



## **Introduction to trusts for private bankers**

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# Introduction

- This material is not for specialist trust lawyers
- This material is an introduction to trusts for private bankers and other investment professionals for whom trusts are relevant in your professional lives
- Trust law:
  - » is based upon a combination of legislation and case law and
  - » differs in its detail in each jurisdiction, but has common principles

# What is a trust? – 1/2

- A trust exists where a person (known as a trustee) holds legal title to property not for his own benefit but:
  - » for the benefit of any person (known as a beneficiary) and/or
  - » for the attainment of any purpose
  
- A trustee must in the exercise of his powers and discretions:
  - » act:
    - with due diligence
    - as would a prudent person
    - to the best of his ability and skill and
  - » observe the utmost good faith

## What is a trust? – 2/2

- A trustee must administer the trust in accordance with its terms (subject to compliance with mandatory law)
- A trustee must always act in the interests of the beneficiaries or achieving the purposes
- A trust is not a legal entity
- A trust is not a contractual arrangement

# Parties to a trust – 1/2

- The settlor:
  - » Establishes the trust
  - » Transfers assets to the trustee to be held on trust
  - » Ceases to own the assets after transfer
  - » May be a beneficiary of the trust
  - » May be a co-trustee of the trust and
  - » May retain some control over the trust
  
- The trustee:
  - » Holds legal title to the trust assets
  - » Must hold the assets in accordance with the law and the terms of the trust for the benefit of the beneficiaries and/or the purpose of the trust
  - » Is responsible for administration of the trust and
  - » Has certain minimum obligations

## Parties to a trust – 2/2

- The beneficiaries:
  - » Have beneficial interest in the trust assets (or at least a right to be considered for benefit in a discretionary trust)
  - » Have a right to enforce the terms of the trust in event of breach of trust by the trustee and
  - » Their interest in the trust is personal property
  
- The protector:
  - » Is not mandatory
  - » Is appointed to protect the interests of the beneficiaries and
  - » Is not a trustee

# Basic requirements

- For a trust to be valid it requires three factors to be sufficiently clear and certain:
  - » Certainty of intention to create the trust
  - » Certainty of objects. It must be possible to ascertain the beneficiaries/purpose. For example, a trust for “my tall friends” would be uncertain and so invalid and
  - » Certainty of subject. It must be possible to ascertain the trust property
  
- There must be a trustee and beneficiaries
  
- Assets must be transferred to the trustee
  
- A trust generally need not be in writing (but there are some exceptions to this and it is normal for a trust to be in writing)

# Types of trusts

- Trusts are very flexible and there are many different types. Some examples are:
  - » Unit trusts
  - » Discretionary trusts
  - » Fixed interest/life interest trusts
  - » Purpose trusts
  - » Charitable trusts
  - » Reserved powers trusts
  - » BVI VISTA trusts
  - » Cayman STAR trusts



# Myths and misconceptions about trusts – 1/5

- The settlor has no control over the trust assets
  - » No
  - » Just because the settlor transfers the assets to the trustee does not mean that the settlor can no longer have any involvement or control over those assets
  - » There are numerous ways that settlor can retain some control. These include:
    - Reserved powers trust - the settlor reserves to himself (or a third party he trusts) power to make decisions on certain issues (e.g. investment of the trust assets)
    - BVI VISTA trust - the trust assets are held in a BVI company. The BVI company is owned by the trustee, but is managed and controlled by its directors (who can include the settlor or any other person)
    - Protector provisions - the terms of the trust can provide that certain trustee decisions (e.g. investment of the trust assets) require consent of the protector (who can be the settlor or any other person)
  - » However, must ensure that retention of control does not invalidate trust or cause other issues

## Myths and misconceptions about trusts – 2/5

- The trust can not be changed in the future
  - » No
  - » The trust deed can be amended in any way, at any time and as many times as permitted by the terms of the trust deed
  - » The trust can be revoked and the assets returned to the settlor if permitted by the terms of the trust deed

## Myths and misconceptions about trusts – 3/5

- The trustee could use the trust assets for its own benefit
  - » Not legally
  - » The trustee must act in accordance with:
    - trust law
    - the trust deed
    - the best interests of the beneficiaries
  - » The trustee can not act for its own benefit
  - » Professional trustees in many countries are regulated (e.g. BVI, Cayman, Guernsey, Jersey)
  - » The beneficiaries have legal rights if the trustee breaches its duties - they can go to court to get a remedy

# Myths and misconceptions about trusts – 4/5

- The trustee could act contrary to the terms of the trust deed
  - » Not legally
  - » The trustee must act in accordance with:
    - trust law
    - the trust deed
    - the best interests of the beneficiaries
  - » The trustee can not act for its own benefit
  - » Professional trustees in many countries are regulated (e.g. BVI, Cayman, Guernsey, Jersey)
  - » The beneficiaries have legal rights if the trustee breaches its duties - they can go to court to get remedy

## Myths and misconceptions about trusts – 5/5

- A trust is just like a bank account
  - » No
  - » A trust can be used to hold assets like a bank account, but is not a bank account
  - » The parties to a trust (the trustee, settlor and beneficiaries, etc) must comply with the terms of the trust and with trust law when dealing with the trust assets

# Uses of trusts as part of wealth management – 1/2

- Trusts are extremely flexible and can be used in a wide range of ways to assist clients as part of wealth management
- Asset holding - Trusts can be used as a vehicle to simply hold assets
- Tax efficiency - Depending on the particular country where the settlor and the beneficiaries are resident and the law governing the trust, trusts can potentially be used to reduce taxes. Sometimes by changing the nature of the asset owned or the funds earned. Sometimes by dividing or re-directing income. Sometimes by deferring recognition of income or gains
- Creditor protection - Trusts can be used to hold assets outside the ownership of the settlor and potentially beyond the reach of the settlor's creditors

## Uses of trusts as part of wealth management – 2/2

- Succession planning - Trusts can be used as a mechanism to transfer assets to family members in a more effective way than by will or by gift. Trusts can allow the transfer to occur gradually and/or at the time which is most appropriate for the family members involved
- Avoiding asset fragmentation - Trusts can be used to hold assets and many different family members can benefit from those assets without dividing the assets and distributing them between different family members. For example, a trust can retain a majority holding in a family company and many family members can be beneficiaries of the trust and thereby benefit from the earnings arising from the holding while avoiding fragmenting ownership between the family members and losing the majority control of the family company

# How to talk to clients about trusts

- No client wants a trust - but they do want the things that a trust can achieve
- Ask your client questions - find out more about your client and their needs
- Is your client concerned about:
  - » Succession planning - possibly a trust to hold assets until his children reach a certain age or achieve a certain milestone
  - » Creditor protection - possibly a trust to hold certain key assets (e.g. the family home and a "rainy day" fund) in case of creditor claims
  - » Probate - holding shares in an offshore company would require offshore probate on your client's death. If the shares were held in a simple trust, no probate would be required - saving many months and many thousands of dollars in fees



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