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What are the advantages of a Trust?

Trusts are an important tax planning tool but they also have other uses that are of equal, if not greater, importance. A properly drafted and managed trust can confer advantages under any or all of the following heads:

Asset Protection

Trusts can be one of the most effective ways of protecting assets. In simple terms, assets transferred to a trust no longer form part of the Settlor's property, so the trust assets cannot be seized if a Settlor gets into financial difficulties. This is an oversimplification of the law. Under certain circumstances, the transfer into trust may be set aside and a court may order the trust assets to be transferred back to the Settlor.

The rules of many onshore jurisdictions make this possible if a creditor of the Settlor, who cannot otherwise get paid, can show that the Settlor transferred assets into trust with the intention of avoiding a current or future liability, or if the liability owed to the creditor arose within a certain statutory period after the transfer into trust. For these reasons it has not been possible to be certain that assets transferred into trust are completely safe from creditor attack.

To overcome this problem many offshore jurisdictions amended their trust or bankruptcy laws to create what is now commonly referred to as the "Asset Protection Trust" (APT). This legislation gives protection to assets transferred into the trust structure from all forms of creditor attack, provided the Settlor can show that he was solvent at the time of the transfer and did not become insolvent as a result of that transfer. By choosing an offshore jurisdiction which has enacted APT legislation it is possible to gain a degree of additional asset protection over and above that inherent in a normal trust structure.

Tax Planning
Assets transferred into trust are no longer considered as belonging to the Settlor, so the income and capital gains generated by those assets are taxed according to the rules governing the legal owner – the Trustee. Inheritance tax would be eliminated because the Trustee would continue in existence despite the death of the Settlor. Anti-avoidance legislation in the home country of the Settlor, or in the location of the trust assets, may seek to counteract this outcome but a correctly structured and administered trust should produce substantial tax savings.

Confidentiality
Proving a will is a public procedure. The tax authorities will need to receive a complete list of all the property owned by the deceased in order to assess the amount of estate duty payable before the property can be transferred to the executors who may then distribute to the legal heirs according to the will. This procedure is entirely unsuitable for those who wish to keep details of their assets confidential. The only other legal form of transfer is via a trust and this would generally save estate duty and keep the trust assets confidential.

Avoiding Forced Heirship
Many continental European countries, civil law jurisdictions and countries of Islamic tradition have “forced heirship” provisions, which prevent the deceased from leaving his property to whomever he wishes. Typically one-third of the estate must be left to children, one-third to the spouse and the other third is the free estate that may be left to anyone else. If that course of action doesn’t appeal, a trust will frequently be the answer because it will allow a wider or different distribution of the estate.

Estate Planning
Many people do not want their assets to pass outright to their heirs, whether chosen by them or as prescribed by law, and prefer to make more complex arrangements. These might involve providing a source of income, but not capital, for a spouse for life, making provision for the education of children but not letting them have access to capital until later in life, or providing a fund to protect members of the family in the event of sudden illness or other calamities. A trust is probably the most satisfactory and flexible way of making arrangements of this kind.

Protecting the Weak
A trust provides a vehicle by which a person can provide for those who

may be unable to manage their own affairs such as infant children, the aged, the disabled or persons suffering from illness.

Preserving Family Assets

Preserving the family assets, or increasing them, is often a motive for setting up a trust. An individual may wish to ensure that wealth accumulated over a lifetime is not divided up amongst the heirs, but is retained as one fund to accumulate further, with provision for payments to members of the family as the need arises while preserving some assets for later generations. This can be achieved through a trust.

Continuing a Family Business

An entrepreneur who has built up a business will often be concerned to ensure that it continues after their death. If the shares in the company are transferred to Trustees prior to death, a trust can be used to prevent the unnecessary liquidation of a family company and to ensure that the individual's wishes are observed. These might include provision for payments to be made to members of the family from dividend income, with the Trustees retaining the shares and keeping the company running except in special circumstances justifying sale of control or liquidation. This may be particularly advantageous where family members have little business experience of their own or where they are unlikely to agree on the correct way to manage the business.

Gaining Flexibility

The best-laid plans can rapidly become obsolete but a Discretionary Trust can provide a system of management of property that is capable of adapting as circumstances demand. No Beneficiary has any fixed or absolute interest in the trust assets under a Discretionary Trust. Instead, the Settlor can simply nominate a class of Beneficiaries and the Trustee is given wide discretionary powers in terms of whether, and to whom, he distributes trust assets. Beneficiaries only have a contingent interest and avoid any tax liability until such time as a distribution is made to them.

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