



Control of an Australian Family Trust – 1st Generation

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 chosen by the appointor has complete discretion to choose between any of the beneficiaries as to who receives the trust income and (usually) capital.

Control of an Australian 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 to behave ethically. 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 Guide –
Chapters 18 & (in the
Premium Edition) 49**

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

The latest version of this Pocket Summary is at
www.mooreslegal.com.au/services/estateplanning/pocketsummaries

Further Reading

- *Australian Master Estate Planning Guide* – Allan Swan, to be published (in both a Standard and Premium Edition) by CCH in 2012.
- *Estate Planning Documents* – Allan Swan, Moores Legal (includes many of the Pocket Summary series).
- *You Can't Take It With You* – Andrew Simpson, Wrightbooks.
- *Tax Issues in Family Law Property Settlements* – Peter Szabo, Moores Legal.

Australia-wide Seminar, Workshop & other Presentations – Allan Swan

EPSTTAP Introductory: • Estate Planning – The A-Z (includes both pages of this Pocket Summary) • Superannuation – The A-Z • Trusts – The A-Z (both).

EPSTTAP Advanced: • Estate Planning – Case Studies • Estate Planning Masterclass (both) • Superannuation – Death Benefits & Binding Nominations • Testamentary Trusts – Drafting the 6 Major Types • Trusts & Deceased Estates – Income & Capital Distributions (both) • AMEPG Chapter Workshops.

Allan's local Moores Legal client, community & discussion group topics are:

- Estate Planning – Protecting & Enhancing Wealth • Estate Planning – Vulnerable Family Members • Family Trusts – Income & Capital Overview • Farm Succession – Avoiding Tax Pitfalls & Anticipating Disputes • Providing an Estate Planning Service for Clients • SMSFs – Instalment Warrants, Pensions & Binding Death Benefit Nominations • Tax & Business Structures Overview • Update – Estate Planning, Superannuation, Trusts, Tax & Asset Protection.

To book Allan for any of these topics, contact Lilian Bruère on 03 9843 2153. All Pocket Summaries are copyright and are for general information purposes only and should not be relied on as (or in substitution for) legal or other professional advice.