FAMILY TRUSTS

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What is a Family Trust?

A Family Trust is a legal way to protect your assets and hold them for the future. In most cases it means major assets, like your home, are put into the trust and you no longer own them. This doesn't mean you can't use the assets or have a say in what happens. In fact, a trust can help you ensure your wishes are carried out, even after you are gone.

The trust can safeguard all, or a portion of, your assets because you no longer own them yourself – the trust does.

You can put any type of asset into the trust, including your home. This doesn't mean you'll have to move or that you'll lose your home in the future.

The idea of a family trust is to protect assets for you and your family, now and in the future.

Why do I need one?

Having a family trust can give you some confidence that there will be assets left to those who are important to you. Some of the benefits of having a trust include:

- providing for your family and protecting assets for the future;
- reducing the chance of relationship property claims by future partners;
- protecting assets against unexpected business debts;
- preventing unwelcome claims against your estate;
- maintaining the confidentiality about your affairs;
- preparing for the time you might need residential care;
- structuring your affairs effectively for tax;
- preparing for possible capital gains or death taxes;
- protecting against professional liability claims.

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How can a Trust protect assets?

By putting your assets into a trust you no longer own them. This can help protect them from any debts or liabilities you may have in the future. For instance, if you are in business, having your major assets in a trust could protect them if you get into debt or are bankrupted.

What about relationship property?

A trust can't be used to prevent the sharing of relationship property with a current partner unless you enter into a contracting out agreement at the same time your trust is established. However, if your assets are already owned by a trust before you meet a new partner you may not have to share those assets with them if you split up. Similarly, having assets owned by a trust can help protect your children's and grandchildren's inheritances from future relationship breakdowns they may have.

How does it work?

When you set up a trust, how it will work is detailed in a trust deed. You appoint trustees, who will ensure the trust operates as set out in the trust deed. You can appoint yourself as a trustee which will ensure you will have a say in guiding the trust. You also decide who the beneficiaries of the trust will be - this could include yourself, your family or a charity.

When you set up a family trust, you 'sell' your assets to the trust at their full market value. The trust then owes you that amount as a debt. Now that gift duty has been abolished, you may make a gift of that amount, in full if you wish, to forgive the debt. However, you should know that forgiving the entire debt in a single gift may have repercussions if you ever need to ask the Government for a Residential Care Subsidy. Most people therefore choose to slowly gift away the debt at a rate of $27,000 each year. We can advise you on this.

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Setting up a family trust

There are three parties in a trust: A person who sets up a trust or puts assets into it is called a settlor. The people the trust will benefit are the beneficiaries and the people who will run the trust and look after the assets are called the trustees.

The basic principle of a trust is that a settlor hands over assets to a trustee to look after for a third party. There must be a trust deed and then assets can be added to the trust. But you cannot just give assets to a trust. The trust must buy them at market value and then you gift back the debt owed to you by the trust.

The Trust Deed

The trust deed sets out the rules for the trust - and more specifically - what the trustees can and cannot do on behalf of the trust. Basically, the trust will be able to enter into a whole manner of transactions that you or I can do, such as: buying or selling property; borrowing money or guaranteeing a loan for someone else; entering into leases; and employing people to work for the trust.

The Trustees

The trustees are usually yourself (and your partner) and an independent trustee. I strongly recommend that you do appoint an independent trustee so as to provide the trust with some transparency in the event that it was ever challenged as being a sham.
I have my own trustee company that can act as an Independent Trustee to your trust, the main benefit of which is confidentiality if you do not want others to know your trust affairs.

The main duties of a trustee are to:

- make decisions in keeping with the trust deed;
- manage the trust assets properly;
- act prudently when making trust decisions;
- keep proper records of the trusts transactions;
- keep beneficiaries informed about the trust and their rights under the trust deed.

The trust deed is drafted in such a way that the “interested trustees” (i.e. the non-independent trustees) will have the power to hire and fire trustees at any time. So if you are ever unhappy with your independent trustee or simply want to change the trustee you can do so easily. This helps keep you in control of the trust and any assets it may own.

The Beneficiaries

You can make anyone a beneficiary. But including anyone other than you, your near family, close friends or charities can cause tax issues.

Ideally the trust should be set up to benefit people or charities that you have natural love and affection for. This expression means near family and close friends, and cannot mean a company, even if your family are shareholders.

A discretionary beneficiary is someone the trust can make a payment to during the life of the trust. Including someone doesn’t mean they have a right to get any benefit, but they do have the right to be considered and the right to ask about the trust and its finances.

You can specify how long the trust is to last. A trust can’t continue forever, but it can carry on after your death and last up to 80 years from the date the trust started. If there are any assets owned by the trust when it is wound up (the Date of Distribution) they are to be transferred to the final beneficiaries.

The most common beneficiaries are yourself, your children (current or future), and your grandchildren (current or future).

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Common Questions

Can we still sell our home and buy another one?

Yes. If the home no longer meets your needs, the trust can sell it and buy another one to suit you. But you need to arrange this with the trustees beforehand and they will need to keep a record of the decision and sign all legal documents involved in the transaction.

Can we still borrow money against the house?

Yes. The trust may be able to borrow the money using the assets as security. Or you may be able to borrow the money yourself with a guarantee from the trustees, which is backed by the trust's assets. It depends on the situation and your lender.

How can I protect my inheritance?

Any inheritance is separate property, but if it becomes intermingled with other assets and becomes relationship property it may be subject to the 50/50 division rules of the Property (Relationships) Act 1976. One way that you can protect your inheritance is to have it paid straight away into a trust.

How can a trust protect my children's or grandchildren's inheritance?

Beneficiaries can receive funds or assets from the trust earlier than the date of distribution at the discretion of the trustees. By "loaning" the money from the trust to a beneficiary that money cannot be subject to a relationship property claim in the event of a relationship breakdown.

How do I start the process?

Contact me for a **free** 20 minute no-obligation consultation to discuss your requirements, and to decide whether or not a family trust is the right option for you and your family.