



Control of a Family Trust

The trustee's control of most family trusts is not absolute, because the trustee:

- Usually needs the consent of the appointor before major decisions can be made, eg the distribution of all or part of the capital;
- Can be removed as trustee by the appointor and another, replacement trustee can be appointed.

This means that the choice of the appointor of a family trust is often crucial, eg if the trustee has complete discretion to choose between any of the beneficiaries as to who receives the trust income and (unless it is reserved by the Deed) capital.

Control of a Family Trust – 2nd Generation

A critical estate planning issue for many people is who is to take over the power of appointment if the decision is taken to continue the trust into the 2nd generation as a single trust. Usually, this issue is decided by the terms of the trust Deed, with the terms of a Will only becoming relevant if and to the extent the trust Deed so provides. Where the control is to pass to one person, eg an only child or just one child, this can usually be achieved by a simple nomination or amendment providing for the person to take over control on the death of the current appointor(s).

Where the control is to pass to more than one child, the issue is how that control is to be shared and what deadlock breaking and dispute resolution clauses are to apply.

Probable Need for Review

Frequently, a review of the trust Deed is needed as many existing Deeds do not deal with the issue of 2nd generation control. Care should be taken with the terms of any amendment in the light of the ATO's Statement of Principles on resettlement of a trust and the varying attitudes of different State and Territory Revenue Offices.

Family Trusts – 2nd Generation Options

1. **Sole** Control
2. **Shared** control (adding dispute resolution clause may trigger CGT/duty)
3. **Neutral** control
4. Reduction of **net assets to nil**, eg distribution from asset revaluation reserve
5. **Cloning** or splitting (may trigger CGT/duty)
6. **Winding up** (may trigger CGT/duty)

2nd Generation Control Options

For people with 2 or more children or other beneficiaries that they wish to benefit in the future from a family trust with assets that are likely to be retained past the current generation of control, there are 6 main options for passing that control.

Notwithstanding the triggering of a CGT Event and possibly a dutiable transaction, winding up a trust can prove the most straightforward solution. Cloning or splitting a trust can now trigger a CGT and a dutiable transaction. The other 4 options are:

1. Sole Control

Often the simplest solution, usually accompanied by an adjustment clause in a Will and/or a compensatory superannuation binding death benefit nomination. An amendment to the trust Deed may be needed to facilitate this and the shares in the trustee company would be transferred via the Will as well.

2. Shared Control

Often this option occurs when the current appointors decide to trust the 2nd generation not to behave unethically. Amending the Deed to provide a process for regulating disputes between the 2nd generation, eg via mediation or arbitration, runs the considerable risk of a taxable CGT Event and possibly a dutiable transaction.

3. Neutral Control

The apparent cost of neutrality is often the reason why this option is not taken up. When the neutral administration option is utilised, it is critical that the neutral trustee is given clear guidelines as to how to administer an otherwise discretionary trust.

4. Reduction of Net Trust Assets to Nil

Creating asset revaluation reserves to fund capital distributions reducing the net trust assets to nil enables the size of the Willmaker's net estate assets to be increased. Income tax consequences need to be considered with this option, particularly if the trust has a "distributable surplus" in favour of a company beneficiary.

Family Trust 2nd Generation – Further Reading

**Australian Master Estate
Planning & Succession
Guide – Chapter 28**

**You Can't Take It
With You –
Chapter 10**

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Further Reading

- The 1st edition of the ***Australian Master Estate Planning and Succession Guide*** by Allan Swan is scheduled to be published by **CCH** in 2011.
- The 1st edition of ***You Can't Take It With You*** by Andrew Simpson was published by **Wrightbooks** in 2009.
- The 5th edition of ***Tax Issues in Family Law Property Settlements*** – The Difference Between Hacking and Carving by Peter Szabo was published by **MOORESLEGAL** in 2008.

About the Author of the Pocket Summaries – Allan Swan

In addition to his main role as a principal of the **MOORESLEGAL** estate planning team (working in the areas of **Asset Protection, Trusts, Superannuation, Tax and Estate Planning**) Allan is also the principal of **APTSTEP**, a provider of training and materials. Allan's current presentation topics are:

- Asset Protection Planning
- Blended Families (includes page 2 of this Pocket Summary)
- Business Structures Overview
- Estate Planning – Key Cases and Rulings
- Estate Planning – Practical Case Studies for 2010
- Estate Planning – Tax and Strategic Issues (all)
- Funding Estate Planning
- Ruling from the Grave (all)
- SMSFs – Planning Issues
- Superannuation Death Benefits
- Superannuation Overview
- Testamentary Trusts
- Trusts – Income and Capital Distributions
- Trusts – The A-Z (all).

Contact Allan on 03 9843 2153 for further information regarding on the content of the topics, the fees charged and to schedule a presentation, workshop or seminar.