Setting up a Trust is an accessible, easy to read pamphlet. It provides a summary of information about forming a trust, how trusts work, and their advantages and disadvantages.

Setting up a Trust also provides some key questions to ask yourself if you’re thinking of setting up a trust.

SETTING UP A TRUST

Information about forming a trust, how trusts work, and their advantages and disadvantages
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DEFINITIONS AND TERMS

**Beneficiary:** A person for whose benefit property is held under the terms of a trust document.

**Estate:** Property owned by a person at the time of their death.

**Executor (male) / Executrix (female):** A person given the power by a will to manage an estate.

**Legal capacity:** The ability to fully understand the nature and effect of a decision.

**Property:** Anything that can be owned.

**Settlement:** Property handed over (settled) for a particular purpose or purposes.

**Settlor:** A person who creates a trust.

**Will-maker:** A person who makes a will.

**Trust document:** The document which records the property held by one person on behalf of another, or others, or for a particular purpose.

**Trustee:** The person in a trust document holding the trust property. The person for whom it is held is called the beneficiary.

**Trust property:** The property held by a trustee.

**Trustee corporation:** The Public Trustee or Māori Trustee or any corporation authorised by the Trustee Companies Act 1967 to administer the estates of deceased persons and other trust estates.
What is a trust?
A trust is a way of putting aside property, while you are alive, to benefit one or more people, to benefit a charity, or for a purpose you have nominated. A trust can also be set up for your own benefit, such as to provide medical care and living expenses.

There are four essential elements to a trust:

1. There must be a trustee. The trustee legally owns the property but holds it on behalf of the beneficiaries.
2. There must be property (i.e. something that can be owned, such as land, stocks, shares or specified cash funds). Something like a social welfare pension could not be the subject of a trust.
3. There must be a purpose, or a beneficiary or beneficiaries who will benefit under the trust or who will ultimately become the owner of the property.
4. The trustee must deal with the property for the benefit of the beneficiaries, or for the purpose of the trust.

How do I set up a trust?
Trusts can be created in two ways:
• During your lifetime;
• In your will.

During your lifetime
A trust which comes into effect during someone’s lifetime is generally set up through a written document (the trust document). It contains:
• The names of the trustees and, if necessary, a provision for their replacement;
• The names of beneficiaries (for example, children or grandchildren);
• Details of how and when the trust property can be distributed;
• A description of the trust property (usually an initial amount or assets, to which others are often added later);
• The rights, responsibilities and powers of the trustees, together with any provision for payment or reimbursement of expenses.

In your will
Someone who makes a will (a will-maker) can create a trust in their will. The trust will not actually come into existence until the will-maker dies and the will takes effect. The will also names who the trustee will be — quite often the trustee will also be the executor of the will. The will must also state the length of time and the purpose for which the trust will exist, for example, money to be held in trust for a beneficiary until that person turns 20.

In a will, trust property may take the form of:
• A gift, for example, a particular item of property described in the will;
• The remainder of the estate after all other property directions have been satisfied and all debts paid.

A trust created in a will does not take effect until the will-maker dies. It can be revoked or altered at any time during the lifetime of the person making the will.

Need for a lawyer to set up a trust
Because setting up a trust can be a very complex matter, it should be dealt with by a specialist such as a lawyer or a trustee corporation. You should always seek appropriate advice before setting up a trust.
Cost
The cost will depend on how complex the trust is. You should always get an estimate or a quote before deciding. There will also be associated costs such as asset transfer costs, yearly administration costs and taxation costs. Trusts, like any other entity, have to file tax returns, so trusts often pay an accountant to keep the trust's accounts.

3 | TYPES OF TRUSTS

Are there different kinds of trusts?
Trusts can generally be divided into private and charitable trusts.

A private trust is created for the benefit of one or more individuals, for example, to make provision for family members.

A charitable trust is created for charitable purposes, such as to provide for the relief of poverty, or for religious or educational purposes, such as to provide scholarships for young musicians. To qualify for tax benefits, a charitable trust must be registered with the Charities Commission.

4 | HOW A TRUST WORKS

Why should I set up a trust?
You might want to set up a trust to:

• organise your personal financial affairs;
• provide for your family members, for example:
- to provide for your dependants
- to hold and manage property for those who cannot do so themselves
- to protect family property from careless family members or from relationship property claims, and enable property to be passed on to future generations

• protect yourself from business risk;
• protect your beneficiary, for example:
  - to protect a child from a greedy spouse, or from worry that there might be one in the future
  - to protect your beneficiary from future estate duty or succession duty
• protect yourself against future unforeseen events, such as needing residential care.

**Who can establish a trust?**

Any person who has legal capacity, who is or may become the owner of assets — for example, someone who can count on receiving assets under a will — and has the power to dispose of that property, can create a trust.

**Who can be a beneficiary?**

Any one or more people, a corporation, a club or an organisation may be a beneficiary. There are a wide variety of ways in which beneficiaries can benefit from the trust property. For example:

• the right to live in or use property;
• the right to income derived from property;
• advances of capital or property where the trustee has the right to determine when all or part of the property passes to a beneficiary.
Who can be a trustee?
Any person with legal capacity may be a trustee. A corporation can also be named as trustee (for example, the Public Trust, NZI and Guardian Trust).

How is a trustee appointed?
A trustee is appointed:
- by the trust document;
- under the Trustee Act 1956;
- by a court appointment.

Trustees’ powers
The trustee is the legal owner of the property and is obliged to manage and distribute it according to the trust deed, the Trustee Act 1956, and the law.
The main source of a trustee’s powers is the trust document itself. The Trustee Act 1956 can also give powers to the trustee, unless expressly excluded.
Some powers that may be given to trustees are, for example, the powers to:
- carry on a business;
- sell or lease land or other property;
- take out a mortgage;
- insure the property;
- pay income or capital to beneficiaries.
If trustees are not sure if they have the power to carry out a specific activity, they can apply to the High Court for directions.

Duties
Trustees must:
- know the terms of the trust;
- obey those terms;
• act impartially towards all beneficiaries;
• invest the trust funds (this can be done in a wide range of property and securities, but must be done prudently);
• not freely dispose of the trust assets;
• not delegate duties to someone else unless some specialist knowledge is needed, such as the specialist knowledge of a solicitor, an engineer or a real estate agent;
• act jointly and unanimously with other named trustees (unless the trust deed provides for majority decisions);
• act without payment unless this is provided for in the trust document, or the Court sanctions it, or all beneficiaries are of legal capacity and agree to payment;
• keep and give property accounts and keep beneficiaries fully informed.

5 \hspace{1cm} \textbf{WHEN THINGS GO WRONG}

\textbf{What sorts of things can go wrong with a trust?}
Sometimes trustees might not carry out their duties as they should. They might, for example:
• fail to keep proper accounts;
• fail to insure a property;
• sell a property specifically excluded from sale in the trust document;
• pay trust money to the wrong person;
• act in a dishonest manner (for example, embezzle trust funds).
Solutions

Trustees are liable for any breach of trust they have committed. Beneficiaries can:

• apply to the Court to stop a breach of trust which they think has taken or may take place;
• have the trustee removed;
• sue the trustee;
• lay criminal charges against the trustee (Section 229(1) of the Crimes Amendment Act 2003 provides that someone “who, as a trustee of any trust, dishonestly and contrary to the terms of that trust, converts anything to any use not authorised by the trust”, has committed an offence);
• receive any profit which a trustee has made by dealing with trust property in contravention of the terms of the trust.

Removal of a trustee

A trustee can be removed in these ways:

• The trust document may contain a power of removal;
• By way of the statutory powers of removal, given in the Trustee Act 1956;
• By applying to the High Court. The High Court has the power to remove a trustee when it considers that the removal is in the best interests of the trust property or beneficiaries.
What things should I keep in mind before setting up a trust?

1. Decide what you want to achieve in the long term. A trust must be flexible enough to adapt to changing circumstances. You should be clear about the purpose and your priorities. Do not leave yourself without sufficient assets.

2. Think about who you would like to act as trustees — it is sensible to have at least two. What powers do you want them to have? Do you want them to be paid? Are you confident that the trustees have the skills and experience necessary for their prescribed tasks? Professional people like lawyers and trustee companies can act as trustees.

3. Who do you want to receive the benefits of a trust, and when?

4. What property will you put in a trust? Note that you can add additional property to the trust after it has been set up.

5. How much control do you want yourself? It is very important to think about this. You may experience a feeling of loss of control over your assets, so you need to recognise these feelings and talk about your concerns with your lawyer, and plan carefully.

Finding a lawyer

• Trusts can be quite complex so you should consult an experienced trust lawyer. If you are not sure who to use, ask friends, acquaintances or relatives who have already set up a trust, or contact the New Zealand Law Society, www.lawsociety.org.nz;

• Ask about likely costs;

• Prepare a list of the property and assets you would like included in the trust;
• Discuss the trust’s structure with the lawyer;
• Have the names and addresses of proposed trustees and beneficiaries available.

IMPORTANT

A trust must be structured to your individual circumstances and needs. Discuss your needs fully with your lawyer.
Read the trust documents your lawyer gives you. Ask questions until you are satisfied you understand the effects of setting up a trust.
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