CORMISTON LEGAL

# Family Trusts Explained

The term "Family Trust" is generally used to refer to a discretionary trust set up for the benefit of a family to hold assets or conduct a family business. Family trusts are mainly used for asset protection and tax purposes.

**What is a trust?**

A trust is a legal structure where a person or company (trustee) holds assets on trust for the beneficiaries. In a family trust, the beneficiaries are normally related, however the list of beneficiaries under the trust can include companies controlled by the family and other family trusts.

**Key Points**

- The trustee is responsible for the trust and is the legal owner of the assets.
- The trustee also has the day to day control over the administration of the trust.
- The terms of the trust are set out in a Trust Deed between the settlor, being the person who originally set up the trust (normally the solicitor or accountant) and the trustee.

**Appointor**

The appointor is the person (or persons) who has the real control of the trust. The appointor has the power to hire and fire the trustee at their discretion.

**Distribution of Income**

The trustee has the discretion as to which beneficiaries will receive income and capital from the trust. This is distinct from a unit trust where the entitlement to the income and capital of the trust are fixed.

The capacity for the trustee to decide how to distribute the income each year means family trusts can be very tax effective structures.

**Asset Protection**

While the trustee has legal ownership of the assets of the trust, the assets cannot be used to satisfy debts owed by the trustee in his or her personal capacity. Similarly, the assets of the trust are generally protected from creditors of the beneficiaries, unless the trust owes money to the beneficiary.

A beneficiary cannot force a trustee to distribute income or capital to the beneficiary in any year. It is the trustee who has the discretion to determine the distribution of the income of the trust.

When assets are transferred from his or her own name into a trust that person ceases to be the legal owner of the assets. This means if that person is subsequently sued, the assets should be protected, provided that the assets have not been transferred into the trust with the intention of defeating creditors.

Family Trusts can help avoid or reduce the likelihood of challenges to a Will following the death of a family member. Generally, a beneficiary under a Will can only claim against assets which are in the estate of the deceased. As the assets in a family trust do not form part of the estate of the deceased, the assets are generally quarantined from claims against the estate.

**Issues to consider**

It is important for the family to have a succession plan in place so that the control of the trust passes to the right people at the right time. This is because disputes can arise where control of the trust is passed down to the next generation and the assets will normally need to be controlled by and distributed amongst a greater number of people.

It is important that distributions are made in accordance with the Trust Deed and the proper records are kept regarding distributions.

Establishing a family trust involves many factors and it is very important before entering into one that you obtain professional advice from both your accountant and solicitor.

Please contact us if you would like advice in relation to the establishment of a new trust or guidance in relation to an existing trust.



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