



I've got a Trust, so what now?

Over the last decade there has literally been an explosion in the number of trusts formed in New Zealand. These trusts have been prepared in a variety of ways and come from a variety of sources. They are also being used in a large range of different situations.

The most important thing we can recommend that you do is not just to leave the trust documents in the bottom drawer and think that, having spent the money to set up the trust, all the issues have been solved. Trusts require regular care and administration to ensure they perform at their best when most needed – in times of crisis or challenge.

With literally hundreds of thousands of trusts now formed in New Zealand, we are beginning to see situations where these trusts are being subjected to challenge or scrutiny and the lessons learned will continue to accumulate. The whole area of trust law is very dynamic. Not only are trusts being challenged by disgruntled spouses, unhappy creditors, unhappy government departments and disaffected families, but the topic of trusts and the use of them is presently the subject of a Law Commission research and review project which may yet culminate in proposals to the Government on ways in which it could reform the law relating to trusts.

The biggest lesson to be taken from this situation is to ensure that your trust and its operations are regularly reviewed. As an example of the types of changes currently at work, consider for a moment:

1. The Government has just enacted changes to the caps on gift duty for Inland Revenue Department purposes. This will allow people to make gifts of whatever amount they wish without being subjected to gift duty. This has enormous implications for people currently in the process of carrying out a gifting programme to their trust at the present rate of \$27,000.00 per person per annum. However the implications of this change have yet to be fully appreciated. The Ministry of Social Development has made it clear that for their purposes (administration of the means test for rest home subsidies) nothing has changed and any gifts greater than \$27,000.00 per year per application will not be acceptable.
2. Recent cases have also potentially enlarged the ability of creditors to start pursuing gifts which have been made in circumstances where it is clear there will be a prejudice to creditors. How far this ability stretches remains to be seen as further court cases are heard.
3. It is also not yet clear quite what view the Family Courts will take of large gifts in a matrimonial context where assets that would have been available to be divided on a separation are put beyond reach in a single gift.
4. "Bundle of Rights". Principally within the Family Court jurisdiction, there has been a substantial amount of notice given to an emerging doctrine called the Bundle of Rights. This doctrine provides a mechanism for the Courts to be able to bring into account assets owned by

a trust in the course of a relationship property division. The doctrine is not entirely orthodox and has been criticised by some trust practitioners and there are signs emerging that the doctrine may be losing traction. Suffice it to say the position presently is not clear either way.

5. Insolvent trusts: With the adverse economic times of the last few years continuing, we are starting to see trusts which have become technically insolvent. This raises issues for trustees and those creditors dealing with insolvent trusts as to how to unwind or deal with that situation.
6. Trustee liability on property sales: A recent case resulted in trustees of a trust which was selling a property, ending up with a liability for work done on the property prior to the trust owning the property. This occurred because one of the trustees was a former owner in her personal capacity when the unauthorised work was completed. It reinforces a need for caution when taking on and dealing with assets on behalf of a trust.

The key message we want clients and potential clients to take from this article is simply that a trust structure is not a “set and forget” operation. They should be regularly and carefully administered to ensure they stand you in good stead if you ever need to fall back on them.

Govett Quilliam have skilled and experienced lawyers who can assist with any trust query you may have.



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