

FAMILY TRUST STRUCTURES

Background

1. This bulletin canvasses typical considerations for the establishment of a family trust in the situation where a couple are to jointly be the Settlers of the trust. Common questions to resolve include:
 - 1.1. Who the trustees of the family trust should be;
 - 1.2. Who the beneficiaries of the family trust should be;
 - 1.3. Which assets should be transferred to the family trust;
 - 1.4. How the trust would cope with contingencies that may arise; and
 - 1.5. What the costs of establishing the family trust structure are likely to be.

Who Should the Trustees of the Family Trust Be?

2. It is quite common for the Settlers to be trustees together with an independent trustee. We are strongly of the view that an independent trustee should be appointed to avoid the situation where a husband and wife are the Settlers, the sole trustees, and the primary beneficiaries of the trust. In such cases there is a significant risk that the trust could be construed as a “sham”.
3. Settlers of a trust will usually wish to retain strong influence (if not tight control) over the assets placed in trust. If an independent trustee is appointed, which we strongly recommend, it should be possible to retain a significant degree of control over the independent trustee. In particular:
 - 3.1. In the case where a husband and wife are the trust Settlers, the trust deed should vest the power to appoint and remove trustees in them both jointly. This means that if the Settlers disagree with the independent trustee as to what is in the best interests of the beneficiaries, they can remove and replace the independent trustee.
 - 3.2. You should consider appointing an independent trustee who is sympathetic to your aims. We recommend a professional adviser that has some affinity with your values and an understanding of the needs and circumstances of the beneficiaries.
 - 3.3. The trust deed should require all trustees’ decisions to be unanimous. This prevents the situation arising where the independent trustee holds the balance of power where the other two trustees cannot agree on what is in the best interests of the beneficiaries.

Who Should the Beneficiaries of the Family Trust Be?

4. It is quite normal for a husband and wife that may settle a trust to also be the primary beneficiaries of the trust. During the lifetime of the Settlers their needs can be given paramount importance for consideration by the trustees in their deliberations. Other family members are normally listed as discretionary beneficiaries together with general provisions for charitable distributions and the like.
5. The trustees would have an unfettered discretion as to who receives a distribution from the trust. To assist the trustees in their decision making (but without fettering the trustees' discretion) we recommend that the Settlers document a 'memorandum of wishes' that will may be referred to and provide helpful guidance.
6. Note that the trust deed will need to specify the final beneficiaries at the vesting date not more than 80 years following original settlement.

What Assets Should be Transferred to the Family Trust?

7. Ideally, all growth assets should be transferred to the family trust. Even where it is not expected that the Settlers will be able to forgive the debt owed to them by the trust (to finance the purchase of the assets) during their lifetime, any increase in the value of the assets will accrue to the trust. The debt owed by the trust will not increase in value as the debt will normally be expressed as interest-free and repayable on demand. Alternatively, the debt owed may carry a market rate of interest, which will only become payable if demanded within a specified period of time.
8. Practically, there is a cost involved in transferring property into trust (particularly real estate). Accordingly, it is necessary to weigh the benefits of transferring property into trust against the costs.

How Would the Trust Cope with any Contingencies that may Arise?

9. In the case where one Settlor survives the other the trust deed will provide that the power to appoint and remove trustees is vested in the surviving spouse. This means that the surviving spouse could unilaterally remove the existing independent trustee or appoint new trustees.
10. In the case of husband and wife Settlers, common options upon the death of both individuals is for:
 - 10.1. The trust deed to provide that the power to appoint and remove trustees is vested in the executor(s) of the estate of the surviving spouse. This means that the executor(s) of the surviving spouse could remove the existing independent trustee or appoint new trustees.

- 10.2. The trust deed may provide that the power to add and subtract beneficiaries can only be exercised while you and/or your wife are trustees of the trust. This means that the class of beneficiaries would “crystallise” upon the death of both you Settlers.
- 10.3. The trust deed would provide that the trust would be wound up and that the trust assets would be distributed equally or resettled on new trusts for the final beneficiaries.

What Costs are Involved in Setting up the Trust Structure?

11. The cost of setting up a trust structure depends on what assets are transferred into trust, which will involve solicitor conveyancing fees.
12. Wills should be amended so that any debt owed by the trust is forgiven upon your death.
13. Ongoing administrative costs will include:
 - 13.1. Administration of the trust by the independent trustee (attending trustee meetings; preparing trustee resolutions; annual gifting and advising on issues that may arise);
 - 13.2. Filing tax returns for the family trust if necessary.

Disclaimer:

The above outline is provided for general guidance only. Professional advice should be sought relevant for each individual circumstance.