PIER LAW
LAWYERS

FAMILY TRUSTS

What is a Family Trust?

- A Family Trust is a legal entity created by a Trust Deed
- A Trust is managed by the Trustees who have a responsibility to deal with and look after the Trust assets for the benefit of the Trust beneficiaries
- A Trust can hold assets and liabilities in the same way that natural people or a company can
- Once assets have been transferred to a Trust they become Trust property and should be managed accordingly

Who is Involved in a Family Trust?

There are three parties:

1. The Settlor(s) – those who provide money, property or other assets to be held on trust for certain purposes

2. The Trustees – those who take legal ownership of the Trust property and manage the day-to-day running of the Trust. The Trustees must manage Trust assets in accordance with the rules set out in the Trust Deed and the Trustee Act 1956.

   As the Trustees will become the legal owners of all Trust property, this will require the Trustees being involved in and knowing about the Trust's financial position. Accordingly the Trustees should be people trusted by the Settlors.

   The Trustees can include the Settlors themselves, although it is recommended that there is an independent Trustee as well e.g. accountant, friend or family member so that the Trust does not appear to be a "sham". The independent Trustee would preferably be local for convenience purposes during Trust transactions as that Trustee will need to sign documentation along with the other Trustees.

   In some cases, a Trustee company formed by Pier Law may be appointed as an independent Trustee. This is at the discretion of Pier Law and dependent on the assets held by the Family Trust.

3. The Beneficiaries – those individuals selected by the Settlors to receive the benefits of the Family Trust.

   Commonly the beneficiaries include the Settlors, their children, grandchildren and others as nominated.

   The beneficiaries may benefit from the Trust regularly or intermittently during the Trust's lifetime by way of a Trust "distribution" (a payment or entitlement transferred from the Trust to the beneficiaries). Alternately the beneficiaries may not benefit from the Trust until the Trust comes to the end of its lifetime and the Trust assets are then distributed amongst the selected beneficiaries.

How can a Family Trust Benefit you?

The advantages and reasons for having a Family Trust have changed considerably over the past few years due to legislative changes and developments.

At Pier Law we put an emphasis on finding out why you might want a Trust, so together we can consider whether you will actually benefit from the Trust. Depending on your situation, the initial expense of forming the Trust may not be insignificant and the Trust will add a layer of complexity, this is why we think it's important to make sure it's right for you before proceeding.

Although not an exhaustive list, you may benefit from a Trust if you fit within these categories:

1. In business as a sole trader or self employed by your own incorporated company
   - you can use the Trust to assist with protecting your personal assets from creditors should the business suffer financially
   - we work in with your accountant to ensure the Trust formation and transfer of assets to the Trust is completed in accordance with best practice

2. In a new relationship and with assets that you have taken into that relationship that you wish to protect
   - A Trust, paired with a Contracting Out Agreement, can help with this protection
   - This allows you to ensure your assets are protected for your own children in the event of the relationship failing
   - Assets in a Trust are less likely to be considered part of the relationship property pool if the relationship does not last

3. Considering estate planning during your lifetime for the advantage of you and your family
   - Vulnerable or less than trustworthy children could have their inheritance left to them in a Family Trust so the Trustees can manage that asset for them and ensure it is used wisely

4. Concerned about protection of an inheritance from your child's partner/spouse
   - To minimise the risk of your child's inheritance being halved with their partner if that relationship dissolves, you can leave their inheritance to them in a Family Trust, rather than to your children personally

5. Setting money aside for a specific purpose (e.g. children's education)

What about the Residential Care Subsidy Benefit?

You may notice that this benefit is missing from the list above.

Over the last few years, the law and best practice has changed considerably in this area. Previously it was not uncommon to transfer the family home to a Trust so that if one party needed rest home care later in life, the home would not be an asset of theirs that WINZ would factor in when assessing the assets. This had meant that it was more likely that person would receive the residential care subsidy from WINZ as their personal assets had been reduced.

WINZ have addressed this, are now more aware of Family Trust's and have changed their processes accordingly. Due to these developments and future uncertainties, we no longer encourage our clients to form Family Trust's solely for the purpose of trying to improve their position with WINZ and the residential care subsidy.

This can be discussed in more detail with a member of our Trust's team.

How do I Transfer Assets to a Family Trust?

Transferring assets to a Trust is comparable to selling the assets to a third party – the exception is that no actual money changes hands; instead a debt is created as between you (the vendor) and the Family Trust (the purchaser).

The debt is reduced by way of gifting, which is a paper transaction. Gift Duty has now been abolished, so large amounts can now be gifted without incurring a penalty however it's not always in your best interests to do this.

The gifting can be done annually over a course of years or all at once, depending on what's best for your personal circumstances and we can guide you on this. If you gift annually, then the amount you gift will vary depending on whether you are a single person or a couple and whether you wish to keep the possibility open of receiving the WINZ residential care subsidy in the future.

How do Family Trust transactions work?

All Family Trust transactions should be formally documented and signed off by all Trustees.

It is therefore important that you consider carefully who you select as Trustees as they will need to sign off all Family Trust documentation. This may include bank documentation regarding loans drawn or guarantees given by the Trust, Agreements for Sale & Purchase of Property or a Business, Trustee Resolutions.

Once I have a Family Trust, What Should I be Aware of?

Although not an exhaustive list, the following are some key things to bear in mind once you have a Trust:

Family Trust Money:

- The money in the Family Trust bank account is not "yours", it is the Trust's
- Open a Family Trust bank account and keep Family Trust money separate from your own money
- When you withdraw that money it is a Distribution from the Trust and should be documented accordingly by a Trustee Resolution
- Tell your Family Trust solicitor and accountant when you use Family Trust money. They can help you manage the account and keep it simple.

Family Trust Expenses:

- If you transfer a property to the Family Trust, all the costs of maintaining and improving that asset are correctly Family Trust expenses. For example; mortgage payments, property rates, house insurance and the cost of improvements
- Keep a record of these expenses. Advise your Family Trust solicitor of these expenses each year so that amount can be gifted to the Trust

Accountancy Issues:

- If your Family Trust simply holds the family home, it is unlikely you will require much accountancy input
- However, depending on the extent of assets and liabilities held by your Trust, you may need regular input from an accountant and may need annual financial statements prepared.

I would like a Family Trust – What should I do?

Telephone our office and arrange to meet with one of our Family Trust lawyers to discuss your needs and the purpose for the Family Trust. Once we know your personal and / or commercial circumstances, we can guide you as to whether a Family Trust will be effective and beneficial for you.

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