www.theengine.biz | admin@theengine.biz | (09) 869-3990

The Power of Trusts in Protecting Your Assets

By Andrew Skinner – Urlich Milne Lawyers

There have been many headlines recently about changes to the trustee tax rate and whether it may signal the end of New Zealand's 'love affair' with trusts. While bringing the trustee tax rate into line with the top personal tax rate may mean some people no longer find them attractive, it is certainly not the end for trusts.

There are many different reasons for forming a trust and they continue to offer asset protection in a way that other legal structures cannot. If you are self-employed, have your own business or are going into business with others you should consider forming a trust. Particularly if you will be signing personal guarantees in the course of doing business or if you have employees.

You should consider forming a trust to protect your personal assets in the event that a claim is brought against you personally. During the course of business, you may face personal claims arising from:

- future creditors if your business fails where you have signed personal guarantees
- health and safety and employment law

What is a trust?

A trust is a legal structure consisting of a relationship between the trustees and the beneficiaries of the trust. The trustees must follow the terms of the trust deed when dealing with trust property and act only for the benefit of the beneficiaries.

The person who initially sets up the trust and transfers assets into it is called the settlor. Business owners commonly transfer their family home into trust, and the trustees will pass a resolution allowing the settlor and their family to continue living there (as beneficiaries of the trust). Other assets that are often transferred are rental properties (commercial and residential) and shares.

How does a trust protect assets?

When you move assets into a trust, the legal ownership of them transfers from you to the trustees. Generally speaking, you no longer own the assets. They are out of your control and therefore out of the reach of potential creditors.

Assets can be transferred outright by gift from the settlor to the trustees. Another method is for the settlor to sell the assets to the trustees. Each situation is unique and the method of transfer will be determined taking into account all of the circumstances.

Obligations of trustees

Trusts are not a set-and-forget creation. Depending on what assets a trust holds, annual accounts should be completed, and trustees must meet at least annually.

Trustees have disclosure duties to both the beneficiaries and the IRD. Compliance obligations have intensified in recent years with the introduction of the Trusts Act 2019 and changes to IRD reporting requirements. However, the increased responsibilities in this area do not outweigh the benefits that a trust offers in terms of shielding your assets from claims brought against you personally.

Timing can be important

It is generally preferable to form a trust sooner rather than later. When setting up a trust, you should be able to pass the solvency test as assets cannot be transferred into a trust with the intention of defeating the rights of a third party, such as a creditor. It is acceptable to transfer assets into a trust if you do not have any liabilities at the time of transfer, or if you hold onto enough assets to meet your potential liability. It is important to discuss the timing with your lawyer and accountant.

Despite the commentary, trusts remain a useful mechanism for protecting your personal assets if you own a business. Talk to your lawyer about whether a trust is right for you.

Andrew Skinner has over 20 years of experience as a commercial lawyer and is a director in the law firm Urlich Milne as well as being Vice Chair of the Frame and Truss Manufacturers Association. Andrew's email address is andrew.skinner@uml.co.nz.

Katee Yukich is an Associate at Urlich Milne and is an experienced trusts specialist. Katee's email address is katee.yukich@uml.co.nz.

Resource supplied by The Engine's provider:

URLICH MILNE
LAWYERS