

Trusts and Companies - Information Guide

What is a family discretionary trust?

A family discretionary trust is a trust where the trustee is given wide powers to determine which beneficiaries should receive the income and capital from the trust, and when those distributions should occur.

In a discretionary trust, the beneficiaries do not have any right to demand a distribution of income or capital, as those distributions occur at the trustee's discretion. The beneficiaries do not have a specific entitlement to any assets of the trust.

The trustee is also given discretion as to the types of investments that may be held in the trust.

Ordinarily, the beneficiaries in a family discretionary trust are immediate family members, as well as extended family – parents, grandparents, brothers, sisters, nephews, nieces, aunts, uncles and cousins, together with any associated family companies or trusts.

It is common for family businesses to be conducted through discretionary trusts.

What role does the appointor play in a family discretionary trust?

An appointor of a trust is the person nominated in the trust deed as having the power to appoint or remove a trustee. In other words, the appointor has the power to change the trustee. Sometimes appointors are referred to by other titles – e.g. principals, guardians, and controllers.

Generally, the power to change the trustee is a discretionary power and can be exercised by the appointor at any time.

The appointor has a great deal of control over the trust. They determine who is to be the trustee, and therefore who controls the trust and its assets.

In some trust deeds, the power of appointment is flexible, and the current appointor is able to nominate who will succeed them.

In other deeds, however, a successor appointor may be specified or the power may end on the death or incapacity of the nominated appointor.

When an individual trustee or appointor dies, who takes over these functions?

It is important to firstly look at the particular trust deed to determine who will succeed an appointor or trustee in the event of their death.

If a trust deed nominates who is to succeed an appointor, then that person will become the new appointor of the trust, and will be able to change the trustee.

It may be possible for an existing appointor to appoint a new appointor via their will, but only if the trust deed allows this to occur.

Where no replacement appointor is provided for, the trustees have the power to appoint their own replacements. If they fail to do this, then on the death of the last surviving individual trustee, the executors of that person's estate have the power to appoint the new trustee.

Where the role of a trustee is held by a company, who gains control when a director or shareholder dies?

Shareholders control the appointment of directors. On the death of a director, the shareholders will determine any new appointment of directors.

Where a shareholder dies, their shares form part of their estate and are dealt with by their will (or under the intestacy rules where there is no will).

The person who receives the shares effectively gains control of the company and has the power to appoint the directors. That person will control the trustee, and in turn the trust.

Again, this conclusion is subject to an appointor of the trust having the power to change the trustee. The appointor could remove the company as trustee, and appoint another trustee.

What happens to company shares owned by the testator upon death?

A company is a separate legal entity. It has its own legal identity that is discrete from its shareholders.

Companies can own property, enter into contracts and be subject to legal liability in the same manner as an ordinary person.

Shares represent ownership of a company. However, even as owner, a shareholder is not entitled to the assets of the company. Thus, the death of a shareholder has no effect on the company's continuing existence, or on the ownership of its assets.

However, the shares owned by the testator in a company form part of the estate assets and can be disposed of by the testator in their will.

During the period when the testator's estate is being administered, their executor will be able to exercise any rights that attach to their shares (for example, voting at general meetings).