

ESSENTIAL CONSIDERATIONS WHEN SETTING UP A TRUST

HANNAH BISSON DISCUSSES THE IMPORTANCE OF CLIENTS ASKING THE RIGHT QUESTIONS WHEN SETTING UP A TRUST AND WHY CHOOSING A REPUTABLE TRUSTEE IS CRUCIAL FOR EFFECTIVE WEALTH PROTECTION.



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When I have the opportunity, I like to ask my clients how they ‘made it’. Why do they think they have excelled and are successful, where others may have tried and failed. In one such discussion recently, the client simply answered – ‘question everything; asking questions is the key to success’.

I immediately thought, but how will I know the right questions to ask? And perhaps being able to pinpoint that, is indeed the real key. But for those who *have* asked the right questions, and *have* made a success of themselves; it is likely that their thoughts will next turn to protecting their hard-earned wealth and for many that could include establishing a trust.

So, what are the right questions to ask when setting up a trust?

This article poses, and seeks to answer, seven important questions to ask, consider and understand in the trust creation process. Namely Why? Who? What? Where? When? How? and How Much?

WHY?

The first, and arguably most important, question to consider is ‘why?’

Why should I set up a trust?

Why do I need to?

It is vital to have a clear understanding of why you are establishing a trust and the purpose the trust will serve.

The first step in this process should be identifying your needs.

From my experience of helping families in the early stages of their planning, I have found that initially this question can be difficult to answer. The good news however is that, when it comes to wealth planning and when we strip it back to basics, most of us actually want and need the same two things:

- > to protect what we have (asset protection); and
- > to provide for the people and/or causes we care about, even if we are no longer around (succession planning).

Trusts can be set up for a whole variety of different reasons, but the two most common are these; asset protection and succession planning.

Asset Protection

On the creation of a trust, the settlor will typically gift a portion of their personal wealth to the trustee, to hold on trust in accordance with the terms set out in the trust deed, for the benefit of their beneficiaries.

The settlor will no longer legally own the assets in question and similarly, future generations of the family will not directly inherit the assets either (instead they may be beneficiaries of the trust).

When it comes to asset protection, the less ongoing involvement and influence the settlor is willing to have, the better. It may not be enough to rely on a carefully drafted trust deed – but rather focus on how the trust is actually managed and controlled in practice and who is pulling the strings.

This change of ownership, and handover of control, to the trustee should help to protect family wealth from potential future claims against the assets, as a resource of the settlor or of a beneficiary, and also from spendthrift members of the family itself.

Succession Planning

Trusts enable wealth owners to pass on their wealth to any person, group of people, and/or charitable causes they like, in a controlled manner.

When a settlor makes a gift to a trust during their lifetime, the assets are no longer part of settlor's estate thus avoiding probate (an often lengthy, complex and public process) and also avoiding a one-time, total wealth transfer to their direct heirs and further dilution and separation of family wealth with each successive generation.

Under a trust, consolidated family wealth can be invested and accumulated over more than one generation, and distributions may be made to the beneficiaries only when appropriate and needed.

WHO?

If these benefits are resonating with you, let us move on to the next question, 'who?'

Who will be the parties involved?

Who should I select for each role?

As the settlor and wealth owner, you should consider carefully who to appoint for the key role of trustee and the optional role of protector. You should also decide who you would like to benefit from the trust as beneficiaries.

Choosing a Trustee

The trustee is the legal owner of a trust's assets and will be responsible for adhering to the terms of the trust and acting in the best interests of the beneficiaries, so selecting a trustworthy, competent and reliable trustee is vital.

A good starting point would be a professionally licenced trustee in a well-regulated jurisdiction that has statutory recognition of trusts. This will give a good indication of the trustee's ability to properly carry out their duties, as well as having a route for recourse in the unlikely event that they do not.

Other important qualities to consider in a trustee include independence, a stable, long-term ownership structure, experience and having both the intent and capacity to remain pro-actively involved on an ongoing basis.

For a more detailed look at this topic, you may wish to read [7 Considerations When Choosing Your Trustee](#).

Choosing a Protector

The protector will be a person who the settlor knows and trusts, and their role is to monitor the trustee.

Most commonly a protector is given the power to change the trustee. This gives comfort that should the relationship with the trustee break down, a third party can independently remove them and appoint a new trustee in their place.

The protector may also have a more extensive role in monitoring the trustee on an ongoing basis. This would commonly include both rights to trust information and to veto key trustee decisions, for example a protector's consent may be for needed distributions, adding and removing beneficiaries or varying the terms of the trust deed.

A suitable protector will therefore not only be someone you trust and that has a good knowledge of the dynamics of your family, but they should also understand what is expected of them and be willing to commit the time to take on this responsibility, and to give their input / make decisions when required, throughout the lifetime of the trust.

The Beneficiaries

The beneficiaries of the trust are those who will be able to benefit from the trust assets. Settlers are free to provide for whoever they wish, including themselves, named individuals, groups of people or charities.

Most commonly the beneficiaries of a trust will include the settlor and their immediate family; such as their children and future lineal descendants.

Classes of beneficiaries can even include those who are not yet born (for example 'lineal descendants of the settlor'), so that at birth a qualifying person will automatically be considered a member of the class and a potential beneficiary of the trust.

As settlor, you can provide a 'letter of wishes' to the trustee, which is to give your guidance to the trustee on how, and when, to consider making trust distributions. Your wishes can be updated as often as necessary, to adapt to changing family requirements, and will also continue to guide the trustee in the future, when the settlor is no longer around.

As well as deciding who *should* be a beneficiary, equally important is deciding who *should not* be able to benefit. For example, a settlor may decide to exclude their children's future spouses as a protection against marital dispute claims.

WHAT?

What should I settle into the trust?

The trust may hold any asset for which the settlor can transfer the legal title to the trustee. In addition to cash and investment portfolios, this could also include real estate, private company shares, family businesses, airplanes, yachts, intellectual property and so on. You are not limited to having a partial solution, just for your bankable assets – why not protect other, perhaps even more valuable, assets such as your business too.

However, the trust should be a pot that you are putting aside for capital preservation over the longer term. You should consider what proportion of your total wealth you are comfortable with putting aside in this manner and keep enough liquidity outside of the trust for your short-term, day-to-day living.

WHERE?

Where do I want my trustee to be located?

Where should I select as the proper law of the trust?

When it comes to the location of your trustee, in addition to the considerations mentioned in the 'Choosing your Trustee' section above; convenience and time zone will be key factors.

The proper law on the other hand, is the law and court system that will govern the trust and the enforcement of any trust disputes.

WHEN?

When should I set up the trust?

When it comes to timing, as a general rule, the earlier the better. Once you have something of value, it makes sense to protect it as best you can.

Frequently a new client will be introduced to me because something has already gone wrong. For example, a stressful and confusing estate administration whilst grieving the loss of a parent, or, a marital dispute and a hefty divorce settlement that has nearly halved their wealth. This will be their trigger to create a trust because the settlor does not want their own children to go through the same experience, or they want to better protect the assets they now have left.

Would it not have been better if they could have avoided the issue in first place? Of course. So my advice is always plan early, and please do not wait to become a cautionary tale.

HOW?

How should I establish the trust?

If you have decided that you do need, and want, to establish a trust, the next logical question is – How? How should I create it?

Professional Advice

Firstly, I would always recommend seeking independent legal advice, and any relevant tax advice, before establishing a trust.

Structuring

The legal document that establishes and governs a trust is the trust deed. It is a bespoke document and can be drafted by your legal advisors and your chosen trustee, based on your specific needs and requirements.

Once the terms of the trust have been agreed upon, and you have transferred the initial trust assets to your trustee, you and your trustee will simply sign the trust deed in order to establish the trust.

Regular Reviews

Once established, the trust deed should not be filed away and forgotten until an issue arises.

Family circumstances may change; beneficiaries may relocate overseas; even applicable laws and regulations can be amended from time to time and so ongoing reviews and check-ins will keep the trustee updated of your current wishes. It will also help to highlight any need for amendments to the trust structure, keeping it fit for purpose in the long term.

HOW MUCH?

How much will it cost me?

This article would not be complete without this last question, because of course whilst cost should not be the only consideration when deciding whether to establish a trust, it would be naive to infer that cost is not a factor too.

Buying anything is a transaction. Payment in return for a product or service. We assess the value of a product or service, based on its ability to meet a want, or need, that we have. When that need is to protect your wealth, and to ensure your loved ones are well looked after financially even when you are no longer around – why entrust this hugely important task to the lowest bidder. Professional trustees should be pro-active, experienced and stable; and accordingly, should be expected to charge a commensurate fee for providing their trusteeship services so that they can commit time and attention to each and every client as stewards of their wealth.

ARE WE THERE YET?

As we wrap up this article, it is clear that the decision of whether, and how, to establish a trust requires careful consideration. I hope that these questions may serve as a useful checklist and introduction to the subject and that by following these basic principles, robust and effective trust structures may be established for securing assets and protecting family wealth for generations to come.

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