



Estates, trusts and wealth management

Trust basics

Briefing

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A trust can be used for a wide variety of personal and commercial purposes. If you are considering a trust as part of your estate plan or business structure, it will be important to understand what a trust is, the duties and powers of trustees, and the rights of beneficiaries.

What is a trust?

A trust is not a legal entity, although it is treated as such for Canadian tax purposes. A trust is simply the word used to describe the relationship created when property is transferred by one person (the “settlor”) to another (the “trustee”) to hold for the benefit of specified persons or a class of persons (the “beneficiaries”).

Subject to tax and other considerations, it may be possible for the settlor and the trustee to be the same person. In some cases, a settlor or trustee might also be a beneficiary of the trust.

How is a trust created?

A trust can be created by an individual during his or her life (an “inter vivos trust”) or as a consequence of his or her death (a “testamentary trust”).

The terms of an inter vivos trust are usually set out in a document signed by the settlor. It will appoint a trustee or trustees and direct how assets are to be held, managed and distributed to or for the benefit of the beneficiaries. An inter vivos trust is created once the beneficiaries and the terms of the trust have been settled by the settlor and the trustee with sufficient certainty, and property has been transferred to the trustee to hold in accordance with the terms of the trust.

A testamentary trust, on the other hand, is created as a consequence of an individual's death, usually pursuant to the Will of the individual or a beneficiary designation made in respect of an insurance policy, a registered retirement savings plan or a registered retirement income fund. A testamentary trust only comes into existence on the death of the individual who made the Will or beneficiary designation.

Why do people create trusts?

People create trusts for many reasons, including those set out below:

- trusts can provide protection for a minor beneficiary, or for a beneficiary who suffers from a physical or mental disability, has creditor concerns or a substance abuse problem;
- sometimes there is a cross-border component, such as an asset located in a foreign jurisdiction, an anticipated gift or inheritance from a relative who lives abroad, or a beneficiary who plans to leave Canada – these may all be reasons to consider a trust structure;
- a trust may offer tax savings in some circumstances and can be used to eliminate probate fees on the value of the assets transferred to it;
- trusts can be helpful as part of a succession plan for a family business or other legacy asset;
- a trust structure may be preferable to a power of attorney when it comes to incapacity planning; and
- a trust can also provide increased confidentiality in respect of an individual's affairs.

Role of the trustee

The trustee will control, administer and distribute the trust assets for the benefit of the beneficiaries in accordance with the terms of the trust and applicable law. Given the extensive powers of a trustee, it is important to choose someone who is trustworthy, but other factors should also be considered, such as:

- the age of the trustee;
- whether the trustee has experience or skills relevant to the role of trustee and the assets under administration;
- where the trustee resides and his or her citizenship status;
- the trustee's relationship to the beneficiaries; and
- whether the trustee's personal or financial circumstances might give rise to a conflict of interest that could interfere with the exercise of the trustee's duties.

Duties of a trustee

The law imposes a number of responsibilities upon trustees, including the duty to:

- act personally in exercising certain trustee powers;
- avoid conflicts of interest and act exclusively for the benefit of the beneficiaries;
- maintain an appropriate level of skill and prudence when carrying out trustee duties and exercising the discretionary powers conferred upon the trustee by the terms of the trust and applicable law;
- act impartially as between the beneficiaries, also known as the duty to maintain an even hand; and
- maintain complete and proper accounting records in respect of the administration of the trust, including copies of all supporting cheques, invoices and other voucher material.

How is a trustee compensated?

Unless the Will or trust document provides otherwise, the compensation payable to a trustee will be determined in accordance with applicable law. A trustee who wishes to be paid compensation must obtain approval of the amounts claimed from the beneficiaries who have an interest in the matter. If approval is not forthcoming, a trustee may apply to the Court to have the compensation approved.

Sometimes a Will or trust document will specify a formula for the calculation of compensation. For example, it might direct that a lump sum be paid to the trustee annually, or that the trustee be paid for time spent based on a specified hourly rate.

Professional trustees, such as trust companies, may require that a fee agreement setting the terms of their compensation be signed and incorporated into the Will or trust document.

Compensation will be taxed in a trustee's hands as income, and where the Will or trust document appoints more than one trustee, it will be shared between them. Sometimes it is shared equally. In other cases, particularly where one trustee assumes most of the work and responsibility associated with the trust, it may be divided on some other basis.

Conclusion

If you would like to consider the possibility of a trust as part of your estate plan or business structure, contact us. The lawyers in our estates, trusts and wealth management group would be pleased to talk with you about the opportunities relevant to your circumstances.

Contacts

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