

How do you transfer control of your family discretionary trust?

If you hold assets in a family trust, you must think about what will happen to the trust in the event of your death. The trust assets do not form part of your estate and cannot be given away under the terms of your Will.

Depending on the terms of the trust deed, your family trust can continue well beyond your death. Although the trust assets will not form part of your estate, you can influence the future control of the trust through your Will.

A separate legal entity

A variety of ownership structures can be used by a person during their lifetime to assist with asset protection, the tax effective distribution of income, and the transfer of control of assets. Discretionary family trusts (also known as inter vivos trusts) are a popular business and investment structure in which the trustee holds assets in trust for a group of beneficiaries, usually family members.

A trust is a separate legal entity and the trust, not the beneficiaries, owns the assets. If you are a beneficiary of a family trust, the trust assets do not form part of your estate and you cannot leave them in your Will.

It is important that you understand how a family trust operates and the roles within the trust, as this will affect how you plan your estate. These matters are established in the trust deed when the trust is set up, but the trust deed may have been varied by deeds of amendment.

The trustee

The trustee is responsible for the day-to-day running of the trust. The trustee's powers are set out in the trust deed and their duties usually include the allocation of the income and capital of the trust, the administration of the trust's investments, the maintenance of financial records and the decision of when the

trust is wound up. The trustee may currently be you (either solely or jointly with others) or a company in which you hold shares and are a director.

It is usually the trust deed that sets out how a trustee is replaced. It is therefore critical that the deed be reviewed. If you are the sole trustee of your family trust, on your death your executor may become the trustee. If the family trust has joint trustees who are individuals, on the death of one trustee the surviving trustees will usually continue as the trustees of the family trust. On the death of the last trustee, the executor of the estate of that trustee may become the trustee of the family trust.

If the trustee of your family trust is a private company, whoever becomes the majority shareholder in the private company will usually control the position of trustee of your family trust (depending on the voting rights). You should take this into consideration when determining who will inherit your shares in the company.

The appointor

Depending on the terms of the trust deed, it is usually the appointor who has ultimate control of the trust; they are authorised by the trust deed to appoint and remove the trustee. The first appointor is generally the person who initiated the establishment of the trust.

Often, the trust deed will provide the appointor with the power to nominate a new appointor in their Will. If you are the appointor, your Will may provide that the position of appointor will be transferred:

- equally to those of your beneficiaries whom you wish to have ultimate control of the family trust, or
- to an independent person who may not be a beneficiary of the family trust but who you consider will act in accordance with your intentions.

The beneficiaries

The beneficiaries of a trust are generally a group of persons or entities who may receive distributions from the trust, as specified in the trust deed. There may be one group of beneficiaries who may receive ongoing income distributions (income beneficiaries) and another group to whom the assets will be distributed when the trust is wound up or during the existence of the trust (capital beneficiaries).

Although the assets of a family trust do not form part of the personal estate of a beneficiary, it is important to consider who may ultimately receive the capital of a family trust or control of that trust. For instance, you may want people who are not beneficiaries of the family trust to receive an equal share as those who are beneficiaries. In that case, when you prepare your Will, consideration should be given to equalising potential discrepancies in the overall distribution of the assets of your family trust and the rest of your estate.

The vesting date

The vesting date is the date on which the trust must be wound up. It may be a date established in the trust deed or chosen at the discretion of the trustee.

If the family trust was established for the benefit of a particular family member, the trust may not need to continue after their death. The trustee of the family trust can then decide to wind up the trust and distribute the assets to the capital beneficiaries.

Would you like further information?

For further information please contact your AET estate planning specialist on **1800 882 218**.

Loans

During the operation of the family trust, you may have deposited personal funds into the trust, creating a loan from you to the trust. Loans may also exist between the trust and its beneficiaries if income has been allocated to the beneficiaries but has not been paid from the trust. These are usually recorded as beneficiary loan accounts and are liabilities of the trust.

Although the assets owned by the family trust do not form part of your estate, loans from you to the trust are an asset of your estate that can be called upon by the executor on your death. When preparing your Will, care must be taken to ensure that your death does not create a sudden need for the family trust to sell assets in order to repay the loan to your estate.

If you have withdrawn funds from your family trust as a loan, this will generally be a liability of your estate and will need to be repaid to the trust following your death. The impact of this liability on your estate also needs to be carefully considered as part of the estate planning process.