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Independent Trustee - does a trust need one?

One of the first decisions to be made when creating a trust is who will be appointed as trustee. So is there a reason why you and your partner can not be the only trustees?

There is no legal requirement in New Zealand to have an independent trustee - a trustee who receives no benefit from the trust fund. However, there are many advantages in appointing an independent trustee:

1. An independent trustee will help establish a trust is valid and not a sham.
2. Trusts will be held to be a sham where the intention is to have a trust in appearance only. For example, where the person establishing the trust ('settlor') intends the trustees to hold the trust assets for the settlor, at the settlor's direction, rather than for the beneficiaries. If the Court holds that a trust is a sham, it is able to look through the trust and access the trust property as if it were the settlor's property and make that trust property available to third party claimants, such as creditors of the settlor, the IRD or the Official Assignee.
3. An independent trustee is likely to improve the management of a trust by increasing the likelihood of:
 - meaningful discussion of trust decisions;
 - trustee resolutions or minutes; and
 - separation between the affairs of the trust and the settlor.
4. One of the major duties of trustees is to maintain the trust fund for the beneficiaries of the trust, not the settlor. It is a common pitfall for the individual or couple who establish the trust to continue to treat the trust property as if they are still the owner(s) of the trust property. The settlor may see the trust as "my trust". An independent trustee is able to be a check and balance on the other trustees who are also beneficiaries and perhaps also the settlors.
5. An independent trustee can be objective when it comes to the competing interests of family members.

The recent case of *Official Assignee v Wilson* [2008] 3 NZLR 45 highlights the importance of an independent trustee. Mr Reynolds was a property developer who was adjudicated bankrupt in July 2001. He had no assets to administer, but the Official Assignee contended a Queenstown home owned by a family trust was, in reality, the property of Mr Reynolds.

The trustees of the trust were both independent trustees – including a solicitor, Mr Wilson. Mr Reynolds was not a trustee of the trust, but he had directed much of the trust business, including the buying and selling of houses. At one point the trust had sold a home to Mr Reynolds because Mr Reynolds said the trustees were not prepared to carry out renovations. The Official Assignee argued that this was unbelievable and the transfer was done to allow Mr Reynolds to use the house for security for his business finances. In other words, the trustees were merely managing the trust in a way that suited Mr Reynolds – as his 'puppet'.

The Official Assignee contended the trust was a sham because Mr Reynolds intended the trustees to hold the assets for himself, when he was not even a beneficiary, rather than for the beneficiaries.

The Court of Appeal found the trust not to be a sham largely due to the trustees being independent and

including a professional trustee who knew what he was signing. Although there was not good documentation for the trust, there was no basis to suggest that the trustees, and in particular Mr Wilson as a professional trustee, were indifferent to what was occurring with the trust.

Had there not been an independent trustee for this trust, we believe the outcome would surely have been different.

Choosing the right trustees is an important decision. We believe an independent trustee can be invaluable in ensuring trust compliance and validity.