CONTROL OF TRUSTS

Grindal Legal

Do Trusts Form Part of your Estate?

A fundamental feature of a trust is that the assets are not owned by you personally and therefore do not form part of your estate when you pass away. Real property or shares that you may own in a trust structure is not owned by you personally and cannot be distributed in accordance with your Will. The assets of the trust are owned by the trustee and the trustee has the discretion to decide who shall benefit from those assets in accordance with the terms of the trust deed.

Succession of Control

Whilst the trust assets sit outside of your estate, you can deal with the control of the trust via your will. Two crucial issues to consider when you have trust structures in place is who is going to be the appointor and trustee of the trust on your death (if you held these positions of control before your death).

- **Appointor:** Has the power to appoint and remove the trustee. Not all trust deeds have an appointor - it depends on the terms of the trust deed.

- **Trustee:** Takes legal ownership of assets held by the trust and administers the trust to the beneficiaries. The trustee owes a duty to the beneficiaries and must always act in their best interests.

Should the wrong person gain control of the trust there is a risk they may take advantage of the trust assets to the exclusion of your intended beneficiaries. Who will be the appointor and trustee of the trust on your death depends on the terms of the trust deed. It is, therefore, critical that when you are discussing your estate plan, that you provide copies of your trust deeds and company constitutions to your lawyer.

Things to Consider

It is important that your estate plan effectively deals with control of the trust on your death to ensure that it complies with your wishes and does not fall into the wrong hands. To deal with the succession of control of the trust, it is important to consider the succession of the trustee and the appointor. Control of these roles can be dealt with in your will or a variation to the trust deed. You can nominate who you would like to hold the shares that you own in any trustee company that may act as the trustee of your trust and to replace you in the role of appointor of the trust.

Where the estate involves trusts that are to continue into the future, the will maker commonly appoints their executors as the trustee, appointor and to hold any shares that they may own in a trustee company. If, however, there is a trust that carries out the will maker's business, it may be appropriate to appoint separate trustees and appointors with the necessary skills and knowledge of the business and the business's assets. Who you decide to appoint in these roles of control depends on your unique circumstances and should be tailored to your succession wishes.