



## FAMILY TRUSTS

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### 1. What is a Family Trust?

A family trust is a separate legal entity created when the person setting up the trust (settlor) transfers assets to the trustees. The trustees hold these assets subject to the terms of the trust deed for the benefit of certain defined people (beneficiaries).

Once the assets have been transferred to the trust you no longer own them. They are owned by the trustees. Most family trusts are Discretionary Trusts meaning the beneficiaries right to benefit from the trust is dependent on the discretion of the trustees.

### 2. Why set up a Trust?

There are a number of reasons to set up a trust but the main reason is to protect and preserve your assets. The main reasons are:

- **Creditors** - the trust can provide protection from personal creditors as the trust owns the assets rather than you. A creditor suing you may not therefore be able to get access to the trust assets to satisfy the debt.
- **Rest Home Subsidies** - trusts can in certain cases assist you in excluding assets from asset testing.
- **Matrimonial Property** - a trust can provide some protection for family trusts from claims under the Property Relationships Act 1976. This Act now provides for 50/50 sharing of assets not only between married couples but also for civil union and de facto relationships.

- **Asset Planning** - trusts provide a valuable tool in estate planning, succession of family wealth and asset management.

### **3. Parties to a Trust**

A trust deed is a document signed between the settlor and the trustees. There are a number of parties involved in forming a trust:

1. **Settlor** – these people set up the trust and generally have the final say with hiring/firing of trustees and adding or removing beneficiaries.
2. **Trustees** – the trustees control the day to day operation of the trust and are the legal owners of all property in the trust. Independent trustees are generally professional and are appointed to ensure that the trust operates properly and to show that the trust is not a sham.
3. **Discretionary Beneficiaries** – these are the people that can benefit from a trust. It is set up for their benefit. The trustees are only permitted to give assets/income to beneficiaries.
4. **Final Beneficiaries** – these are the people who are entitled to the assets of the trust when it comes to an end.

In a typical family trust involving a couple and their children, the couple will be the settlors as well as the trustees (together with an independent trustee) and the couple and their children will be the beneficiaries.

### **4. Establishing a Trust**

If you wish to establish a trust then competent legal advice needs to be sought. Every trust is different and your personal circumstances need to be considered. We can assist you in preparing a trust document that will fit your requirements and needs.

### **5. Transferring Assets to a Trust**

In order to be effective an asset needs to be sold to the trust at market value. In a typical situation involving the family home being transferred to the trust, a home is valued and then sold at that value. The trustees then sign a deed of acknowledgement of debt back to the settlors for the purchase price. The debt is then gifted off at a rate of \$27,000.00 per person per annum (gifting programme).

### **6. Wills and Memorandum of Wishes**

It is important when creating a trust to review your wills at the same time. For instance, where you have a family trust your will should forgive any outstanding loans owed by the trust to you. It might also cover who is to have the appointment of new trustees on your death. It is also common to leave the balance of your assets directly to the trust in your will.

A memorandum of wishes is similar to a will for the trust. The memorandum sets out your intentions with regard to the trust once you have died, e.g. wind the trust up and distribute the assets to the children or, maybe, to retain assets, such as a family bach, as an asset for

the beneficiaries for the future. The memorandum is not binding on trustees and they are free to make the most appropriate decision at the time.

## **7. How should a Trust be managed?**

It is important for trusts to be properly managed to be effective.

The trustees are responsible for the management of the trusts assets. Their powers and responsibilities are set out in the trust deed. We consider the following matters need to be addressed in all trusts:

- Apply the terms of the trust deed and the standards set out in the Trustee Act and by the Courts;
- Active management and administration of the trust by trustees, such as an annual review and passing resolutions to all significant decisions;
- A plan for the management of the trust and the investment of the trust assets.

If these requirements are not met then the trust may be open to challenge. We can assist you in making sure you and your trust meet all of your requirements.