



# Trusts

## Your Risks (and ours) as a Trustee

*Both the Courts and the IRD are paying more attention to Trusts and are showing an increasing trend to set aside the trust and attack the trustees where proper records have not been kept.*

### Your Risks as a Trustee are:

1. You have unlimited liability to the IRD in respect of any income tax owing by the Trust.
2. You have unlimited liability to the IRD in respect of any GST owing by the Trust.

In both the above cases the normal rule, that a trustee's liability is limited to the assets of the Trust, **does not** apply. Increasingly, we are seeing the IRD seeking to recover unpaid income tax and GST from the Trustees.

3. The Trust does not keep proper records.

The most common failings in this regard are:

- a) the Trust not having its own bank account (it does not need one if it does not receive any income, e.g., its only asset is the family home);
- b) using the Trust bank account as a personal bank account;
- c) having the Trust own depreciating personal assets such as cars and boats and not charging a lease for their use;
- d) not having expenditure approved by the trustees;
- e) not having at least one formal meeting a year.

Not keeping proper records increases the risk the Trust will be overturned as a sham.

### Can You Limit Your Liability as a Trustee?

The use of a trustee company may help. The use of trustee companies to protect individuals from unlimited liability to the IRD has not, to our knowledge, been tested. Given the IRD have a real issue with Trusts we suspect that one day it will be.

### Is It Worth Leaving Assets in a Trust?

While the recent budget has introduced changes that have removed most of the current tax, and "social welfare" benefits previously enjoyed by trusts, we consider that trusts are still of value.

- Tax rates have a habit of changing.
- Trusts are flexible in regard to distribution of income. Income can be distributed that should ensure minimal tax impact.
- Trusts remain effective for asset protection from unsecured creditors (other than IRD?).
- Assets held in trust are not exposed to date of death tax adjustments that can be expensive to an estate.
- Trusts remain a good vehicle for controlled transfer of assets to the next generation.

### Our Involvement in Trusts

The recent Court decisions and changing tax law has prompted us to rethink our involvement in trusts. We are no longer accepting trusteeships either personally (by Director) or through our trustee companies. Further, we wish to work towards withdrawing from existing trusteeships.

We realise this is a long process which we will be addressing with our trust clients over the next twelve months.

Modern trusts often do not have an independent trustee. Legal opinion does vary on this so you should seek advice from your solicitor on this matter. It is certainly easier to administer a trust without an independent trustee.

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