



S J SCANNELL & CO

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Types of trusts and their benefits

There are many types of trusts that can be tailored to achieve a specific purpose. The general purpose of a trust is to protect your assets and provide for desired succession planning for future generations. A trust is created by a trust deed whereby a person (the settlor) transfers property to the trustees of the trust. The trustees control the property in accordance with the trust deed for the benefit of the beneficiaries (which can include the settlor).

This article focuses on four types of trusts that are commonly used within New Zealand. These include family trusts, inheritance trusts, business trusts and charitable trusts.



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If you have any questions about the newsletter items, please contact me, I am here to help.

Family trusts: A family trust is generally set up by a couple that have combined assets such as a family home, investments, etc. for the benefit of the next generation. This type of trust can provide income and capital benefits to its beneficiaries who can be (including but not limited to) the settlor(s) themselves, their children, grandchildren, parents or other trusts. The benefits of a family trust are:

- to assist in protecting family or a family business from potential relationship property claims or someone contesting a will;
- ensuring assets are retained for family members who may need rest home care;
- to manage assets of someone who may not be able to manage their own affairs;
- maintaining separation between business and personal assets; and
- maximising tax efficiency for the beneficiaries.

Inheritance trusts: An inheritance trust is generally created by parents for their children. It not only benefits children when their parents pass away, but

also during their parents' lifetime. The benefits of an inheritance trust are:

- allowing parents to ensure that their children's inheritance is protected from future relationships, business partners or creditors; and
- protecting separate property from relationship funds if you are expecting to inherit significant assets.

Business trusts: A business trust generally holds assets that are separate from family and personal assets to protect you from a business failure or major loss. It also protects your personal or family assets from potential creditors. A common scenario is to have your business trust own shares in your private company, which allows dividends to flow through the business trust and to the beneficiaries. A business trust provides for succession planning if a business partner dies or becomes incapacitated, and also may result in tax advantages.

Charitable trusts: A charitable trust as the name implies, is a formal arrangement set up for a charitable purpose. This can relate to relieving poverty, advancing education, religion or any other matter that benefits the community. The benefit of a charitable trust is that as a donor, you can provide long-lasting contributions that continue after your lifetime. Furthermore, registering a charitable trust with the Charities Commission can provide tax advantages.

Whether a trust is suitable for your needs is best determined by a lawyer. This article is simply an overview of the more general points about the common trust structures. Each case is different as it depends on the purpose of the trust. It is advisable to discuss your overall asset planning goals, financial and relationship situations with your lawyer who can also liaise with your accountant (if applicable) to determine the best course of action for you.

Purchasing a property at auction – what you need to know

When purchasing a property, there are generally two ways in which you can achieve this.

The first, the traditional offer method, is by offer and acceptance of a signed Agreement for Sale and Purchase between the vendor (seller) and purchaser (buyer) of a property. The terms of the Agreement for Sale and Purchase can be negotiated between the parties, whether through a real estate agent or a private sale. These types of agreements, can contain terms, known as special conditions to enable the purchaser sufficient time to ensure they have completed their due diligence on the property including (and not limited to) confirmation of finance being approved, obtaining Land Information Memorandum (LIM) reports to check for building consents, code of compliance certificates, location of services such as stormwater and wastewater running through the property, and any intended works by the council or government agencies, such as road construction. Additional reports may be required such as building and methamphetamine contamination reports and anything else the purchaser may need to satisfy themselves that the property is suitable for their needs. This traditional method gives the purchaser the ability to terminate the agreement should they genuinely not be in a position to confirm their special conditions of sale.

The second method is purchasing by way of auction. For any purchaser using this method, which can be riskier than the traditional method, it is highly recommended that they complete their due diligence of the property being purchased first. The consequences of not completing your due diligence could result in the property being purchased with hidden issues, such as weather-tightness or not having had code of compliance certificates issued for works completed from 1993 onwards, which may in-



validate your insurance or prevent your bank from lending you mortgage funds.

The check-list mentioned above under the traditional offer option must also be carried out when an auction is the method of sale. The only difference is timing. Under the first traditional

method, the purchaser has the luxury of having a signed agreement to work with. However, with the auction method the purchaser will have needed to complete their due diligence for the property, including approved finance as he or she must be ready before the auction. This is because when the hammer falls in your favour you are bound to purchase the property from that time.

The important steps to be aware of when purchasing by auction include the following.

- Register your interest with the real estate company before the auction.
- Have your conveyancer or solicitor review the auction terms and conditions to the Agreement for Sale and Purchase before the auction.
- Ensure the vendor warranties, which give the purchaser protection in some circumstances, have not been deleted from the auction terms.
- Be prepared to have your deposit amount available, as at the fall of the hammer, if you are the winning purchaser your deposit is immediately payable.
- The reserve price the vendor has disclosed to the agent will not be known to the general public. Researching the value of the property before you attend the auction will ensure you are not over paying for it, or entering into a bidding war and going over your pre-approved finance limit.
- Once you have purchased at auction you are committed to completing it. There is no going back without a great legal battle, and you may forfeit the deposit you have paid.

- If the property fails to sell at auction, you may then be invited to enter into negotiations with the vendor to discuss price, the settlement date and any special conditions of sale.

It is recommended that you consult a legal professional before signing any Agreement for Sale and Purchase, whether it is by the traditional method or by way of auction, to ensure your rights as a purchaser are protected.

Bringing the Adoption Act into modern times

The New Zealand Adoption Act 1955 (“the Act”) has been widely viewed as being in need of an overhaul to bring it up to date with the modern times. In 2016 the Human Rights Review Tribunal ruled that sections of the Act were discriminatory and outdated. This article will take a closer look at the specifics of the Act that are not in keeping with today’s New Zealand.



single woman is not allowed to adopt a male child.

Until the Marriage Amendment Bill was passed in 2013, same sex couples could not legally adopt children. In New Zealand the number of children available for adoption has declined substantially over

the years, meaning many New Zealanders now have to adopt from overseas. The problem for same sex couples in this regard is that New Zealand has overseas adoption agreements with five countries (India, Lithuania, Philippines, Russia, Thailand) but none of these countries will accept applications from same sex couples, whether they are married or de facto.

Surrogacy - The Act sees the natural mother (the woman who births the child) as the legal guardian of the child. The natural mother is named on the birth certificate and her partner, if she has one, as the father. This occurs even in the case of surrogacy where the natural mother and/or her partner have no biological connection to the child. This means that the biological parents have to go through the adoption process to become the legal guardian of their biological child.

The Act does not allow for surrogacy agreements to be enforced. This leaves the biological parents with little or no security that when their baby is born it will legally become their child if the natural mother decides to keep it. On the other hand, except for direct costs such as the hospital invoices, surrogates cannot be compensated for their time or loss of wages.

Not the nuclear family - Currently under the Act single men cannot adopt a female child unless the court is satisfied that the man is the child’s father, or that there are special circumstances that justify the adoption. There is nothing in the Act that states a

Magic numbers - The mandatory age requirements for adopters are found in section 4 of the Act. This section explains that you must have reached the age of 25 years and be at least 20 years older than the child that you wish to adopt; or you have reached the age of 20 years old and the child that you wish to adopt is a relative.

You are considered a child in the Act until you have reached the age of 20. This means that adoptees are not able to obtain their birth certifications or know any medical background regarding their biological parents until they reach the age of 20.

The Act is a reflection of New Zealand society in 1955, and perceptions have changed over the 64 years since the Act was brought in, with different views now on adoption. With that said, the Act requires an overhaul to bring it in line with the modern views of today’s world.

Further change to gun laws

Following the amendments to the Arms Act 1983 (“the Act”) that came into force on 11 April 2019, a second tranche of proposed changes, the Arms Legislation Bill (“the Bill”), is currently under review by the Select Committee. This next step in the reform of the Act looks to establish a firearms registry and amend licensing requirements with the intention of reinforcing positive behaviour that is required of firearms owners.

Not much is currently known about the firearms in New Zealand in respect of how many there are (legally), who has them, who is buying and selling, and how secure the firearms are. The Bill proposes to create a firearms registry that would store this



information about firearms and link them to licence holders. Information about licence holders, their weapons, and ammunition would be stored on the registry. This would allow every legally held firearm in New Zealand to be monitored.

The licensing regime would be strengthened with the Bill aiming to tighten the current rules for both individuals and dealers. The licence period would be shortened to five years from the current ten-year period, with potential increases to the fees as well. Licence requirements would also be extended to cover parts, magazines, and ammunition.

A new system for warning flags is proposed in the Bill to give the police more tools to vet people and allow them to intervene if concerns are raised about a licence holder. This system would capture behaviour such as encouraging or promoting violence, hatred or extremism, serious mental health or substance abuse issues, having close associations with gangs or organised crime, and being convicted of certain offences. The aim here is to filter out high risk people that are deemed an unfit and improper person to hold a firearms licence.

Shooting clubs and ranges would also have a licensing regime introduced by the Bill. There are currently no licensing requirements for clubs and

ranges in New Zealand. Clubs will also be required to have rules in place in regards to the safe operation of firearms. Ranges will be required to meet safety standards.

The recent amendment to the Act saw increases in penalties relating to firearms offences. This Bill will see further increases in penalties and also introduce new offences. An example of the degree of change that is proposed under the Bill is the penalty for being found guilty of selling or supplying firearms to an unlicensed person. Currently, a person found guilty of this is liable for up to three months imprisonment or a \$1,000 fine. This would be increased to up to two years imprisonment or a \$20,000 fine.

The Bill looks to re-state the purpose of the Act to put an emphasis on owning a gun being a privilege not a right, and people with that privilege have a responsibility to act in the best interests of public and personal safety.

What rights do beneficiaries of a discretionary trust have?

When trustees act for a discretionary trust, they have a primary duty to act for, and in the best interest of the beneficiaries. Consequently, any benefit received under the trust is provided at the discretion of those trustees.

Trustees of a discretionary trust have a wide-ranging scope of power in terms of the decisions they make for the trust, with a limited liability for such decisions. However, beneficiaries do also have rights under law to monitor the trust/trustees.

Generally, a discretionary beneficiary has the right to:

- request from the trust or its representatives, documentation for the trust (i.e. trust deeds, appointment/removal of trustee documents, details of trust distributions, trust accounts, trustee contact details and details of trust assets and liabilities);
- receive fair treatment from trustees;
- be considered in any decision made by the trustees;
- seek the court to remove a trustee; and
- apply to the court for intervention or assistance.

The ability for a discretionary beneficiary to request and obtain trust information is an important right and can be where disputes arise. It is important for beneficiaries (especially if you have only just found out you are a beneficiary) to understand what exactly the trust assets and liabilities are, who the trustees are if you want to contact them, and potential history of the trust and trustees. Whilst the request for this information can ruffle the feathers of some trustees, and trustees have been known to deny requests (see the recent case of *Erceg v*

Erceg), the underlining fact remains that the trustee's role is to act for the beneficiaries benefit above all.

Discretionary beneficiaries can request, but may not be entitled to receive the reasoning behind trustee decisions. This is to protect the role of the trustee and the trust that is placed in them when the trust was established. However, the court can intervene if an explanation is considered justified.

If a trustee is thought to be acting contrary to the benefit of the discretionary beneficiaries or is refusing to provide information to the beneficiaries, then the beneficiaries can apply to the court to have such information released and potentially have the trustee removed or replaced.

Given that there is no requirement for anyone to inform you that you are a discretionary beneficiary of a trust, sometimes trusts can be wound up before you are made aware. Where this occurs, a beneficiary can request provision of information relating to the winding up and final distributions of the trust to see how the assets and liabilities were distributed.

Under section 68 of the Trustee Act 1956, a trust beneficiary can apply to the court to review a decision or act performed by the trustees if they feel that they have reasonable grounds for being aggrieved by the act or omission. Whether a discretionary beneficiary can apply under this act is not yet set in stone, however, decisions by the court point to the idea that if the number of discretionary beneficiaries is small, it may be permissible.

If you are a discretionary beneficiary and unsure of your rights, it is advisable to contact a legal professional to talk you through this.

Snippets

The role of the executor



Often when you are asked to be the executor of a will, you accept the role without truly knowing its parameters. While not wishing to deter anyone from accepting the responsibility to carry out this very important role, you must understand what it entails. When a member of the family or a close friend asks you to be the executor of his or her will, you should seek some legal advice before you say yes.

Often the words 'executor and trustee' of the will are included together. The roles are often combined these days, with the trustee aspect relating to any testamentary trust set up under the will. For example, if a child under 20 receives a distribution under a will, he or she must wait until the specified age before receipt of such distribution. In the meantime, the executor oversees both the investment of those funds and how access may be affected based on the terms of the will.

The executor works closely with the lawyer for the estate of the deceased to co-ordinate all aspects of the wishes as set out in the will. These jobs include: organising and accepting responsibility for the funeral; the obtaining of Probate (which is a court document confirming to the world at large that the executor stands in the shoes of the deceased); the distribution of chattels and cars; the itemising of all assets and liabilities of the estate; the investigation of any issue that arises as a result of that itemising; the transfer and distribution of all property and cash and other investments once known; together with the closing off of all matters ending with a final tax return for the estate.

While your lawyer helps with every step of the way, it is your role as executor that ensures a life well lived is recorded and signed off appropriately.

The new Trust Act 2019

Trusts are widely used in New Zealand, with the main focus in recent years being on family trusts. These have been utilized in relation to relationship property, succession planning, risk control, and as a vehicle for enabling blended family outcomes; to name but a few.



The previous legislation around trusts has not been overhauled or reviewed for a long time. Aligned to that are a myriad of court cases setting up common law positions, both old and new. Often the current issues fit like square pegs in round holes. Many common-sense outcomes in today's world have been frustrated by the legislation lagging behind. Trust law is no exception.

So, the new Trust Act 2019 is very welcome. While passing into law on 30 July 2019, it does not come into effect until 30 January 2021. The interim time frame allows a true knowledge of what is proposed to be digested; with variations to be made both to documentation and best practice systems. These are being prepared and introduced so immediate compliance with the new parameters are completed and expected.

A heads up then about compliance requirements. You will be reminded about the duties required of those running the trusts, namely the trustees and settlors; that the term of a trust may be longer than the current 80 years; that those who benefit from them may be able to obtain more information in certain circumstances; that written documents must be held and easily accessible; and that reviews of trusts decisions will be more prevalent.

S J Scannell & Co

Would like to wish you and your family a Merry Christmas and prosperous New Year



**We advise our offices will be closing on Friday, 20th December 2019 at 5pm
and re-opening on
Monday, 13th January 2020 at 8.30 am**