



# Trusts

What do I need to know?



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## What is a Trust?

The concept of a Trust came into being through English Law some centuries ago and remains a common way of managing and protecting assets. Trusts are a mechanism to divest ownership of assets while retaining the benefit and use of those assets.

### Why set up a Trust?

Traditionally, the most popular reasons for establishing a Trust have been:-

1. Asset protection from creditors.
2. Residential Care Home subsidies.
3. Relationship Property matters.
4. Succession planning.
5. Taxation planning.

### What are the main elements of a Trust?

The first step to establishing a Trust is the preparation of a Trust Deed. Getting the Trust Deed right is essential as this provides the set of rules to be followed by the Trustees.

There are various roles within a Trust: -

1. The Settlers. This is the person/s who settles (or transfers) property into the Trust. Any property can be settled onto a Trust, including shares, cash, and real estate.
2. The Trustees. Trustees are responsible for holding and managing the Trust's property. More on the role of Trustees below.
3. The Appointors. Appointors can unanimously agree to add and remove beneficiaries and add and remove Trustees. Not every Trust Deed refers to "Appointors", although there will always be an individual/s with these powers.
4. The Beneficiaries. These are the individuals or organisations who stand to benefit from the assets of a Trust. Beneficiaries can be discretionary (which means they may benefit but are not entitled to) or final (which means they will benefit from any assets the Trust owns once the Trust ends).
5. Under the Trusts Act 2019, Trusts can continue for a maximum of 125 years, although generally the Trustees will have the power to end the Trust earlier if they wish.

## Discretionary Trusts

Most Trusts are discretionary, which means that beneficiaries are not automatically entitled to benefit from the assets of the Trust. In general, the Trustees will have the final decision as to who is to benefit from the assets of the Trust.

There is also no requirement for beneficiaries to receive the same amount or benefit as each other.



## Trustees

Trustees can be individuals or companies, and it is common to have a professional Trustee company acting in this role. We would recommend, and often Trust Deeds will require, that there is an independent Trustee as this helps avoid the suggestion that the Trust is a “sham”.

Generally speaking, anyone can be a Trustee. There are a few exceptions, however, including children, undischarged bankrupts, or someone who lacks the capacity to perform the role. As the role of Trustee can be an onerous one, it is important that Trustees are aware of their obligations and aware of the financial position of the Trust. It is worth noting that, should you wish to appoint a friend as a Trustee, they will have access to the Trust’s financial information.

The Trustees must act unanimously and in accordance with both the terms of the Trust Deed, and the Trusts Act 2019. Trustees have a broad range of powers and generally have all powers in relation to the Trust fund which you would have had if you continued to own the property personally.

Trustees should meet annually (at a minimum) to discuss the position of the Trust, any recent or upcoming transactions, and whether any updates or changes are required.

The terms of the Trust Deed will provide for how Trustees may be removed or appointed. The Trusts Act 2019 also includes provision for how a Trustee may be removed.

## Getting assets in and out of a Trust

Generally, the Trustees decide which payments from income or capital are to be made from the Trust and which beneficiaries shall receive them.

Assets can be transferred into a Trust at any time. The Settlor will usually transfer the assets into the Trust, or the Trustees may purchase the assets from a third party.

Before gift duty was repealed in New Zealand in 2011, it was common for Settlers to sell the assets to the Trustees. If there were no funds in Trust to pay for the asset, the Trustees signed a document acknowledging that they owed the Settlor the purchase price.

The Settlor then usually forgave the debt gradually in instalments not exceeding \$27,000 per year. That sum was the maximum amount that could be gifted without incurring gift duty. The debt was an asset owned by the Settlor.

## Gifting

The repeal of gift duty in October 2011 means that assets can be transferred into a Trust without incurring gift duty. This means that the full value of the asset can be “gifted” from the Settlor to the Trust, without the need for annual gifts of \$27,000.

The impact of gifting in relation to Government asset testing for residential care subsidies is discussed more below and in our “[Estate Planning](#)” booklet on our website.



## The Trusts Act 2019

The Trusts Act 2019 ("the Act") came into effect from 31 January 2021 and contains a number of changes as to how Trusts are to be governed and administered in New Zealand.

The Act aims to increase both the accountability of Trustees, and the transparency for beneficiaries.

One of the main changes which affects every Trust is that Trustees are required to disclose certain basic information to all beneficiaries of the Trust. An appropriate procedure must be in place to ensure that the Trustees' disclosure requirements are met. This will involve identifying who the beneficiaries of the Trust are, and exactly what information will need to be provided to them.

## Trust Tax Rate

Another factor to consider is the impact of the Trust's tax rate. Trusts are taxed at 33% for earnings of \$10,000 or less per financial year. Trusts earning over that amount will pay tax of 39%.

## Death of a Trustee

A Will is a legal document that specifies how you want your assets to be distributed after your death.

There is a common misconception that an individual can record through their Will how Trust assets are to be distributed. Trust assets are not owned by an individual and do not form part of an individual's estate. Therefore, your Will is not relevant when it comes to Trust owned assets.

An alternative to a Will is what is known as Memorandum of Wishes. Although a Memorandum of Wishes is not binding like a Will is, it is a document addressed to the Trustees which clearly sets out how you would like the Trust to be operated, and assets distributed, after your death.

## Trustee incapacity

Similarly to above, if a Trustee is mentally incapacitated (in other words, they no longer have the ability to make decisions on behalf of the Trust), any Enduring Power of Attorney that individual may have signed is not relevant when it comes to Trust owned assets.

The majority of Trusts provide for unanimous decision making by Trustees. This means that all current Trustees of the Trust must be involved in all decisions made. If one of the Trustees has lost the capacity to understand matters, then the "other Trustees" cannot simply continue without the incapacitated Trustee.

Section 104 of the Act applies, which briefly provides for the person with the power of appointment of Trustees to remove a Trustee if "(a) a trustee loses the capacity to perform the functions of a trustee".

Best practice would be to make provision within the Trust Deed itself for a process to remove an incapacitated Trustee. From a practical perspective, these provisions are also useful to be able to provide to organisations such as a Bank, Share Registry, WINZ and Government departments.



## Are Trusts still worthwhile?

Over the years, changes have occurred in various areas of law which, in some circumstances, may affect the usefulness of a Trust. These include:-

### 1. Ongoing compliance costs

The impact of legislation such as the Trusts Act 2019 and the Anti-Money Laundering & Countering Financing of Terrorism Act 2009 is that the costs of ensuring that a Trust remains compliant has increased.

### 2. Government asset testing when it comes to the eligibility for subsidised long-term care for the elderly

Trusts have often been formed with the intention of ensuring that individuals or couples are eligible for subsidised rest home care. Rest home care subsidies consider an individual or couples assets and income, and therefore by transferring such assets to a Trust, the idea is to avoid those assets being taken into account by the Government. Policy considerations have changed in the last decade or so with the Government taking a stricter approach. Any action to deprive yourself of assets is likely to result in a subsidy application failing. The Government has also indicated that if an applicant has other means of funding their rest-home care (for example if they are a beneficiary of a Trust which owns assets) then these resources should be used before seeking financial assistance from the Government.

### 3. Relationship Property

There are several provisions in law that allow property in a Trust to be clawed back in certain circumstances. A Court may set aside transfers of assets that were made with the intention of defeating the rights of spouses/partners under the Property (Relationships) Act 1976. If a couple's relationship property has been transferred into a Trust and that transfer has the effect of defeating the rights of one of the partners under the Property (Relationships) Act, the Court may order the other partner to compensate the partner whose rights are defeated.

In other areas, however, it is still just as useful to have assets held in a Trust. These include:-

### 1. Business purposes (protecting assets from creditors)

Trusts are renowned for their ability to safeguard assets from various risks, including potential claims from creditors, litigants or family disputes. By placing assets in a Trust, individuals can create a legal separation between themselves and the assets they seek to protect. While a Trust does not guarantee protection, if properly administered they can and do provide a robust shield for assets.

### 2. Succession planning / Protection of vulnerable family members

Having a Trust can be effective in managing inter-generational wealth or the preservation of specific assets for the benefit of certain individuals. Trusts can also help protect vulnerable individuals from being taken advantage of financially. Whether it's an elderly person, someone with a disability or an individual who isn't capable of managing their own wealth, a Trust can help by managing assets in a manner that best caters to the needs of the beneficiaries.

Whether or not a Trust is worthwhile is therefore likely to depend on your circumstances. Please reach out to us for personalised advice.



## Contact Us

Please do not hesitate to contact us on 03 379 3880 to discuss how our commercial and property team may be able to help.

### **Disclaimer**

The information in this booklet is current as at the date of publication and is only intended to provide general comments about the law. Young Hunter accepts no responsibility for reliance by any person or organisation on the content of this booklet. For further information or specific advice please contact our commercial and property team who will be happy to assist.