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WHAT IS A TRUST?

General

A trust is a legal mechanism by which the ownership of assets is held in suspension for periods of time for the benefit of certain people called "beneficiaries" and then passed to the beneficiaries at certain times, as circumstances require.

A trust can be created by contributing any assets specifying the potential beneficiaries and setting out the terms of the trust. A trust can be created by a lifetime document or by a will. Trusts are very useful in managing future uncertain needs. The person creating the trust by contributing the assets is called the "settlor". The assets are passed to "trustees" who is one or more nominated persons who administer the terms of the trust. The trustees do not own the trust assets and have strict duties to act for the exclusive benefit of the beneficiaries.

The simplest form of trust is where beneficiaries are absolutely entitled to property and the ownership is held by a trustee for administrative and practical reasons. In this case the beneficiaries under the trust have much the same rights as if they are owners. This would commonly happen where one or more of the beneficiaries are under full legal age (18 years)

A discretionary trust is a useful means of making provision for beneficiaries where the settlor is unsure which of them will turn out to have the greatest needs. They are flexible and leave key decisions until the future. If it turns out that one beneficiary has special needs, the trustees can decide to distribute the money unevenly between the potential beneficiaries. This will frequently be used in family situations to cater for young children and to allow for the uncertainties of the future. Under this type of trust the beneficiaries do not have definite rights; they may never receive anything.

Discretionary trusts over capital enable the trustees to decide how, when and to which beneficiaries, the capital of the trust must be appointed (given). The trustees must act in good faith in making their decision, but they have no obligation to give any particular beneficiary, any particular share at any particular time.

Another type of trust is where the beneficiaries have definite rights but the timing of the passing of the assets is left to the trustees. This type of trust is useful where a settlor wishes to make income provision for one beneficiary while preserving capital. For example, a settlor may wish to provide for his wife for life while retaining the capital for his children. He may give the trustees power of discretion to allow them to pass or appoint the capital to his spouse should particular needs arise. The trust will often say what can be done with income or capital. It is a matter for the settlor creating the trust to decide what powers the trustee shall have. They can be cast widely or narrowly.

A person may wish to pass a fixed benefit to a young person when they reach a certain age. The trustees will normally have the discretion as to how to apply the income in the meantime. It might, for example, be available for the education, welfare and maintenance of the children while they are under age.

There are rules in relation to the duration of trusts. It is not permissible to tie up property and assets in a trust for ever. The longest period a trust can continue in being is 80 years. 80 years is the latest time by which somebody must become absolute owner of the assets. In most cases someone will become absolute owner of the assets and the trust will end long before that.

The maximum period for which income can be rolled up within a trust without being distributed is 21 years. It is permissible to accumulate income for minors for an additional period up to the time they are 18 years of age in addition to the general period. Income received during the accumulation period becomes part of the capital and so is generally unavailable as income in future years. It is possible to give discretion to trustees to enable them treat income accumulated as if it was income on the current year.

The person creating the trust appoints the initial trustees. The trustee is the person who is responsible for taking care of the trust property and putting the terms of the trust into effect. A trust takes effect immediately in the case of a lifetime trust. In the case of a trust in a will, the trust takes effect on the death of the person who has made the will. The trustees need not necessarily take up their roles. There are mechanisms for appointment of substitute trustees and appointment of additional trustees.

Trustees have strict duties to put the terms of the trust into effect. Generally, they will not be entitled to remuneration although it can be specifically allowed by the terms of the trust e.g. for professional trustees. Trustees must not do anything which causes a conflict of interest. They must not benefit directly or indirectly from the trust. They have duties to act with due care and skill. The misappropriation of trust assets is a criminal offence and it also entitles the beneficiaries to pursue their personal assets for recovery. Beneficiaries can sue for breach of trust if this occurs.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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