

11 *What is a Memorandum of Wishes or Guidance?*

This is a separate document signed by the Settlor and setting out how the Settlor would like the Trustees to administer the Trust's assets after the Settlor has died. While not legally binding, it is intended to assist the Trustees in determining the needs of the different Beneficiaries and the priority they should be given, how the assets are to be dealt with and when those assets should be distributed. For a Trustee this is arguably the most important document and needs to be regularly reviewed by the Settlor.

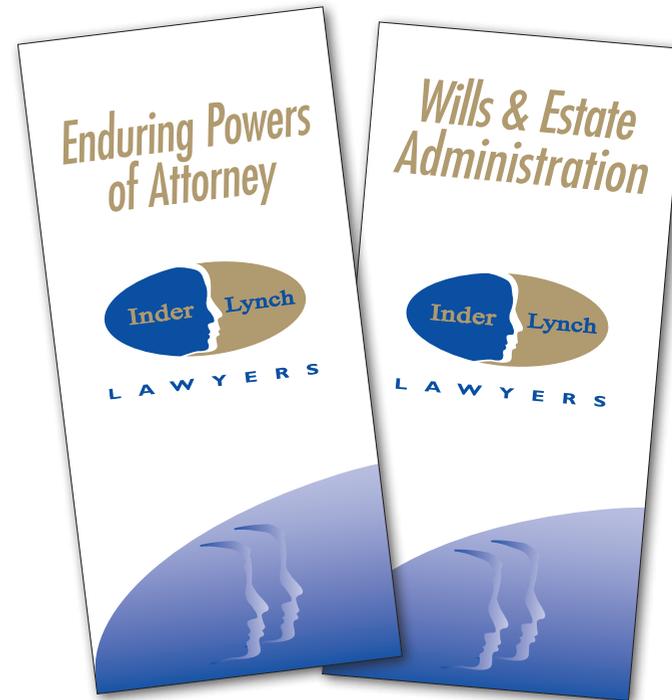
12 *Do I Need Specialist Legal Advice?*

While there are other ways to own assets, the Trust in general terms has less disadvantages than other forms of ownership. Over the life span of a Trust there can be many benefits accruing to the Beneficiaries. However Trusts are subject to many legal requirements. The danger of accepting advice regarding Trusts from those who do not have specialist legal knowledge in the area is that the Trust and its continuing operation may not achieve the results originally intended. You need to ensure that the Trust meets your needs and purposes and that you are aware of your and your Trustees rights and powers.

WHY HAVE A WILL?

What is involved in dealing with my assets and liabilities when I have died?

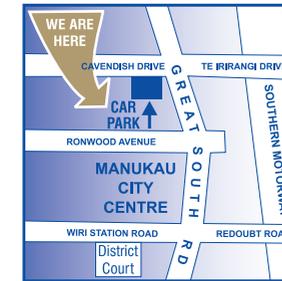
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Family Trusts



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Important facts about Family Trusts

1 What is a Trust?

Trusts are usually created by a document called a **Trust Deed**. The person who wishes to create the Trust (called a **Settlor**) transfers property to people called **Trustees** who hold and use that property for the purposes that the Settlor specifies in the Trust Deed. The most predominant of those purposes is to use and manage the Trust property for the benefit of people called **Beneficiaries**. In normal circumstances the Beneficiaries must be persons for whom the Settlor can have “natural love and affection”. That would normally include family members and certain charities. There are many types of Trust, however the most common is the discretionary Family Trust most often simply referred to as a Family Trust.

2 Why have a Family Trust?

By having property held in a Trust that property can be protected from certain claims or events. This protection may not be available if the property was owned in a person's own name.

Particular circumstances where a Trust may be of significant advantage are:

- **Creditor Protection** – A person may be able to carry out a higher risk business if a Trust is used to own assets which may then be protected from creditors.
- **Relationship Property** – Whether it be a marriage or a de facto relationship, a Trust may give protection to assets which, but for the Trust, would otherwise be treated as relationship property and subject to the equal sharing provisions of the Property (Relationships) Act 1976. In second relationships, a Trust may give protection for children of the first relationship. It is desirable that the Trust is created prior to the commencement of the relationship, however, in certain circumstances a Trust may still be effective if created during the course of the relationship.

- **Wills Challenged After Death** – A Will can be challenged after death and a person's estate may not go where it is intended. A Trust's assets are safe from the legislation that allows Wills to be attacked.
- **Income Tax Splitting** – Owning assets in a Trust may enable any income from those assets to be spread among the Beneficiaries to take advantage of lower tax rates.
- **Government Subsidies and Benefits** – Owning assets in a Trust may enable the obtaining of a benefit or subsidy otherwise not available. However the Government and its agencies do have a very wide discretion to disregard any steps taken by a person to deprive themselves of income or assets.

3 Who's Who?

- **Settlor** – The person who initially transfers property to the Trust and determines the way that the property is to be dealt with by setting out the rules in the Trust Deed.
- **Appointor or Protector** – The person named in the Trust Deed who has the power to appoint and remove Trustees. This is usually the Settlor or a person appointed by the Settlor.
- **Trustees** – The legal owners of the assets in the Trust and the people who have the control over those assets. The Trustees must however use the assets for the purposes the Settlor specifies in the Trust Deed. There will usually be two or more Trustees on all occasions. Whilst the Settlor is often a Trustee it is recommended that there be one independent Trustee (that is someone who is not named as a beneficiary, such as a family friend, Lawyer or Accountant).
- **Beneficiaries** – These are the people for whose benefit the Trust has been created. With a discretionary Family Trust there are usually two groups of Beneficiaries:

1. **Discretionary Beneficiaries** – These Beneficiaries have the right to be considered for payments of income or capital from the Trust property but they have no automatic right to receive such payments. Usually this group includes the Settlor, spouse, children and grandchildren. The Settlor's parents, siblings, spouses of children and grandchildren and charities may on occasion also be Discretionary Beneficiaries.
2. **Final Beneficiaries** – These Beneficiaries have the right to the assets of the Trust on the day that the Trust ends or is wound up. They are normally the Settlor's children and/or grandchildren.

4 Does a Trust Need a Name?

There is no requirement for the Trust to have its own name. There is no registration procedures for Family Trust names. Ownership of assets of the Family Trust is recorded in the names of the Trustees. The name of the Trust is primarily used by professionals dealing with the Trust, such as Lawyers and Accountants.

5 What Can a Trust Do?

It can own property, buy and sell property, operate bank accounts, raise mortgages, invest in a wide range of alternative securities and generally operate the same way as a person can.

6 How Does a Trust Get Assets?

Either by purchasing them from third parties or from the Settlor or other family members. The Trust raises funds for its purchases by loans from a bank or by signing a document acknowledging that it owes the Settlor an amount equal to the value of the asset purchased or a combination of both.

7 What is Gifting?

When the Settlor or other family member has transferred an asset to the Trust the resulting debt owed by the Trust

to the Settlor or other family member can be reduced in a number of ways, the most common of which is for the Settlor to cancel or forgive the debt (gifting) at a maximum of \$27,000 per year without incurring tax. Of course, the Trust can also pay back the debt out of Trust income or capital.

8 Can a Trust be Changed?

Normally the Trust Deed contains provisions enabling the powers and administrative clauses of the Deed to be varied. The power to do this is usually left with the Settlor. Some Trust Deeds also allow for the Settlor to add or remove people from the group of Discretionary Beneficiaries, although this right usually ceases on the Settlor's death. It is important that the terms of the Trust can be altered to be able to keep pace with changing legislation.

9 When Does a Trust Come to an End?

While legislation requires that a Trust must come to an end after 80 years or after the death of the last Beneficiary alive at the Trust's commencement plus 21 years, the Trust Deed usually allows for the Trust to be wound up upon the death of the Settlor or even earlier with the Settlor's consent.

10 If I Form a Trust, Does my Will Need to be Updated?

In almost all cases it should. While your most important assets may have been transferred to the Trust and therefore do not need to be included in your Will, there are administrative matters to be taken care of. Any debt owing to you by the trustees can be forgiven in the Will. Any remaining assets can be left to the Trustees and you can nominate who will take over the power to appoint the Trustees of the Trust when you have died. It is essential to take care of these issues in your Will to ensure that your Trust operates in the way that you intended.