Raising the bar

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Review set out to make things easier but liability tweaks will unsettle some

Trustees are obliged to act in the interests of beneficiaries and in order to do that beneficiaries need to be able to hold trustees to account, and vice versa.

Changes to trust law mean mum and dad are now obliged to disclose property held and information about who the trustees and beneficiaries are. Photo / 123rf

Legal overhaul of trusts — a few pains alongside the gains

What better way to start the year fresh than by assessing one's finances?

In the event I were to win Lotto, marry a millionaire, or take charge of the sad status of my bank account, I'd want to assess whether a trust might work for me. What are they? Is it only for the rich to hide their money? It's also been more than two years since the long-awaited Trusts Act 2019 came into force in 2021. I spoke to trusts aficionado Otago University law professor Nicola Peart to find out.

Can you create a trust willy nilly?

If you put land or property into a trust you need to pay for the cost of surveying and if you have independent trustees you have to transfer the ownership so that they become the legal owners of the property, which includes legal fees. If there's a mortgage the bank will want to know what's going on too, which complicates things. But if you've got cash and appoint yourself as a trustee it's really easy. Since we abolished the gift duty in 2011 you can divest yourself of all your assets in one fell swoop.

Trusts are very common but to be honest, in many cases there's no good reason for them. People settle trusts because it sounds like a good idea but they find out that actually, it comes with all sorts of obligations and accountability measures.

Why are trusts appealing?

In the past creating a trust to avoid tax liabilities was a driver and still is for some. Currently, the personal income tax rate for people earning more than $180,000 is higher than a trust tax rate, which is attractive to some.

Trusts are also attractive for people wanting to protect assets against claims by creditors, spouses, or partners. If you create a trust, which is discretionary in nature, it means beneficiaries have no property interest in the assets until or unless the trustees exercise their discretion in the beneficiaries' favour. You can sit on the outside with all your assets in a trust and enjoy benefiting from it so long as the trustees say you can.

Most people opt for discretionary funds which are structures that give trustees the power to distribute capital and/or income to beneficiaries at their absolute discretion.

Beneficiaries otherwise don't have any entitlements. They can simply say "I don't own any of those assets" and it's up to the trustees to manage the trust.

So they're cheeky?

What we have here is that mum and dad put their assets in a trust. They'll get an independent third party to be a trustee to manage the trust and mum, dad, and the kids will benefit. Some people may argue it's a sham but it's not because it doesn't intend to conceal what's going on.

The difficulty is that people are trying to avoid what others would regard as responsibilities and duties — whether that's to pay creditors, distribute property to former spouses, or sharing property on the basis of an equal sharing regime.

The other one — which can be brutal for living family members — is when people put their assets into a trust just before they die and the Family Protection Act can't access it.

A while ago a very popular reason to create a trust was to safeguard state welfare benefits. You say to MSD that you don't own any interests because they're sitting in trust even though you might be a discretionary beneficiary, and MSD would then assess you on that basis and you might qualify for a residential subsidy that you otherwise mightn't be entitled to. Now, MSD has the power to look at trusts or benefits derived from them.

If you put property into a trust and you have independent trustees, you have to transfer legal ownership to them, which will involve legal fees. Photo / NZME

Can I set up a trust from me, for me, and administered by me?

You can't set up a trust for yourself as a beneficiary with yourself as a sole trustee, because you can't owe yourself any duties. You need either multiple beneficiaries or multiple trustees.

Conflict of interest issues are a problem. Default duties require people not to put themselves in a position of a conflict of interest, or to profit from a trust, or to act for any reward.

All three of those duties are seen as a duty of loyalty towards beneficiaries. But these are often excluded or modified depending on the intention of the trust.

Sometimes a trust can be created that is so flexible that it effectively becomes meaningless and fails to provide protections. It can function as a trust for as long as no one takes issue with it. But as soon as a claim arises, you can bet your bottom dollar somebody's going to look very closely at it to question its validity.

What's the benefit of being a trustee if you can't get any benefit of the trust?

When a trust is set up there may be provisions so that trustees are paid remuneration for their services but the fundamental rule of trusteeship is that you act for no reward.

Has the situation changed since the introduction of the Trusts Act 2019?

The aim of the legislation was to make the law more accessible rather than to change the law completely. The move was to streamline the existing case law and put it in statute. Codifying it is a strong word because the legislation doesn't purport to completely replace the common law or equity principles. For example, the Act says trustees must act honestly and in good faith, but it doesn't explain what that means so you have to go to the case law to find out.

What was the driving force behind the legislation?

There are thousands of trusts in New Zealand and we don't know quite how many exist. Many of them are run by family members who don't necessarily have the legal qualifications and understanding to navigate them. So a big part of the legislation was aimed at education. Early sections in the Act specify how to create a trust, what the essential requirements are, its intention, and who will benefit. The basic principles of trust law are now clearly set out in the legislation.

What's the big deal then?

People are worried about the clauses relating to trustee obligations. Fundamentally trusts involve a relationship between trustees and beneficiaries, where the trustees are the owners of the property and have the burden of the property and the beneficiaries collectively benefit from it. Trustees are obliged to act in the interests of beneficiaries and in order to do that beneficiaries need to be able to hold trustees to account, and vice versa.

Sections 49 to 55 deal with disclosure of information, which is more stringent than before. While mum and dad have treated the trust as their own for decades, they now have an obligation to disclose property held and information as to who are the beneficiaries, trustees, for example, and whether things change.

Have there been any other concerns?

In the past, you could exclude liability for trustees breaching their duties, provided they hadn't acted dishonestly. Now, you cannot exclude liability if there's been an act of gross negligence. Exclusion clauses are limited. It's going to make some trustees quite nervous, because it exposes them to a greater risk of liability.

Aside from educating the public and making the process easier, what are other benefits of the legislation?

In the past removing trustees who had become incapacitated was a real problem, particularly as people are living longer. It would traditionally involve having to get a court order, which was expensive, time-consuming and undesirable. Now, enduring powers of attorney can come into play, for example. It also means it's easier to remove trustees that aren't performing.

It's also easier to vary the terms of a trust. Let's say you have a stroppy beneficiary who doesn't agree to any of the variation proposals, the court now has the power to waive that beneficiary's consent. It's helpful because trusts can exist for up to 125 years and they're invariably going to change.

Finally, the Act now includes provisions for alternative dispute resolution such as mediation and arbitration. It means a spat between family and the like can be dealt with outside court and kept nice and confidential.

Dividends

Payments

Company	Period	Cents a share	Ex date	Payable date	Imputation credit
Argosy	Int	1.6625	06/12	21/12	0.15
Arvida	Int	2.50	06/12	21/12	Nil
DIV	Int	2.0816	29/11	20/12	0.809
Kiwi Prop	Int	1.425	05/12	21/12	0.29
MDZ	Int	5.5498	29/11	20/12	1.94
MZY	Int	7.6934	29/11	20/12	1.82
NGB	Int	0.8585	29/11	20/12	Nil
NPF	Int	2.1411	29/11	20/12	0.44
NZ Bond	Int	1.0904	29/11	20/12	Nil
NZ Cash	Int	1.4319	29/11	20/12	0.16
OZY	Int	7.6403	29/11	20/12	1.169
PLP	Int	0.89	13/12	21/12	0.34
Radius Res	Int	0.5043	19/12	13/01	0.19
Scales	Int	6.00	04/01	16/01	2.33
TNZ	Int	1.5129	29/11	20/12	0.58
Tower	Fin	4.00	17/01	01/02	Nil
Turners Auto	Int	5.00	11/01	26/01	1.94
US 500	Int	5.4183	29/11	20/12	1.01
Windfarms	Int	0.05	15/12	23/12	Nil
Overseas					
BIT	Fin	0.6p	26/01	28/02	n/a
FCT	Int	3.2p	05/01	01/02	n/a
HFL	Int	6p	26/01	24/02	n/a
TCL	Int	5p	26/01	28/02	n/a
TEM	Int	2p	15/12	27/01	n/a