

A Guide to Trusts





Why use Perpetual Guardian?

- We are an expert trustee company built on more than 130 years of experience in establishing and managing Trusts and planning estates.
- As a trustee company, we exist in perpetuity – we will not go out of business or die, leaving you without a trustee or adviser.
- We will be here when you and your family need us.
- All Perpetual Guardian staff are professionals with extensive experience in their areas of expertise.
- We are independent, and will act objectively and impartially when dealing with family members.
- We will deal with your affairs promptly and efficiently.
- We offer a full range of associated services, including Enduring Powers of Attorney, online storage of your Will and much more.

Trusts come in many shapes and sizes.

They are an invaluable and efficient structure to separate and protect your assets.

We have prepared this guide to give you more information about creating a Trust with Perpetual Guardian. It covers:

- What is a Trust?;
- Why should I establish a Trust?;
- Will a Trust work for me?;
- How do I establish a Trust?;
- What is the role of a trustee?;
- Prudent investment - investing the assets in a Trust;
- Trustee options;
- Trust management;
- How do I distribute the assets in a Trust?, and;
- Other frequently asked questions

It is commonly thought that all 'Family Trusts' take on the same form. This is not true. Perpetual Guardian will structure a Trust Deed to meet your specific needs.

What is a Trust?

A Trust is a legal arrangement where one party (the 'settlor'), transfers assets to another party (the 'trustee'), for the benefit of another party (the 'beneficiary').

There can be more than one person in any of these roles and it is also possible for the same person to be a settlor, trustee and beneficiary. However, you should not be the only trustee and the only beneficiary. If you were, there would not be a Trust at all.

The arrangement that holds this relationship together is called the Trust Deed. The Trust Deed names the trustees and beneficiaries as well

as setting out the rules as to how the Trust will operate. This document is the 'operating manual' for the trustees.

Settlor

The settlor is the person who wants to establish a Trust for the benefit of others. They are also usually the person who settles assets in the Trust.

Trustee

The trustee, (who may be a person, corporate body or a trustee company, such as Perpetual Guardian) becomes the legal owner of the Trust property and administers the Trust for the benefit of the beneficiaries. A trustee cannot benefit from the Trust's assets unless named as a beneficiary.

Beneficiary

The beneficiary is the person, persons or organisation for whom the Trust assets are held and who receives the benefits from the assets. Beneficiaries are commonly family members, charitable organisations or even friends.

Assets

Any assets you can own as an individual can be transferred to a Trust, and you can transfer more assets later if you wish. Even though assets are owned by the trustees, the beneficiaries can receive benefits from them. For instance, a house can be owned by the Trust with the beneficiary having full use and enjoyment of it.

The flexibility of a well drafted Trust Deed provides the trustees with a wide discretion as to who, how and when the beneficiaries of the Trust can benefit from the assets you have placed in the Trust. The trustees are able to provide benefits to any of the named discretionary beneficiaries in the Trust, however, none of those beneficiaries will have a legal entitlement, but have the right to be considered. It is this change in beneficial ownership of the assets settled with the trustees which provides protection of your current assets.



Important

A Trust is a legal arrangement and it is essential that your Trust is set up correctly. Please make sure you understand what you are getting into.

Why should I have a Trust?

The main purpose for establishing a Trust is to separate assets from your ownership to ensure they are protected for the intended beneficiaries. Here are the main reasons for establishing a Trust:

- To protect your personal lifestyle assets from the risks of business. The use of a Trust ensures your family doesn't suffer the loss of the family home and other personal assets not associated with a business should your business venture fail. The transfer of assets must be fully completed before the first signs of any creditor action or business failure is evident.
- To ensure your assets transfer to your children, without challenge, and without being attacked if their relationship with their partner breaks down in the future.
- To provide for dependants such as children or grandchildren - for their education, if they have disabilities or an inability to manage money.
- To ensure continuity of family ownership. Many New Zealand families have owned businesses or farms for several generations and want to keep these assets in the family. Transferring assets to individuals may result in the loss of the assets through relationship breakdown in the future.
- To protect separate property within



- a marriage or a *de facto* relationship.
- To provide for unequal sharing of your assets on your death. For example, different amounts for specific children of a prior marriage or a child with limited money management skills.
- To provide long-term support for a charity.

A Trust should not be established just to avoid tax. A Trust established for this purpose can be declared void under anti-avoidance provisions of the Income Tax Act. However, it is sometimes possible to set up a Trust in a way which minimises tax liability.

Will a Trust work for me?

Before settling assets into a Trust, it is important that you are fully aware of what is involved and how this will impact on you and your future enjoyment of the assets. Setting up a Trust requires some time and careful planning. The success of your

Trust will largely depend on how well it has been designed to meet your needs. The planning process will take into account factors such as the ages and health of the settlor(s) and beneficiaries, as well as the type and value of the assets intended for the Trust. Like all good things, there is a cost to asset protection and you need to understand the trade-offs. This is a personal decision and before making it, you need to be aware that:

- Once the assets have been settled into the Trust they no longer belong to you personally, but to the trustees who hold the assets on behalf of the beneficiaries named by you. Remember that you can be named as a primary beneficiary and as such the trustees can provide a beneficial interest to you; and,
- There are formalities the trustees must observe, particularly when dealing with the Trust assets or distributing income or capital to the discretionary beneficiaries.

You may consider this is a small price to pay compared to the benefits and peace-of-mind a Trust would bring you.

How to establish a Trust

First, you must decide:-

- Why you need a Trust;
- What property will go into the Trust;
- Who will benefit from the Trust;
- Who the trustees will be;
- The terms of the Trust; and,
- A name for the Trust.

Following a thorough analysis of your needs which captures this information, we will prepare a Trust Deed which is signed by the trustees and settlors. The Trust Deed will define the trustees and the beneficiaries, the duration of the Trust (normally 80 years with the power to distribute the Trust assets earlier at the trustees' sole discretion, if it is in the best interest of the beneficiaries), and will contain various specific powers relating to the management of the Trust assets. An initial gift (usually \$100) is required to make the Trust operative.

The assets to be placed into the Trust are then transferred to the trustee. The assets must be 'sold' to the Trust at market value, and the trustee will usually sign an acknowledgment of debt to the settlor.

It is important the transfer of assets to the Trust be documented to give an accurate record of the transactions. Settlers should also be aware of the importance, as a step towards total asset protection, of the need to forgive (by gift) any debt owed back to them

by the trustees which is equal to the value of assets you have settled into the Trust. Failure to do this in a timely manner will mean you have exchanged one type of asset for another, and there will be only limited asset protection in place. Gifting is therefore an important consideration.

The role of a trustee

The role of a trustee is to hold and manage the assets according to the Trust Deed for the benefit of the beneficiaries.

The trustee must, by law, act in a prudent and professional manner in the best interests of the beneficiaries.

If the assets are in a Trust but continue to be controlled by you (the settlor), there is a risk the Trust will be declared a sham and the assets will still be regarded as your possessions. To avoid this risk, it is important to appoint an independent trustee, such as Perpetual Guardian.

Trustee decisions

To perform their duties, a trustee must act in a completely independent way. They cannot be controlled or influenced by any other party in coming to a decision. All decisions must be made in the best interests of the beneficiaries.

A trustee cannot benefit from a Trust except as permitted by law or by the Trust Deed. Whenever trustees make a decision, they must make an honest decision as to what is in the best interests of both the Trust and beneficiaries, not what is in their own

best interests. Trustees are failing in their duty if they merely rubber stamp the decision of others.

Some of the major decisions made by a trustee relate to investments (see 'Prudent Investment' below) and the exercise of discretions. Discretions are things trustees can do, rather than must do. For example a Trust Deed will give the trustee the ability to distribute any net income between a range of discretionary beneficiaries and they may do so in such proportions as they see fit without having to distribute the income equally between all beneficiaries. Discretions must be exercised in good faith.

A trustee must be able to show they have considered all their obligations to all the beneficiaries in reaching any decision. As such, a trustee should follow a decision-making process such as that made by Perpetual Guardian.



Prudent Investment Of The Trust Assets

Trust assets must be managed prudently.

A trustee is required by law to exercise the same care, diligence and skill when investing Trust assets that a prudent person would exercise in managing the affairs of others.

Perpetual Guardian has developed investment policies and procedures which meet your requirements and provide the foundation to meet the objectives in establishing a Trust.

Trustee Options

Both corporate and private trustees have their own unique advantages. Appointing a corporate trustee like Perpetual Guardian will offer you:

Permanence

We have a distinct advantage over private trustees as we are able to administer the Trust for as long as it exists. The choice of individuals as trustees can create difficulties, for example if they are away when



documentation needs to be signed, if they become incapacitated or die. Remember, a Trust can be around for 80 years or in the case of charitable Trusts, in perpetuity.

Impartiality

Perpetual Guardian will deal fairly with all beneficiaries. By appointing an individual, such as a trusted adviser, friend or family member as co-trustee or advisory trustee, you can also ensure advice can be provided to the trustee before any decision is made by them.

Skilled administration

Perpetual Guardian has professionally qualified staff to provide the range of skills needed for all aspects of Trust administration, including:

- Investment review, advice and management;
- Preparation of annual accounts and tax returns; and,
- Compliance with all aspects of trustee law.

Flexibility

Perpetual Guardian can create a Trust for you with the range of discretionary powers appropriate for your Trust, giving it the flexibility to adapt to changing circumstances. It is possible, for instance, for the Trust Deed to permit transfer of the Trust assets (or partial transfer of the assets) to another Trust in the future, if circumstances require.

Estate planning

Perpetual Guardian can help you with your estate planning requirements and advise you how best to ensure

Important

Trustees must keep proper records. We recommend keeping records of an annual meeting of trustees. Any decisions such as selling or buying assets should also be approved in advance by written resolution.

the smooth transfer of your assets to the appropriate beneficiaries. It is important that your instructions regarding the treatment of assets in your Will do not conflict with the objectives of your Trust.

Experience

Perpetual Guardian is firmly established in New Zealand, with origins dating back over 130 years. We are specialists in all aspects of Trust creation and management.

Trust Management Options

When it comes to creating your Trust, we know it's not a case of one size fits all. Whether you choose to appoint a corporate trustee, private trustee(s), or take up the appointment of trustee yourself, we can offer you a range of options for consideration. This means you can choose the level of involvement which best suits you, ensures your Trust meets all legal obligations and that the Trust will meet your objectives.

Flexi Trust™ Service

This service is specifically designed for clients who wish to remain in full control of their Trust and take up appointment as a private trustee. Flexi Trust™ can provide all the set-up

arrangements and documentation necessary to get your Trust going and then you can select, on a 'pick 'n mix' basis, which ongoing administration and management services you want Perpetual Guardian to help you with. We offer private trustees a range of support including transferring assets to the Trust, managing and recording trustee meetings, trustee investment advice and management, taxation and accounting requirements.

Trust Monitoring Service

The Trust Monitoring Service offers a package of the regular and essential Trust management and administration services. So while you retain your role as trustee of your Trust, Perpetual Guardian will ensure your ongoing duties and responsibilities as trustee are effective and meet best professional standards. In doing so, you can ensure your Trust will withstand scrutiny so as not to be considered a sham and your personal risk as trustee is minimised.

Full Trustee Services

Perpetual Guardian is appointed trustee and takes on the full administrative and management responsibilities as a professional trustee. We provide a comprehensive trustee service as the appointed trustee or co-trustee for our clients. As your professional trustee, with full fiduciary responsibility, we will prudently manage and administer all aspects of your Trust.

By appointing Perpetual Guardian, you can be assured we will apply the highest professional standard

in preserving the Trust assets and carrying out the terms of the Trust.

When you meet with one of our experts they can talk through the various options to allow you to select the level of service most appropriate for your situation.

Distributing the assets in a Trust

A trustee will, over the life of a Trust, be involved in decisions regarding distributions from the Trust. In making these decisions, there is a strict distinction between income and capital.

Income

A trustee must decide whether to retain or distribute income, and if so, when, to whom and in what shares.

Capital

There are two common scenarios:

- During the life of the Trust - the

trustee may distribute capital for the maintenance, education, advancement or benefit of any discretionary beneficiary. The trustee must decide how much, if anything, each beneficiary will receive; and/or

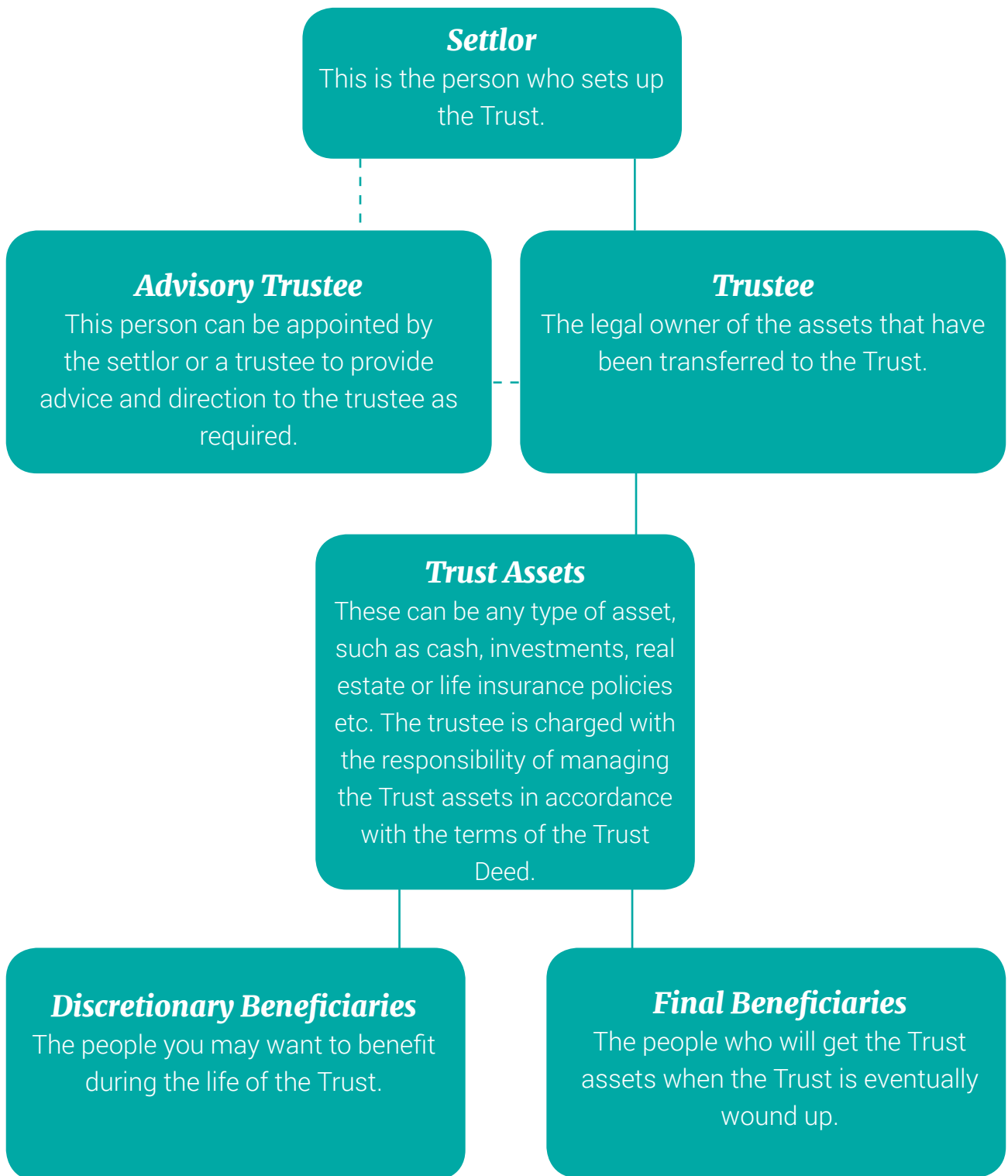
- On the distribution date - the remaining Trust funds are distributed to the final beneficiaries in accordance with the provisions of the Trust Deed.

Seek advice

When assets from a Trust are distributed it is important that the beneficiaries' interests are protected. From safeguarding assets to investment solutions, talk to one of our experts to create a tailored plan for you.



Basic Structure of a Trust



Frequently Asked Questions

As settlor, what control do I have?

There is a difference between owning assets personally and the assets being owned by trustees for the beneficiaries. To secure the benefits of your Trust - asset protection - it cannot be set-up or managed in such a way as to be seen as merely an extension of you. We will work with you to prepare a Trust Deed that will give you enough powers to make sure your Trust can be managed so that both your reasons for establishing the Trust and your future wishes are properly secured.

These powers may include the ability to:

- Add and remove beneficiaries;
- Specify who are to be the final beneficiaries and to change this during your lifetime or in your Will;
- Appoint and remove trustees; and,
- Say who will be able to appoint and remove trustees after your death, if you think this is necessary.

Along with your Trust Deed, we will also prepare a letter of wishes. This enables you to tell the trustees why the Trust was set up and what you would like them to do, for example, what you would expect to happen after your death. You can change your letter of wishes at any time.

What assets should I put in my Trust?

Generally assets that you want to protect from potential claims, or keep

for your children and grandchildren, are best suited for a Trust. Trusts are designed to provide long-term benefits rather than a short-term solution to an immediate problem. Assets that you intend to retain over the longer-term and you anticipate will grow in value are ideally suited to being placed in a Trust.

What if there is a mortgage on my home?

Your mortgage will have a clause saying you must advise the mortgagee (lender) if there is any change of ownership. If you wish to put a mortgaged house into a Trust, we will contact the lender to advise this is happening. Most lenders require the mortgage be replaced by a new set of documents. Banks charge a fee for this and their fee is in addition to our charges for re-documenting the mortgage. This is usually completed some weeks after the initial deeds have been signed. Once the sale document is signed, the property belongs to the Trust.

If you are transferring a property to a Trust and there is a mortgage, there are two possible ways of structuring this:

Option A

Transfer of the home as well as the mortgage so that the Trust becomes the borrower (the bank will probably insist that you personally sign as guarantor as well). If you select this option then some extra work will be required to keep track of the loan and principal payments in the Trust's annual accounting statements.

This option is especially appropriate if you are transferring a rental property to a Trust and want to ensure the mortgage interest can be deducted from the Trust income; or

Option B

Retain the borrowing in your own name so the Trust owns the property. In this case, the bank will usually want the trustees to be guarantors so that there can still be a mortgage over the property title. The advantage with this option is you can repay any of the principal of the mortgage as often as you want (within the bank's parameters) without the trustees needing to take account of these payments, and the property simply needs to be shown on the Trust accounts at its full value without any reference to the mortgage. If your mortgage borrowing includes borrowing for personal purposes, for your business or as a revolving credit contract, then Option B is usually more appropriate. This is something our experts can discuss in more detail with you to ensure the most efficient option is chosen.

Are there restrictions on Trust investments?

There are laws about how trustees may invest. The current rules were introduced in 1988 and are often referred to as the 'prudent person' rules. There are a number of factors for trustees to take into account, including 'the desirability of diversifying Trust investments.' In practice, when people put their home into a Trust, they do not expect the trustees to sell the property and invest

in a diversified portfolio. Fortunately, the law does allow you to say the 'prudent person' rules are not to apply to your Trust.

We usually include such a clause in every Trust Deed unless specifically asked not to do so. Many older Trust Deeds and even some recent ones do not have this clause.

What happens if I want to sell my home?

If you transfer your home to the Trust, you need to remember that your home will be an asset of your Trust. It is the trustees who can sell the property and purchase a replacement - this is an area where a lot of Trusts fall down because the settlors forget to treat the Trust as genuine. If the settlors sell the property themselves, they are really advertising to the world that the Trust is being managed as a sham. Before any assets are bought or sold, it is important that you check with us about the right way to proceed. Our experts will work with you and your lawyers to ensure efficient handling of the process.

How do I transfer assets to a Trust?

Dependent on your personal circumstances, Perpetual Guardian will advise on the most appropriate method of transferring your assets to the Trust. With the abolition of Gift Duty, it is now possible to gift your personal assets to the Trust without incurring gift duty. Accordingly, you can either directly gift the asset, the entire value of the asset via a Deed of Gift or use the traditional method

of selling the assets to the Trust with a gifting programme to gradually reduce the debt. If it is decided a gift of the entire value of the assets is appropriate, we suggest a solvency statement is completed by you to confirm that after the gift to the Trust, you will be able to meet all of your current and anticipated debts as they fall due. We will prepare these documents as part of the Trust establishment process.

It is crucial you understand the choices available to you and the implications of those choices, both in the short term but also in the later stages of your life. A decision to divest yourself of assets may not prove to be a sound plan in the long run. Before gifting assets to a Trust you should talk to your Perpetual Guardian adviser about the implications of doing this.

What will a Trust cost?

Once you have decided to go ahead with a Trust, we will prepare a personalised Trust plan for you. This will outline what has been discussed with you, what we will do to implement the plan and an estimate of the costs

involved. On acceptance of the plan we will ask you to sign a terms of engagement after which we will be able to prepare all the documents required to enable you to create your Trust.

Does a Trust need to be registered?

Other than for charitable Trusts, there is no register of Trusts in New Zealand. Trusts are quite different to companies in this respect. Everything is done in the names of the trustees. For example, land titles must be in the names of the trustees with no mention of the Trust at all. If the Trust receives income, the trustees must file a tax return and the Trust will have its own IRD number.

For identification purposes, we recommend you give the Trust a name. It is best to choose something distinctive that will avoid confusion with other Trusts.

Can a Trust be overturned?

Unfortunately, it is not enough to sign a piece of paper with 'Trust' at the top of the page and then to carry on as if nothing has changed. In recent years the Courts have been quite active in striking down Trusts where these were considered to be a sham.

A Trust is a sham if you started off with no intention of treating it as a genuine Trust. Or it may be that you started off with a genuine intention but over time you forgot to run things properly and started to treat the assets as if they were still yours. Either way you may find you have gone to



all the trouble and expense to set up a Trust, but because of the way you have acted, it is as though you never set up a Trust.

There are a few things you could do to help avoid this risk:

- Ensure trustees' decisions are recorded in a trustees' minute book or by way of written resolution;
- Where there is more than one trustee, all of the trustees must be involved in all of the decisions and actions by the Trust;
- Ensure the trustees meet at least once a year to review the investments and assets of the Trust; and,
- Maintain proper annual accounts and (if required) file tax returns.

Perpetual Guardian can assist you with all of this.

Can a Trust protect my children's inheritance?

Trusts are an excellent structure to protect your children's inheritance. If any of your children have their own Trust, depending on the beneficiaries, it may be a good idea for your Trust to pass your children's inheritance to their Trust rather than to them directly.

You also need to be aware of the provisions of the Property (Relationships) Act 1976. This is outlined in the next section. If, for instance, one of your children receives money from your estate or from your Trust and this money is put towards their home or repayment of mortgage then that gift may be open to claims by a future spouse or partner.



On the other hand, if the money is still Trust money, it can be lent to them to assist them with the house and property purchase, this way the money is most unlikely to be subject to a relationship property claim.

What is the Property (Relationships) Act?

This Act is mainly about how the property of married, civil union and *de facto* couples is to be divided up if they separate or one of them dies.

Qualifying Relationships and Property Sharing

Over the years there have been significant changes to the way in which the property of married, civil union and *de facto* couples is divided following separation or the death of a partner. As a general rule all such couples (including same-sex couples) are treated the same although there are exceptions in some circumstances. For *de facto*

relationships, the test as to whether or not partners are living together as a couple can be wide, and is not limited to living in the same household.

In general terms, the presumption in the Act is that 'relationship property' will be shared 50/50 when a couple separate if:

- They have been married for three years or more. If they lived in a *de facto* relationship together before they were married, the period of that *de facto* relationship is counted as if it were part of the marriage; or
- They have been 'living together as a couple' for three years or more.

The Court also has discretion under the Act to apply the 50/50 property sharing regime to relationships of less than three years, provided they are satisfied that certain conditions apply. Examples are where there is a child of a *de facto* relationship (and this includes natural, adopted and

stepchildren) or the Court is satisfied that failure to apply the 50/50 sharing regime would result in a serious injustice.

Relationship Property and Separate Property

The Act contains definitions of what is 'relationship property' and what is 'separate property'. Broadly speaking, separate property includes gifts made to you, inheritances received by you, property owned by you prior to a relationship and property which you have agreed with your partner will be separate property using an agreement contracting out of the terms of the Act (see below). The Act also specifies how separate property can become relationship property.

You can contract out of the terms of the Act and agree that relationship property will be shared other than 50/50, but to do this you must:

- Be married, in a civil union or

contemplating marriage or civil union; or,

- Be aware that you are in a *de facto* relationship within the meaning of the Act; and,
- After receiving separate legal advice, be in agreement as to the respective property rights each spouse or partner will have in the event of a relationship breakdown.

Trusts Under The Act

The Act contains specific provisions relating to Trusts. In general terms:

- If you transfer 'relationship property' to a Trust, and this transfer has the effect of defeating your partner's rights under the Act in respect of that property, the Court has several tools available to compensate your partner from your separate property and to vary the terms of your Trust.
- Transfer of 'separate property' to a Trust is likely to be more effective in terms of the Act. In fact, provided your Trust is established and

run prudently and professionally, settling separate property into a Trust should assist in ensuring that separate property is not intermingled with relationship property, thus making it susceptible to becoming relationship property.

- Special attention is given to the family home. Where a family home is not owned by either partner (for example, it is owned by a Trust), even if the home was separate property in the first place, the Court has wide powers to compensate the partner who may 'miss out' as a result of the family home being owned by that third party. But, the relevant section in the Act only allows the Court to look to other relationship property to compensate for the absence of a family home. If the home was separate property in the first place, it is likely that the structure of the Trust will not be upset.
- If you are both the settlor and a beneficiary of a Trust, and you receive distributions from that Trust as a beneficiary, these distributions will be relationship property, if the Trust assets were originally settled from relationship property.

Summary

- Transfer of 'relationship property' to a Trust to protect it in the event of that relationship breaking down is likely to be ineffective.
- Transfer of 'separate property' to a Trust to protect it in the event of your relationship breaking down is likely to be effective.
- If you and your partner wish to agree on your respective property



rights now, after receiving independent legal advice, you can enter into a binding agreement specifying that certain property, or a share of certain property (and this can include what may otherwise be relationship property) will be the separate property of one or other partner. You will then be free to do as you wish with your separate property, including transferring it to a Trust as set out above.

- Property which your children may receive from your Trust should be separate property in the context of their own relationships. This means that it will not be available for division with their partner if their relationship breaks down. That is, provided they are careful not to intermingle it with relationship property, and therefore invoke the terms of the Act which convert 'separate property' to 'relationship property'.

How does a Trust affect the Residential Care Subsidy?

There is a limit to the assets you may retain and still qualify for state-paid residential care. As from July 2014, these limits are:

- If you are single or widowed, your exemption is \$218,423.
- If a couple both need care, the total exemption is \$218,423.
- If you are a couple but only one of you needs care, the exemption is \$119,614 not including the value of your house and car or you can choose a threshold of \$218,423 which includes the value of your house and car.



These exemption thresholds for all groups are currently adjusted each year.

Despite abolition of Gift Duty, under the present rules there is a clawback of any gifting in excess of \$6,000 in each of the five years prior to application for a residential care subsidy and also for any gifting in excess of \$27,000 per couple/ applicant in any of the previous five years. 'Clawback' means that the gifted amounts will continue to be included in your assets. We do not advise setting up a Trust just for residential care subsidy purposes. There are other more important reasons for setting up a Trust.

What happens if I move overseas?

Trusts are not as prevalent in other countries as they are in New Zealand and you cannot simply pick up your Trust and take it with you. You will need to obtain specific tax and legal advice about the country you are going to.

We can assist you in obtaining the right information and making the decision as to whether it is worth your while continuing with the Trust or winding it up.

Important Note

These notes can only provide a general guide to the legal and practical issues relating to Trusts and cannot be treated as a substitute for specific advice about individual circumstances.

Perpetual Guardian does not accept any liability for loss arising as a consequence of anyone acting in reliance on these notes alone without individual advice. Equally, liability will not be accepted where individual or specific advice was given but all relevant details were not supplied to Perpetual Guardian.

Perpetual Guardian is a trading name of Perpetual Trust Limited.

*Our experts are
able to meet
your goals in an
ever-changing
world.*

Let us establish a Trust
which best suits you and
your needs. Take care of
things today.

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