

# HOW ASSETS GET INTO A TRUST

Juliet Moses, TGT Legal

Notes...

**Lindsay:** I'm pleased to introduce Juliet Moses, a Partner of the Auckland law firm TGT Legal which specialises in all aspects of trusts and estates. Juliet herself specialises in trusts, personal asset planning and superannuation. She presents regularly to trust conferences and published a chapter in the latest edition of the NZ Master Trusts Guide on the termination and insolvency of Trusts.

Juliet, you're going to take us through understanding how to get assets into a trust and also touch on gifting. First up, how do you go about getting assets into a trust?

**Juliet Moses:** Thanks Lindsay. A lot has changed since the abolition of gift duty on 1<sup>st</sup> of October 2011, particularly around the practices used to transfer assets into trust. These have changed significantly.

Prior to that date, the normal way to get assets into trust was for a person called the settlor, to sell assets at market value to the trustees of a trust. The trustees would then acknowledge that they owed the settlor a loan for the same value as the assets they had received.

These loans were normally made interest free and were reduced over time by a series of gifts of \$27,000 each year from the settlor to the trustees. This arrangement was often called a gifting programme and avoided the need to pay gift duty. Once gift duty was abolished, we no longer have to use this process.

It is now common for a settlor simply to make a one-off gift for the full value of assets to the trustees of a trust. That said, people can still do it the old way and sell the asset to the trust with a debt back and sometimes there may be good reasons for doing that. However, many people now just choose to simply gift an asset or assets into a trust and as best practice, record the gift they have made in a deed signed by the person making the gift and the trustees receiving the gift.

In addition to the deed recording the particular asset being gifted into the trust, it's also necessary to complete any associated transfer documentation. For example, there are formalities to be complied with for transfers of land or shares into trust and you need to ensure the transfer documentation is completed to change the title (or ownership) from the settlor making the gift, into the names of the trustees.

**Lindsay:** That has been a significant change and clearly it's now easier and quicker to transfer assets into trust. Juliet, you've referred to a deed being completed. Why is a deed important?

**Juliet:** While it's not always necessary to have a deed to make a gift, the deed is a useful way to record the gift being made and accepted between the parties. It's the paperwork which supports the gift and makes it very clear that a gift has been made, when it was made and exactly what property or assets have been gifted. The paperwork ensures there's no confusion around the gift.

**Lindsay:** So by having the gift documented in a deed, the trustees can clearly show what assets have come into trust and that they own the assets.

**Juliet:** That's right. It's also important for the person making the gift to have a document to prove they no longer own the asset or property transferred to trust, especially if for example, there was to be a later claim against them by creditors or by relationship property claimants.

As you say, it's important for trustees to also be able to show the asset or property has gone into the trust properly in the event there are any future challenges or litigation as to whether it's a proper trust, or what property is in the trust. A deed just makes it all very clear and it's beyond dispute.

There are a couple of further points on using a deed to support what has taken place. Firstly, for some assets like property or shares that I mentioned earlier, there is a title document. For other assets like a chattel for example, there is no title document so it is not always easy to tell who the owner is.

Let's say you wanted to gift a piece of artwork into a trust. You could complete the gift by just saying the right words and then delivering the artwork to the trustees. However, with chattels like artwork, it's very hard to show that a piece of artwork has been delivered from the former owner to the trustees because the trust doesn't normally have a physical operation or physical place of being. A deed overcomes that problems and is always going to be the most prudent way to do it.

The final point is that I would still recommend doing a deed even where the asset has a title document. That's because even if you complete change of ownership documentation, there can still be arguments about whether an asset transferred was a "gift to the trust" or "a loan to the trust", for example. The deed of gift will show beyond doubt that a gift was intended and made.

**Lindsay:** Are there any assets you wouldn't put into a trust?

**Juliet:** You can pretty much put most anything into a trust legally but there are some things you can't gift like Maori customary land, for example. It's also not normal to put depreciating assets into trust (like the family car) but that is still done from time to time. A vintage car

might be an example.

Normally you would look to put appreciating assets into trust or assets that you would hope will appreciate over time. So really it's not so much from a legal point of view whether assets can be put in, it's more about whether it doesn't make sense to put them into the trust in the first place.

People also need to think about the sort of implications that might arise from a decision to sell or gift assets into trust, for example, tax implications. You always need to think about whether there are any tax implications when you're transferring assets and particularly assets that are within the tax base. That would include income earning assets like property or private company shares which will almost certainly have tax issues that need to be thought about.

Other things can arise relating to shares in a family business that is being considered for transfer into the trust. There may be implications if the business holds some kind of a licence, for example, the licensor might have to approve the change in ownership of the business or you may lose imputation credits, etc. Often there are a number of other things that may need to be considered.

So, while there's not really any legal prohibition against transferring assets into trust (except in rare cases), there may be implications that will need to be thought through and addressed.

**Lindsay:** You mentioned assets that are in the "tax base". Those would generally be assets that may be generating income on which tax or GST may have to be paid. A simple example of an asset where there may be tax, GST or depreciation implications to be thought through could be when someone was considering putting a commercial rental property into a trust.

**Juliet:** Yes, I'd always recommend people get accounting advice in that situation.

**Lindsay:** Juliet, what problems have you seen associated with people putting assets into trust?

**Juliet:** The problems are mostly around potential confusion as to whether an asset is or isn't in a trust. If the asset is in the trust, how did it get there? When did it get there? How was it financed? If that's not clear from the outset, trustees can spend an awful lot of legal or accounting fees trying to figure out what the true position is.

These problems can be avoided simply by doing the gift of assets

properly at the time the gift is made for minimal cost. It is essential for the gift to be done right to make sure everything is very clear because confusion can give rise to claims further down the track if somebody wants to challenge or attack a trust. So it is very important to have good records to ensure there is no intermingling of assets, that it's very clear who owns what and what was the source of the funds or assets.

**Lindsay:** You mentioned at the start that the gifting rules had changed a couple of years ago and I'd imagine there are still a number of settlors who had gifting programmes underway that have yet to be completed. What should trustees be doing where there are still loan balances owing?

**Juliet:** Yes, that's right. However, the decision on whether the remaining loan is to be gifted will need to be made by the person who's actually been doing the gifting or put the assets into trust.

I'd recommend trustees may want to clarify what is intended for any remaining loan balance and could discuss what is intended with the settlor to understand the position. Where the debt is to be forgiven, the settlor and trustees should sign a deed along the lines of what we discussed earlier.

However, some settlors have decided that they don't want to gift off the remaining loan or debt owing back by the trustees and would prefer to leave the remaining loan owing in place. Other people have decided they want to gift everything to the trust and have done so. Then there are some people who just haven't really turned their minds to it either way.

I would always recommend settlors take advice from their legal adviser on what is the best option or decision for their specific situation, as each settlor's situation will be different.

**Lindsay:** That would also be a good opportunity for settlors to review their Wills at the same time.

**Juliet:** I agree. Most Wills if properly drafted and will ensure that any debts owing by the trustees at the settlor's death will be forgiven.

I'd recommend that a clause for the forgiveness of any debts to the trustees should still remain in a settlor's Will, even if the debt has been gifted fully in the settlor's lifetime. You never know what may happen in the future and further loans may be made to the trustees.

**Lindsay:** Finally, are there any points that you would recommend for trustees to consider around the transfer of assets into trust or gifting?

**Juliet:** I think we've probably covered most of them. There is the

issue of valuations. When there was gift duty, you needed to obtain a valuation of the assets going into trust because the assets were being sold at market value.

While you no longer need to have a valuation to establish the market value from a sale point of view, valuations can be useful to reflect the correct value of assets in the financial statements of the trust. A valuation may also be useful for insurance purposes and as assets are transferred into trust, trustees should ensure the insurance policies for assets transferred are put into the trustees' names.

A final point relating to the transfer of assets is where properties are transferred into trust and are subject to a mortgage. In those situations, there's going to have to be dealings between the bank and the trustees. The bank will need to know that the title to the property is changing and the bank will require a lot of new financing documents to be prepared and signed by the trustees.

Trustees need to be comfortable with the terms of what they're being asked to sign, especially around loan documents and guarantees so it's important for them to get good advice on those documents. Each bank has different requirements.

**Lindsay:** Thanks Juliet for a great overview of getting assets into trust and your recommendations for good practices for trustees. For any people who may wish to contact you, they can do that through your website [www.tgtlegal.com](http://www.tgtlegal.com).

**Juliet:** Thank you very much.