ARE THE ASSETS AND INCOME PAID OUT OF A TRUST?

- The distribution of income from a discretionary Trust is at the discretion of the Trustees who may hold on to or distribute all or any of the income. Where income is held by the Trustees the income is taxed as Trustees income, presently at the rate of 33%.
- Alternatively, the Trustees may pay out some or all of the income to any one or more of the beneficiaries. Any distributions like this are taxable income in the hands of the beneficiaries who will pay tax at their personal rate depending on how much other income they have (there are some exceptions to this including recent laws requiring distributions to children to be taxed at 33 cents in the dollar).
- The distribution of the assets and capital of the Trust is also at the discretion of the Trustees and capital distributions may be made from time to time to any one or more of the beneficiaries.
- It is usual to provide in the Trust Deed that at the date of winding up the Trust the assets remaining are to be distributed equally between the family beneficiaries who are living at the time.
- The Trustees usually have wide powers to deal with the assets and income of the Trust for the benefit of the beneficiaries and to deal with the management of assets in the Trust.
- The decisions of Trustees must be unanimous unless the Trust Deed provides otherwise. Trustees in dispute can apply to the Court for a ruling.
- The way a Trust works is relatively simple and holding assets in a Family Trust need not unduly complicate a person's affairs. It is necessary to keep adequate financial and other records for a Trust and there may be extra accountancy expenses for the annual filing of separate taxation and any other returns that might be required.

YOUR COST/BENEFIT DECISION

The all inclusive charge can range from \$2,500 for a simple Trust into which residential property is transferred, to \$3,500 and upwards for farm protection Trusts and associated business restructuring and documentation. These charges include valuations, Government charges and GST, and are all up figures. Before you commit to forming a Trust we are happy to provide you with a no-obligation estimate of the likely costs.

WHAT CONTROL DO I HAVE IF I TRANSFER MY HOUSE TO A TRUST?

Your use of the house without interference can be protected by specific documentation. This can be done if there are circumstances which might mean you cannot rely upon the Trust to act in your favour. We can help you decide whether this is necessary.

In addition with a properly drafted Trust you should retain the power over the Trust to hire and fire Trustees.

SHOULD I CREATE A FAMILY TRUST?

At Govett Quilliam we are often asked to advise on such matters. We like to review the full needs of your family and likely government policy and possible changes to legislation. At the moment people might wish to form Family Trusts for any of the following reasons:

Asset Protection

The commercial risk of being in business in the new millennium often puts personal assets on the line in the case of negligence or sudden financial downturn. Assets held in separate Family Trusts may be protected against future liability because the assets are owned by the Trustees rather than the individuals at risk.

Life after the death of the settlor

Trusts are often practical vehicles to permit the smooth on-flow of assets to family members and their spouses, following the death of the settlor(s).

Undue influence

It is not unknown for some older people to be put under undue pressure by relatives in the twilight of their years. Assets held in a Trust can protect them from pressures in later life.

The broken relationship

Spouses wanting to retain property as separate property may be able to more clearly argue against property claims of an unhappy spouse or partner in certain circumstances, where those assets are held in a separate Trust.

Greedy children

Trusts could be used to maintain the assets of your estate away from greedy children who would be unable to access the capital of the Trust for their own wasteful purposes.

The “tax man”

Whilst income received and retained by the Trust is taxed at 33c in the dollar, if it is not retained by the Trust but distributed to beneficiaries it may be taxed at the beneficiary’s tax rate (there are some exceptions to this). This might mean tax is paid at a lower rate.

Family disputes

Because the beneficiaries are discretionary only they have no specific entitlement to a particular share. Flexibility is provided.

Retention

Placing assets in a Trust means that you do not have to lose total control of the ability to enjoy them.

Changes in Government tax policies

From time to time various political parties may consider establishing some form of estate duties or a wealth tax and assets in a Trust may be protected from such legislative change, depending on what policies are finally introduced.

Family fights

Many people are unaware of the Family Protection Act and the ability for immediate family to establish family protection claims. Because the assets are held in Trust, rather than personally, a smaller estate may reduce the risk of any claim.

Government policy

Those people in our community objecting to asset means testing are able to argue that as a discretionary beneficiary there is no requirement to disclose assets held or income earned by the Trust. There is a moral question involved in this issue but many people are unhappy that they should be forced to pay for their rest home care with tax paid assets saved over a lifetime which were always intended for passing on to children. There are risks and issues associated with Trusts solely for rest home care purposes that you may need to explore with your adviser at Govett Quilliam.

TRUSTEES - WHO TO APPOINT AND AT WHAT RISK?

Who can be a trustee?

- A Trustee is a reliable individual or Trust company, who accepts the appointment made by the person wanting to create the Trust - the Settlor.
- The individual must be over 20 years and can be a member of the family, a trusted friend or a professional such as an accountant or lawyer.
- Two or three Trustees may be appointed, some can be independent Trustees with skills and expertise useful to the management of the trust’s affairs.

How do I become a trustee?

- The appointment is made in the Trust document signed by the Settlor and all Trustees.
- Trustees duties and obligations last as long as the Trust continues to exist or until a Trustee desires to be discharged, is incapable of acting, or is removed by the Settlor, the other Trustees or the Court.

- In the first instance the Settlor usually retains the power to appoint new trustees but in default the remaining Trustees or someone designated by the Trust document can appoint further Trustees to act.
- You do not have to accept the appointment if you so wish.

What are my obligations as a Trustee?

- Trustees have the responsibility to make decisions.
- To hold regular meetings with fellow Trustees and the Settlor - at the very least once a year.
- Accurate minutes of all meetings and distributions must be kept and a minute book maintained.
- Trustees must pass all necessary resolutions at meetings and act unanimously in respect of each resolution passed.
- Ensure annual accounts are prepared.
- Trustees must also approve the distribution of income and capital to the beneficiaries under discretionary Trusts.
- A Trustee must open and maintain a separate bank account for the Trust.
- Ensure that the Trust has its own Inland Revenue Department tax number and file separate tax returns/claims annually.
- Regularly consider and investigate all Trust investments and confirm that such investments are appropriate and in the best interests of the Trust.
- Ensure that those acting with the Trustees delegated authority are properly performing the tasks allotted to them.
- Seek professional guidance in carrying out all that is expected of a Trustee.

What are my duties as a trustee?

- A Trustee is duty bound to comply with the directions in the Trust document.
- The duty of a Trustee is to best ensure the prosperity of the Trust and to exercise the powers granted in the best interests of all beneficiaries.
- To act impartially towards all beneficiaries.
- To seek and take professional advice where prudent to do so.

What are my powers as a trustee?

- The Trustee must use the powers conferred under the Trust Deed or at law to promote the best interests of the Trust.
- A Trustee can sell and buy assets, invest and expend Trust money in exercising these powers.
- The powers may extend to paying rates and taxes and insurance premiums on properties, managing mortgage obligations, authorising payment of brokers and agents' commissions or even concluding agreements on the Trust's behalf.
- A Trustee may, instead of acting personally employ an agent, such as a solicitor, accountant, bank or Trustee corporation, to transact any business or do any act required to administer the Trust.
- The power to delegate authority is also within a Trustee's prerogative in some situations.

Is a trustee accountable to anyone?

- Yes, a Trustee can be sued for abuse or neglect of the powers and duties conferred.
- A Trustee is accountable to the beneficiaries, other parties and ultimately the Courts.
- A Trustee can be held personally liable if the Trustee acts beyond his/her authority.
- Protection may be afforded to Trustees under the Trust Deed where their actions result in a loss to the Trust, so long as the Trustee has acted in good faith and without negligence and has not acted in breach of Trust.

Does it cost anything to be a trustee?

A Trustee can be reimbursed for his/her own expenses or pay out of the Trust property all expenses reasonably incurred.

How much time will the appointment take up?

- This depends on the complexity of the Trust, the assets held by the Trust and what the beneficiaries expect from the Trustee.
- The Trust assets may consist of property interests, stock market shareholdings, rental properties and the like, while the beneficiaries may require the Trustee to devote regular and special attention to the distribution of Trust benefits and income to themselves.
- Trustees have to be acquainted with the Trust's financial position as well as the details of each beneficiary so they can exercise their discretion fairly.
- Where a Trustee is charged with ensuring the maintenance, education and advancement of minor children, a considerable investment in time may be required to ensure the best welfare of the beneficiaries.

HOW TO MAINTAIN YOUR TRUST FOR THE BENEFIT OF ALL?

The 10 golden rules to ensure your Trust does its job are:

Shams

Avoid your Trust being labelled a sham. Get it right now and keep it right.

Trustees

Independent Trustees are not the total answer to credibility. You, as the Trustee of your Trust, hold the key to credibility. Act professionally at all times.

Files

Keep a correspondence file for and properly minute and record the transfer of assets to your Trust and all transactions that the Trust makes.

Records

Keep proper records of the Trust separate from your own including a separate Bank account.

Cash Flows

Record all loan repayments, capital distribution and income distributions, including the need and dates to remind your professionals to forgive further debts.

Tax

File tax returns.

Gifting

Do not neglect your Gifting Programme if there is one still running.

Address

Use an appropriate correspondence address eg: The Mary Smith Family Trust, c/- Mary Smith, 1 Dawson Street, New Plymouth.

Care And Attention

All Trustees must act prudently.

Review

Review your Trust annually including investment policy and minute the review.

Your trustee checklist

The following items may form the basis of a checklist but must not be treated as an exhaustive list:

- Have you recorded sound reasons for the establishment of the Trust and do the facts equate to the recorded reasons?
- Should you have an Enduring Power of Attorney?
- Have you consulted with all other Trustees?
- Do you know all of the assets of the Trust and their value?
- Do you know all of the beneficiaries, their ages and any special circumstances?
- Have you seen any Memorandum of Wishes completed by the Settlor(s).
- Have you recorded an investment strategy and regular review dates?
- Have you approved the annual accounts of the Trust?
- Have you recorded by resolution all purchases and sales of Trust assets and all loan repayments and distributions of income and capital to the beneficiaries?
- Have you kept the Beneficiaries informed either on request or as required?
- Have you adhered to the terms set out on the Trust Deed?

Checking the trust documentation

As Trustee do you have a copy of:

- The Trust Deed (or Trust Deeds for mirror or parallel Trusts)
- The Memorandum of Wishes
- Do you know where the Trust Minute Book is?
- Have you read and signed the initial minutes of the Trust?
- Do you know the form of draft minutes?
 - Future loan repayments
 - Income distributions
 - Capital distributions
 - Annual Review
- Where is the loan scheduled and when are the next gifts?
- Where are copies of the Agreements of Sale and Purchase of the property?
- Where are the settlement statements?
- Where are copies of transfers and assignments?
- Where are the Deeds of Acknowledgment of Debt?
- Where are the Deeds of Forgiveness of Debt in Part?
- Where are the Gift Statements?
- Have new Wills been prepared to stop conflict with the terms of the Trust Deed?
- Who holds Enduring Powers of Attorney for Property?
- Who holds Enduring Powers of Attorney for Personal Care and Welfare?
- What is the Trusts Inland Revenue Department Number? Is the Trust GST registered?
- Was a Property Agreement entered into to assist the Gifting Programme?
- What are the powers of appointment and the ability to change the Trust Deeds?

SUMMARY

This booklet has been designed to be a user friendly summary of discretionary Family Trusts and their maintenance. There are a number of other forms of Trusts which are used actively in various fields of the law. Our team at Govett Quilliam is skilled and available to assist you with any form of Trust law.

Most people create Family Trusts after consulting with their legal advisors. The team at Govett Quilliam like to have an overview of your motivation leading to the creation of a Trust. This overview may avoid unnecessary legal and accountancy expenses in the future. To do this we need to analyse your family's position and needs. We are able to do this bearing in mind the overall benefit your family will receive from the process both now and in the future.

Our questionnaire below will assist you to begin the process.

FAMILY TRUST QUESTIONNAIRE

To assist us in assessing whether a Family Trust is the best option for you please complete the following:

Why you think you would benefit from having a Family Trust?

-
-
-
-
-

Who would be the Settlers?

Please state full name, address and occupation

- 1)
- 2)
- 3)

Who would you appoint as Trustees?

Please state full name, address, occupation and the relationship the trustee holds with the settlor.

- 1)
- 2)
- 3)

Who would be the Beneficiaries of the Trust?

Please state full name, address, occupation, the relationship the beneficiary holds with the settlor.

- 1)
- 2)
- 3)
- 4)
- 5)

What assets would you have to be settled?

Please state the asset, whether there is a mortgage or charge over the asset, the capital value of the asset and the income it generates?

- 1)
- 2)
- 3)
- 4)
- 5)

HOW WE CAN HELP YOU

Govett Quilliam is Taranaki's largest law firm. We have the people, the experience and the resources to assist you, whatever your case may be.

We have prepared this guide as a guideline to family trusts. If you require further information, or have any questions about this guide please contact us.

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Please call our office if you would like further information on any guides prepared by our firm. Copies are also available on our website.

- *Asset Protection and Residential Care Subsidies*
- *Business Grants & Assistance*
- *Buying or Setting Up a Small Business*
- *Charities*
- *Companies Act 1993*
- *Consumer Guarantees Act*
- *Copyright*
- *Credit (Repossession) Act 1997*
- *De Facto Property Rights*
- *Employment Law*
- *Enduring Powers of Attorney*
- *Fair Trading Act 1993*
- *Family Trust*
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