



10 GOOD REASONS TO START A TRUST IN A WORLD OF TRANSPARENCY

First off: tax and confidentiality are not amongst the top ten reasons to start a trust despite media misrepresentation of their use in the recent past.

Tax laws have a history of being ever changing. Reporting and disclosure rules have become omnipresent over the years, which has limited even legitimate purposes of confidentiality. Still, much more important reasons have caused trusts to be created during the last couple of hundred years and there is no reason to believe that this should change in the future.

As a side note, the reasons to set up a trust outlined in this document can to a large extent be applied to foundations, too, even though foundations are different from a legal perspective.

The Trust in simple terms

In principle, a trust is a donation over time that can be used when the limitations of traditional tools such as donations, wills or nuptial agreements need to be overcome. Although historically seen as a pure estate planning vehicle for individuals and families, the trust can also play a valuable role in commercial transactions.

The trust is an arrangement where the trustee holds title of assets, transferred to it by the settlor, for the benefit of others, known as the beneficiaries. These have a proprietary interest in the assets.

Trusts can be revocable or not, define a fixed interest or be structured in a way that the trustee exercises discretionary powers within predefined limits.

The reasons to start a trust lie in private law

Even though typically used in a common-law environment, the trust is today recognised in many civil-law countries and often able to build bridges between different legal systems.

It has become common to own assets in more than one country, like holiday homes abroad or bank accounts, shares, companies or other investments. Cross-border ownership and even more succession, is however an area with many challenges.

Reason No. 1: Avoid Probate

Probate is the legal process whereby a will is "proved" in a court (or with the competent public authority), or in case of an intestate succession (without leaving a will) whereby the competent authority decides on the procedure to apply in order to distribute the decedent's property according to the laws of hereditary succession. The granting of



probate is the first step in the process of administering the estate of a deceased person, resolving all claims and finally distributing the deceased person's property. Until this process is finalised the assets of the decedent are effectively "frozen".

When a person owning assets in multiple countries dies, it can be difficult to know how to deal with the estate administration abroad. With cross-border inheritance, taxation and not the least language issues to consider, foreign estate administration can be extremely complicated, costly and time consuming. The process required varies from country to country and the steps that will be necessary depend on various factors.

With the transfer of assets under a trust, these assets are no longer owned and therefore do not fall under probate in case of the settlor's death. The lengthy and costly probate process is effectively bypassed, avoiding a situation where the courts must appoint someone to manage the assets. Jurisdictional differences are mitigated and the assets can be managed and accessed without interruption.

Reason No. 2: Presumption of death

A person may be legally declared dead despite the absence of direct proof of its death. Such a declaration is typically occurring when a person has been missing for an extended time period and in the absence of any evidence that the person is still alive – or after a much shorter period where the circumstances surrounding a person's disappearance overwhelmingly support the belief that the person has died (e.g. an airplane crash).

This is admittedly an exceptional situation, which is why it is rarely planned for. The financial consequences can however be dramatic for the surviving dependants as, depending on the applicable law, the qualifying period may be long and the missing person's assets may be frozen during that time.

With the transfer of assets under a trust these assets are no longer owned and therefore do not fall under the rules for the presumption of death in case the settlor is missing. In case of need the trust can immediately support the descendants.

Reason No. 3: Long-term family provision and lifestyle planning

Substantial inherited wealth can be hard to adapt to and the dissipation of value therefore common. Heirs may be financially naive, prey to fortune hunters or simply lack the long-term view.

Couples who are unmarried, in same-sex relationships or whose familial arrangements are complicated may discover that the legal system in some countries does not provide adequate solutions on their death or separation. For example, unmarried partners may not be entitled to marital deductions on gifts, may not benefit from retirement assistance in the same way as a surviving spouse or may not be covered by some intestacy laws.

With the transfer of assets under a trust, these assets can be put under a predefined governance, which foresees precise provisions for the distribution of specific assets in accordance with the settlor's wishes. Accordingly, a trust can also help to minimize the risk of possible conflicts among family members. A trust can further be customized in such a way that a beneficiary's spouse cannot access the assets left for the married



beneficiary without his consent. All this favours growth of the assets over the years, for the benefit of future generations and the current beneficiaries. The settlor is able to plan for the family beyond his death, and state exactly how and when the descendants receive their inheritance.

Reason No. 4: Protection of vulnerable dependants

The well-being of vulnerable, i.e. minor, disabled or unstable dependants, is an essential concern for parents. Planning ahead for one's own or dependant's disability can make all the difference. The limited flexibility of traditional tools does not usually offer sufficient comfort for this.

With the transfer of assets under a trust, the terms of the trust can be drafted to provide support for such dependants, with sufficient flexibility to adapt and without forgetting those that may need less assistance. A trust can also pay for the costs of education and health.

Reason No. 5: Retention of a business

The owner of a business may have a clear strategy for a business, its governance and employees, without intending to disadvantage his surviving descendants. Subsequent generations may however have different objectives, different from the original owner, but frequently also different amongst themselves. They may also not have the ability to manage and develop the business. Such situations ultimately lead to family disputes and frequently damage the business.

With the transfer of a business under a trust, the business assets can be put under a predefined business and family governance, including a framework for family or third party involvement, dispute prevention and resolution mechanisms.

Reason No. 6: Consolidation of assets

Assets held in someone's own name are typically fragmented and diverse, which makes efficient monitoring and management often difficult and expensive. Numerous professionals are involved and relationships handled. Critical situations may be overseen or discovered too late.

With the transfer of assets under a trust, the assets are held in a consolidated manner. The accountability rests with the trustee and as such the settlor can have a single point of contact, if desired. The consolidation can provide benefits of scale and certainly simplifies the accounting and monitoring of assets, liabilities, income and costs.

Reason No. 7: Contest-resistance

Planning for the safety of assets is also important for succession situations that can be a breeding ground for disputes for different reasons: alleged breach of set rules for the devolution of assets that limit the testamentary freedom, contested lifetime gifts, claims from personal or business creditors of the decedent or in cases of political insecurity. The consequence is that the assets may pass to persons other than the desired recipients.



Depending on the jurisdictions involved, a trust can provide greater protection against legal action from anyone who is intending to challenge the distribution of assets. However, the fact that a trust is difficult to contest does not mean it is impossible. With the transfer of assets under a trust, the assets are more resistant against challenges, for the benefit of those intended to benefit.

Reason No. 8: Emigration / Immigration planning

A proverb says "If you wish to travel far and fast, travel light". Personal ownership can be problematic when considering a change of country of residence. The administrative burden to amend the different ownership registers and titles as well as exit taxation rules can be a challenge. Unexpected consequences due to unfamiliar regimes may come as a surprise. Planning opportunities and incentives may only be available before relocation.

With the transfer of assets under a trust, many of these issues can be completely avoided or at least simplified and the pre-relocation planning can be optimised.

Reason No. 9: Flexibility

Wills, donations and nuptial agreements are inflexible once fixed and cumbersome or even impossible to adapt. Wills are rarely "actively managed" and may quickly become outdated once circumstances change over time. A donation cannot be limited in many ways, e.g. like though usufruct.

With the transfer of assets under a trust, the flexibility is embedded in the legal vehicle. Usufruct provisions can be included in a trust, such as the use of the family home by the surviving spouse on the death of the settlor or the ongoing distribution of dividends to the settlor. A trust is easy to adapt and a memorandum of wishes fast and inexpensive to amend. The trustee is further able to adapt to circumstances changing over time.

Reason No. 10: Philanthropy

A charitable trust is a popular way to donate to charitable organisations and designate that the assets are eventually benefiting a specific organisation or objective. Charitable goals of the owner are specified for the long term, beyond the owner's death, and should be implemented in a distinct though flexible manner over time.

With the transfer of assets under a trust, e.g. money, real estate or art, charitable objectives may be defined indefinitely and the intended benefit safeguarded. If the assets in the trust are a home or favourite piece of art, these can be enjoyed just as much after being put under the trust as they were before, with the added confidence that the assets will ultimately support a worthy cause. In addition, the assets are protected in case the settlor's family would decide to challenge the charitable objective after his death.



Whether a trust offers legitimate benefits in the area of tax or confidentiality exclusively depends on the applicable rules in the country of residence of the settlor and beneficiaries. These rules are subject to frequent changes, which is why tax and confidentiality should not be the main driver for establishing a trust.

Mandaris operates trustees in several jurisdictions and is specialised in the area of trusts and other asset structuring solutions. Our multi-lingual professionals have particular knowledge and experience with regard to legal, tax and administrative questions surrounding the structuring of assets in an international environment.

Please do not hesitate to contact the author if you have any questions or queries.

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