Irish Tax Institute

Trusts for CTAs

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Outline

Types of trusts

What is/is not a trust

Why have a trust?

Review private client type

Brief tax outline for each

Comparison

Tax implications

Further details for each trust

Anti-Avoidance

Territoriality rules

Specific rules

Administration including reporting obligations

Topical trends

Running example ....

– family of 3 children
– youngest age 12 on parents' death

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Types of trusts available

Types available

Typical trusts... and focus today...

- Bare Trust
- Discretionary Trust
- Fixed trust for period certain
- Fixed trust for life interest
- Special needs trust

Other trusts/a trust by another name

- Charitable trust, pension trust, employee trust
- Section 189A trust
- Trust for minors on intestacy – bare trust
- Foreign discretionary trust or 'entity similar in its effects'
- US Living Trust – discretionary trusts plus
- UK A&M trust or similar – fixed trusts
- Resulting trust – assets back to settlor
- Constructive trust – typically litigation based
- Nomineeship – bare trusts

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Types available

Not trusts...

- Partnership
- Bank account in joint names for convenience during lifetime
- Right of residence
- Attorney under general or enduring power
- Agent
- Covenant

NOTE: Central Register of Beneficial Ownership of Trusts (CRBOT) uses concepts of Beneficial Owner different to trust law

CGT definition of a settlement...

Section 5 TCA97 –

"*settled property*" means any property held in trust other than property to which *section 567* applies, but does not include any property held by a trustee or assignee in bankruptcy or under a deed of arrangement;

"*settlement*" and "*settlor*" have the same meanings respectively as in *section 10*, and "*settled property*" shall be construed accordingly;

Section 10 TCA97 –

"*settlement*" includes any disposition, **trust**, covenant, agreement or arrangement, and any transfer of money or other property or of any right to money or other property

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Why have a trust?

Why?

Protection of Beneficiary

Protection of Assets

Tax Efficiency

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Why a Bare Trust/Nomineeship?

"To child absolutely"

Legal effect

Trustees hold until asked for after 18

Access available at age 18

Effectively a nomineeship

Tax effect

Look through

CAT immediately

No CGT on access at age 18 or later

Income tax on assets earned by the child

Issues

Ensures threshold can be 'bagged' in case of FA changes

Growth in name of child (CGT of child, not trust)

No flexibility in dividing within the family – equity v equality

Protection issues – access full capital and accumulated income at age 18

Combine with other restrictions for protection

Documents – give powers to protect trustees

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Why a Discretionary Trust? s.2 'second limb'

"To trustees to hold for class of children/grandchildren"

Legal Effect

- Protection – no access by beneficiaries until trustees make appointment
- Flexibility – divide between children equitably based on needs at time of appointment
- Hold back pool for youngest after age 21 to cover levy costs?
- Manage spouses of children – if not a pre/post nuptial settlement

Tax Effect

- Inheritance postponed so assets invested gross
- CGT/CAT event on appointment (with potential for set off if not sold within 2 years)
- Levies when youngest age 21 (or youngest grandchild age 18)
- Trustees file and pay standard rate income tax (and 20% surcharge if not distributed)
- Trustees manage CGT

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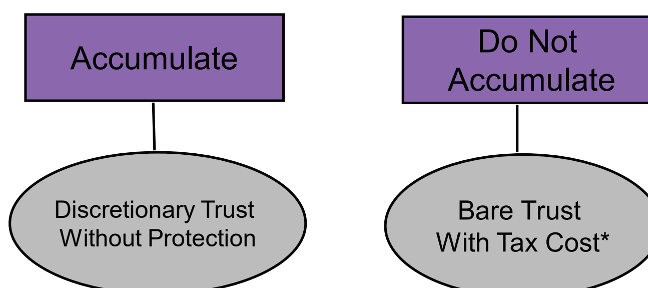
Why a Fixed Trust? (Type I) Period certain

"To child at a specific age - 21/25/30"

- Income discretionary until specific age (accumulate) –
the specific Irish DT (s2 CATCA03 'first limb')
or
- Income paid out up to specific age (access income at age 18)



- Little flexibility in tax or protection
- Typical trusts do not have power to advance capital (wind up early)

*Depending on how trust is worded

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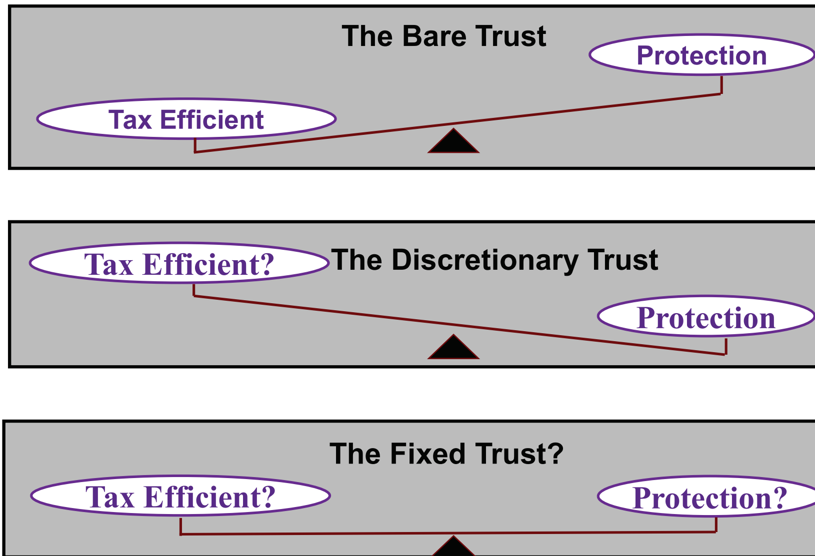
Perception…..



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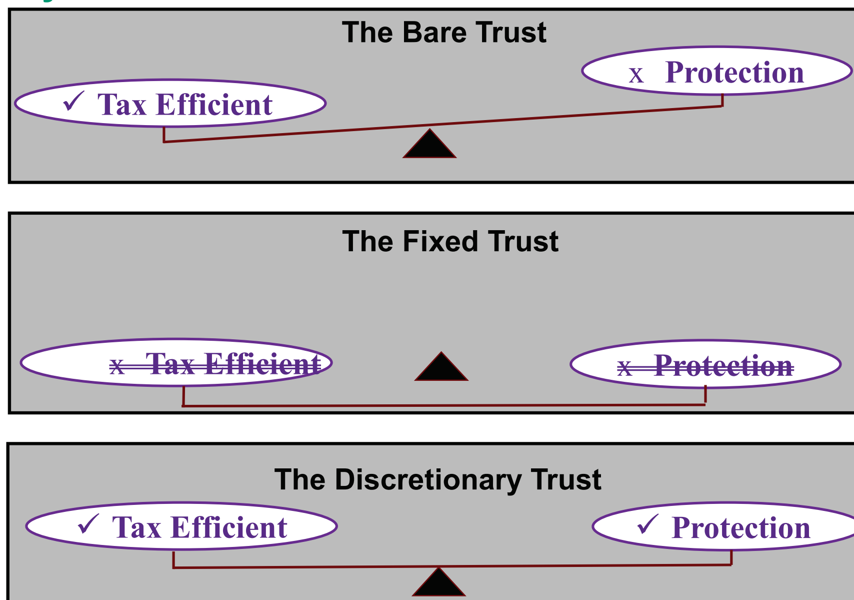
More likely….



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Consider for young families…asset types

Bare trust for certain assets

Use up tax-free threshold anyhow – 'test' of maturity!

Consider which assets better to grow net or gross of tax (what will not be sold long term?)

Appoint out assets with known poor returns/liquidity but which can fund CAT

Protect with other structures or restrictions

Fully discretionary trust for most assets

Keep liquid and high-return assets in this trust

Assess maturity of beneficiaries before the youngest is age 21

Levies MAY then be mitigated or reduced

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Why a Fixed Trust? (Type 2) Life interest

"To John for life then for my children"

- Guarantees children will inherit later
- 'Protects' John in managing his investments
- Useful for non-spouses inheriting where no exemptions – e.g., cohabitant or older sibling with more than one house

- Effect – John gets the income, trustees hold the capital for the children
- Income mandated to life tenant – minimises trustees' administration (manage expenses)

- Build in flexibility -
  - Will the income be sufficient for the life tenant
  - Will the income become too much?

- Flexibility to include veto(s) – 'protect' legal right share/'protect' children – Succession Act claims

- Avoid successive trust interests where possible – CGT problems!

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The "Blended Family"/"Extended Family"

Second marriage of testator

Life interest trusts

- – reduces potential s117 SA65 claims by children of first marriage
- – ensures the assets pass to the children after death of step-parent

Child's marriage break-up

Discretionary trusts

- – reduces access by spouse of child to inheritance
- – Judicial "encouragement"
- – Care re pre/post-nuptial wording
- – G v G 2011 case

Divorced parent dying

Watch out – pensions (trusts) and minors – taxable inheritances where one parent only dies s82(4) CATCA03

Tax considerations and Trusts

- – Generational skipping
- – Options around exemptions
- – Purchase of reversion
- – Rights of residence

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Special Needs Trust

Protection

Of child for life

- Vulnerable to bad influences
- Coping with investments
- Profligate spending - addiction
- For disability benefits - means testing

Of other family members

- Ensures other children will benefit on death of the child who has the special needs
- Inter vivos trust if extended family also wish to provide for the child
- Separate trusts to allow decision on % division be postponed until youngest age c.20

Of assets

- Protects investments as no required sale to pay tax
- No requirement for wardship/ADMA to apply – parents decide who to trust, not the Court appointed "Decision Making Representative"

Tax Exemptions

Lifetime exemptions -

- CAT exemption re: medical expenses
- DTT (CAT) exemption discretionary levies
- CAT exemption for income benefits for maintenance

No mandatory disclosure generally

Care regarding definition of special needs – varies for each exemption

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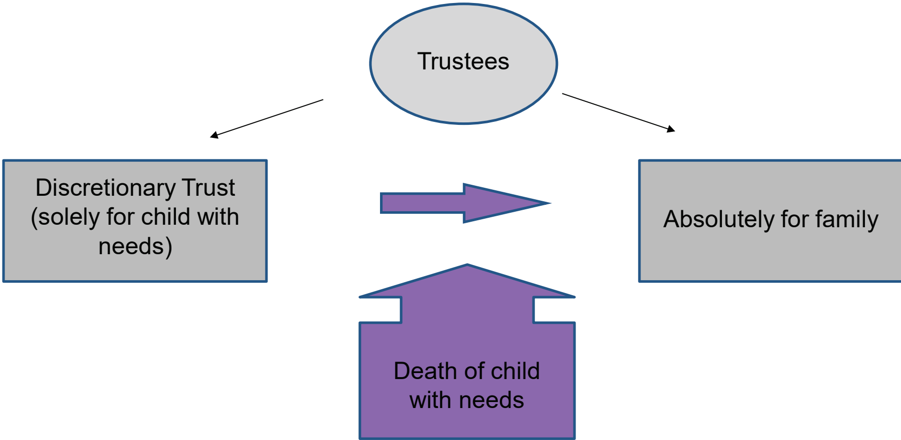
Special Needs Trust



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Tax implications of trusts

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Focused tax points

Bare Trust

- CAT for beneficiary - on creation of the trust if inter vivos (lifetime trust) or - on death if under Will
- Future growth with the beneficiary
- Future gains taxed on beneficiary
- Income tax returned by beneficiary (parents of minor child in limited circumstances)
- Trustees are like nominees

Discretionary trust

- Care re definition – includes trust with accumulated income
- No CAT on creation of 'pure' discretionary trust (second limb)
- CAT on appointment from the trust at then value - beneficiary
- CGT on appointment of chargeable assets from the trust – trustees liable
- CGT credit from the CAT if asset not sold within 2 years
- PPR available for trustees for house lived in by beneficiary
- Ongoing income taxed on trustees - standard rate plus 20% undistributed surcharge
- Income appointments – CAT on net of income tax income, unless exempt maintenance
- Initial levy (6%) on assets remaining in trust on youngest child's 21st birthday
- Ongoing annual levies (1%) while trust remains discretionary
- Refund of 50% of initial levy (3%) if trust wound up >5 years

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Focused tax points

Fixed Trust - Period Certain

If income accumulated

- No CAT for beneficiary on creation of the trust (if inter vivos) or on death (if under Will) – 'first limb disc trust'
- Income appointments – CAT on net of income, unless exempt maintenance
- Discretionary trust levy if nominated age >21
  - Initial levy (6%) on assets in trust on **that child** turning 21
  - Ongoing annual levies (1%) while trust remains discretionary
  - Refund of 50% of initial levy (3%) if nominated age >26
- CAT for beneficiary once age attained at then value
- CGT on appointment of chargeable assets from the trust – trustees liable
- CGT credit from the CAT if asset not sold within 2 years
- PPR available for trustees for house lived in by beneficiary

If income not accumulated

- CAT for beneficiary - on creation of the trust (if inter vivos) or - on death (if under Will)
- Calculated as a period certain to the age named
- CAT for beneficiary once age attained (double CAT)*
- CGT on appointment of chargeable assets from the trust – trustees liable
- CGT credit from the CAT if asset not sold within 2 years
- PPR available for trustees for house lived in by beneficiary

* wording of trust may impose double CAT

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Focused tax points

Fixed trust - Life interest

- CAT on creation of the trust (if inter vivos) or on death (if under Will)
- CAT calculated based on age (VD) and sex of life tenant
- CAT on death of life tenant (remaindermen as beneficiaries) – payment timing issue
- No CGT on death of life tenant if remaindermen take absolutely
- Income assessed on life tenant (mandated)
- PPR available for trustees for house lived in by life tenant
- Life tenant CAT - can be paid for by trustees - TDM CAT Manual 19.21

Special needs trust

- Exemption from discretionary trust levies during lifetime of person with special needs
- TDM CAT Part 5 update eBrief 48/2018 - improvidence and proof
- Section 84 exemption - case law v Revenue practice - eBrief 48/2018 and TAC - proof of intention of testator
- Exemption from CAT on maintenance out of income unless one parent still alive
- PPR from CGT available for trustees for house lived in by beneficiary
- Dwellinghouse exemption available for gift to a dependent relative - but suitable?

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Other tax considerations

- Stamp duty arises on setting up a trust (nominal cash to set up)
- Stamp duty generally not an issue when appointing out

- Discretionary Trusts and residue - the annual levies will now accumulate if administration of the estate is delayed
- Discretionary trust can be used to postpone valuation date for CAT in working out APR or BPR
- APR and BPR does not apply to discretionary trust levies - 6% and 1% on full values of the farmland/business

- Dwellinghouse exemption - very limited now - anti-avoidance for trusts set up by beneficiary for second house
- ARFs - do not suit trusts - double tax
- Life interest + discretionary trust = CGT

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Anti-avoidance

Income Tax, CGT

Foreign Trusts - Territoriality rules - income tax, CGT and CAT (and DTT)

Section 811 GAAR – general anti-avoidance rules

Income tax

- Minor children and parents
- Section 806 & 807A TCA97 transfer of assets abroad

CGT

- Sections 579 & 579A TCA97 – capital benefits for foreign trusts

Income tax

Minor children and Settlors

Presumption income for child is taxed on settlor – s795 TCA97

N/a where any person (including a parent) transfers property to trustees for a minor child

- Where the income is accumulated
- the settlor and spouse cannot benefit from the income or capital during the life of the child
- the trust cannot be determined by the act or default of any person; and
- where there is no penalty for the settlor in failing to comply with the trust provisions

in which case the income is not deemed to be that of the settlor.

On actual distribution to a minor child, the income is deemed to be that of the settlor.

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Section 806 & 807A Income tax “Transfer of assets abroad”

Effect on foreign trusts = income of trustees deemed to be income of settlor/beneficiary

S.806 TCA97 - Applies to transfer of assets to trust by Irish settlor where trustees are non-Irish domiciled or resident

Where an Irish resident/ordinarily resident transfers assets as a result of which

- income becomes payable to a person
- and that person is non-Irish domiciled or non-Irish resident

Arises if Irish settlor or spouse has “power to enjoy” income/capital transferred

S.807A TCA97 - where s.806 TCA97 n/a

Transfer assets by non-Irish person to non-Irish person as a result of which a benefit becomes payable to an Irish domiciled and Irish resident and ordinarily resident

E.g., foreign trust, foreign settlor, Irish beneficiary

Only taxes Irish beneficiary on income (or associated capital) actually paid

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Section 579 & 579A TCA97 "Attribution of Gains"

- CGT in foreign trust - trustees non-Irish resident
- Post 11/2/99 gains only
- Apportion on 'just and reasonable' basis
- DTA - treat gains of trustees as that of settlor/beneficiary?

S.579 TCA97 - Irish connection

- Settlor resident or ordinarily resident in Ireland
  - at time trust created, or
  - current tax year, and
- Beneficiary resident or ordinarily resident in Ireland in current year
- Settlor (spouse/connected person as defined) has an "interest in the settlement" – can receive a benefit (income or capital)
- Automatic attribution of gains based on interest taken
- Settlor accountable if Irish resident at time of attribution

- **S.579A TCA97** - where s.579 n/a
- Settlor (spouse) has
  – no "interest in settlement"
  or
  – has an "interest in settlement" but is not domiciled, resident or ordinarily resident in Ireland at time settlement created or now
- Beneficiary domiciled, resident/ordinarily resident in Ireland
- Based on capital receipt

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Administration

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Practical issues

- Settlor control – danger of sham
- Funding – do not put illiquid assets into the trust without a pool to fund their management
- Trustees
  - Who to select?
  - Decisions by majority or with unanimity?
  - Liability of trustees - indemnity
  - Letter of wishes
- Trust document - build in flexibility (e.g., power to advance)
- Disclosures to beneficiaries - letters of wishes, information on accounts, GDPR, CRBOT as evidence

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Filings on set up of Discretionary Trust

Mandatory Disclosure s817D-R TCA97

- "Tax advantage" as a "Main benefit test"
- Specified descriptions include discretionary trusts s817DA(10)
  - TDM – 33-03-01 – para 4.3.10
  - Includes trusts in Wills at date of making Will
  - Exemptions App 1 – EU Will trust
  - Notify inter vivos discretionary trusts
  - App 2 – s817DA does not apply to s189A trusts or s17CATCA03 trusts
  - Notify non EU discretionary Will trusts

DAC6 s817RA – RI TCA97

- Reportable cross-border arrangements
- "Tax advantage" as a "Main benefit test" and "Hallmarks"
- Hallmark D – discretionary trust is identifiable for CRS?
- Hallmark C – consider payments from trusts

s896A TCA97 Irish professional concerned with establishment of trust

- Trustees non-Irish resident
- Settlor Irish resident

s46(15) CATCA03 – discretionary trust set up

Settlor Irish domiciled
- Terms of trust
- Names and addresses of trustees and objects
- Estimate of market value

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Filings for Trusts

- **TR1** – for income and for PPSN of trust
- **CRBOT** – Central Register for Beneficial Ownership of Trusts – for all trusts
- **FATCA** – US reporting Irish Financial Institution
- **CRS** – Common Reporting Standard - OECD reporting one/more trustees Irish resident
- **S917A TCA97** – transfer of funds other than at arms length to non-Irish trustees
- **S917B, S917C TCA97** – Irish domiciled settlor on establishment of offshore trust
- **S806 TCA97** where purposes bona fide – apply to seek confirmation

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Topical Trends

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Topical trends

- Partnerships with bare trusts – continue to suit families but care regarding borrowing
- Disclaimers – build in to allow flexibility with discretionary trusts and qualifications for reliefs/exemptions
- ARFs where need trust protection – problematic
- Reversionary interest purchase – specific circumstances and complicated – involves trusts & needs to be 'worthwhile'

- CRBOT – how will this develop cross-border?
- Foreign 'similar entities'
  - how will this develop over time?
  - onshoring of trusts – legal adjustments
- Foreign assets
  - US estate tax triggers over USD$60,000 (Irish disponers not typically the usual USD$12.06m and no exemption for spouses)
  - EU countries – estate taxes and trusts

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Trusts for CTAs

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This paper and presentation are an outline of issues for CTAs involved with trusts to consider. It sets out the types of trusts that would typically come across their desks and what tax issues arise from those trusts. It also sets out other considerations that the CTA should be mindful of when approaching trusts.

A trust is an old concept that has stood the test of time despite its perception being tarnished by some tax-aggressive offshore models. The trust can be a practical method of holding assets, a protection for those assets and those who own them and, to a limited extent, a tax efficient structure.

The more typical trusts a CTA will come across are bare (or absolute) trusts, discretionary trusts, fixed trusts either for a particular period or for life, and charitable trusts. Sometimes the CTA will deal with a section 189A trust[1] such as where a GoFundMe page has raised considerable funds for a particular medical cause. Other more specific trusts can arise, through pensions, in managing commercial structures and custodian arrangements, with employee benefits.

This paper is focused on the more typical day-to-day trust in practice of a private client CTA. This may include trusts that are foreign and have structures unfamiliar to the Irish CTA, such as the living trust in the US, the historic Accumulation & Maintenance trust in the UK, or a foreign entity that may be 'similar in its effect' to an Irish discretionary trust[2] and in these cases the CTA will need to fit those trusts into the Irish system to see how they are taxed.

Bear in mind that some structures may appear to be trusts as someone is holding assets for another. A partnership where the general partner is the registered owner of the partnership assets is not a trust.[3] A bank account is held in the name of an elderly parent with their child to allow the convenience of the child to manage the account for the parent, is not a trust during that parent's lifetime.[4] A right of residence is not a trust. Attorneys or other agents are not trustees.

In terms of advising clients on succession planning, where there are parents with young children, typically the parents wish an inheritance to pass to their children in a manner that protects their children from inheriting at an immature age. Typically, the parents wish to provide that, after provision for the surviving spouse, the children should not inherit until each is aged, say, 25, 28 or even 30. Protection until the child is mature is their priority. Next, they are conscious of the protection of certain assets

[1] Section 189A TCA97 in relation to special qualifying trust is established for the benefit of permanently incapacitated individuals arising out of public subscriptions.
[2] See footnote 10 below
[3] Although there is a school of thought that nevertheless it should be registered in the Central Register for Beneficial Ownership of Trusts ("CRBOT").
[4] Though the account passing to the child is on death of the parent then held by the child on resulting trust for the estate of the parent.

such as the family business or farm. While tax is clearly a matter for consideration, typically the question of protection looms more than tax planning while the children are young. Certainly, parents do not want to impose additional taxes and want to avail of reliefs and exemptions available, but they do not want the children taking an inheritance without restriction at the age of 18.

However, the marriage of protection and tax efficiency is not easy and a balance needs to be drawn between them having regard to what is best for the family as a whole.

1. The Bare Trust - prioritising tax efficiency over protection

Generally, the most tax-efficient method of taking an inheritance is to give it to the child absolutely, i.e., without any age restriction, trust or condition. However, this type of trust provides the least protection for the child.

Legal effect

The legal effect of this for a child is that, as the child cannot give a valid receipt to the executor until they "come of age" at 18, the inheritance is protected from the child in a bare or absolute trust until that age 18. However, once 18, the child is entitled to call on the executor(s) (as bare trustee(s)) to hand over the inheritance to them including any accumulated income, which the child can then invest or spend as they so wish. Most parents would be concerned that a child is not sufficiently mature at that age to receive an unrestricted inheritance of any large amount.

While the child is under the age of 18, the bare trustee(s) can apply the inheritance for the benefit of the child, e.g., for living expenses, education, etc. It is sensible to provide, in a Will of this nature, that the executor or a named bare trustee(s) is given significant powers to invest the inheritance and apply it for the child's benefit while under the age of 18. Like all trusts, it is also sensible to provide that trustee with a suitable indemnity to manage the trust free of concerns that their personal assets will be vulnerable to claims.

In the case of a gift, the parent should ensure that the gift is made to trustees for the child rather than making the gift to the child outright. This is seen typically where the child receives the annual small gifts exemption from a parent[5]. This allows the trustees to manage the funds while the child is under age 18. The parents can be the trustees. It is important to record the gift and the trust for evidential proof, particularly where the parents are the trustees.

Tax Effect

The tax effect of this is that for CAT, CGT and income tax purposes the child is deemed to inherit the asset at the date of death of their parent (if the trust is created under the Will of the parent) or on the creation of the trust by way of gift and is taxed accordingly. For CAT purposes the usual Group A tax-free threshold (€335,000 in 2023) is applied to the value received, and any excess is subject to inheritance tax at 33%. At age 18, when the inheritance is handed over to the child (indeed, on any use of the inheritance

[5] Section 69 CATCA03 €3,000 per calendar year from each parent.

for living expenses while the child is under 18), there is no further CAT owing as it has been the child's from the beginning.

Turning 18 is not a taxable event for CAT, CGT or stamp duty purposes.

In the case of bare trusts, the trustees should file the income tax returns on behalf of the children where the children are deemed to earn the income themselves (i.e., the trustees are filing only on behalf of the minor as they are assessable under s1045 TCA97) during the period that the child is under the age of 18. The trustees pay any such tax on the child's behalf out of the trust fund. The trustees have power to recover from the trust assets if they are assessed to income tax[6]. This would normally arise in the case of the beneficiary becoming non-resident and Irish source income arises[7].

Issues to consider

The principal advantage to this type of gift or inheritance is the fact that the tax is paid immediately. This was an advantage if one assumed that the net benefit would be invested in a manner that would produce a better return than the Consumer Price Index (on which the indexation of the CAT tax-free thresholds used to be based). If so, it seemed better to pay tax early on a lower amount that is then invested, than to wait until age 18 and pay the tax on a higher inheritance (because of investment) without a significantly higher tax-free threshold. Quite apart from the question of whether the thresholds will be increased again, by how much or indeed if they are lowered, there is a counter argument that the investment of assets gross of tax would produce a better return. On this basis there is a school of thought that at the most only the tax-free amount should be gifted/bequeathed on such a trust to 'bag' the threshold so that if the threshold were to be reduced in a later Budget, at least a benefit of the tax threshold amount now will be tax free. Furthermore, this allows the trustees to see how the child handles that amount to assist in assessing the level of maturity.

The principal disadvantage to this method of providing for a child is that there is no restriction in legal terms on the child taking (and spending) their inheritance at age 18. Many young adults are not sufficiently mature at this age to handle an inheritance of significant value.

Quite often these trusts are useful where a grandparent wishes to provide for grandchildren to their threshold amounts[8], thus spreading the benefit within the family of their child to maximise the thresholds. The legacies can be paid to the parents of the children as trustees to hold on bare trust for the children. In this way each grandchild will take the legacy free of the trust automatically if the testator dies and the grandchild is already age 18 or, if the testator dies and the grandchild is under the age of 18, when the grandchild reaches age 18. Once each grandchild turns 18, his/her parents as trustees must hand over the monies not yet spent on the grandchild if called upon to do so.

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[6] Section 1046 TCA 97
[7] Section 890 TCA 97
[8] Usually €32,500 for grandchild from a grandparent (2023 threshold)

2. The Discretionary trust - prioritising protection

Notwithstanding the perception that discretionary trusts may have been associated with tax avoidance (hence the additional taxes such as levies imposed on them to discourage such use), they are the best way of protecting children from taking an inheritance until each child is sufficiently mature to do so.

A discretionary trust provides that trustees hold the trust fund on discretionary trusts for a class of beneficiaries including the 'intended' beneficiary, their spouse and children and other extended family members if so desired. The trustees are often guided by a letter of wishes written by the settlor/testator regarding how the trustees might manage the trust, exercise their discretion and indeed giving background information to the trustees about the family and assets to assist the trustees when the settlor has died. This letter should be written in a manner that is not legally binding on the trustees.

Discretionary trusts are widely defined for CAT legislation. A discretionary trust is created, first, where income is capable of accumulation or, second, where discretion is retained over who is to benefit from the income and/or capital. Here we are focusing on the 'second limb' of the definition[9].

The definition of a discretionary trust was extended under Finance Act 2012 to include entities similar in its effect to a discretionary trust (irrespective of how such entities are described in the places where they are established). For instance, foundations, anstalts and etablissements in Liechtenstein and foundations, stiftungs, anlagestiftungs and familienstiftungs in Switzerland are considered discretionary trusts for these purposes[10].

Legal effect

Under the more typical discretionary trusts (the second limb) the parents select trustees whom they trust to make the judgement call on the level of maturity of each child and leave the assets to those trustees to hold at their discretion for a class of beneficiaries which class includes the children. The trustees will appoint trust assets to the children at their absolute discretion once the trustees believe the children are mature to benefit. Indeed, who to appoint as trustees is often the most difficult matter that the parents need to decide on when making their wills. As mentioned, the parents often give general guidance to the trustees in a letter of wishes and this can include setting out the parents' views regarding when to expect maturity, etc.

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[9] Section 2 CATCA 2003The 'first limb' is considered below under fixed trusts.

[10] See definition of discretionary trust under section 2(1), (1A) and (1B) CATCA 2003 and CATCA Notes for Guidance (as amended by subsequent Acts up to and including Finance Act 2015) published by the Revenue Commissioners: "A "discretionary trust", in addition to its normal meaning under general law, whereby the trustees have discretion to make payments from the trust for the benefit of one or more of the beneficiaries named in the trust instrument, includes a trust where the property is held on trust to accumulate the income or part of the income of that property. Any entity which is similar in its effect to a discretionary trust (such as "foundations", the European equivalent of trusts) shall be treated as a discretionary trust irrespective of how it is described in the place where it is established. Any reference in this Act to trustees in relation to a discretionary trust shall be deemed to include persons acting in a similar capacity to trustees in relation to such an entity."

Tax effect

The tax effect of this is that the child is deemed to inherit the asset at the date of the appointment of the trust assets to them on the exercise by the trustees of their discretion and is taxed accordingly. The usual Group A tax-free threshold (€335,000 in 2023) is applied to the value received by the child, and the balance is subject to inheritance tax at 33%. However, if the trustees provide for the child's living expenses, education, etc., before the final appointment of the trust fund to them, there are also tax consequences as these would be treated as taxable inheritances,[11] albeit net of any income tax that would arise in the hands of the child (the CAT is net of that income tax[12].

The trustees are assessed for income tax and CGT purposes on the income or gains made by the trust during the period that the assets remain under the discretionary trust.

CGT on any gains arising in the trust is charged in the hands of the trustees with no annual exemption available to them. The appointment from the trust to a beneficiary is a taxable event for CGT purposes, albeit that usually there is a credit available for any CAT paid. This credit would be lost if the child sold the chargeable assets received by him within two years[13].

The trustees of a discretionary trust should pay income tax at the standard rate and pay an income tax surcharge of 20% on any income not paid out of the trust to a beneficiary within 18 months (the discretionary trust income surcharge).[14] If the trustees do pass over the net income to a beneficiary, they should provide them with a certificate of income tax deducted[15]. The beneficiary is then assessed to income tax on the income received from the trust as Schedule D Case IV income and is allowed a credit for the income tax paid by the trustees. If that income is paid over after the surcharge has arisen though, the surcharge is not available as a credit.

The trustees need to take care in deciding to pay over the income on a regular basis to a beneficiary as, if it appears that the trustees are automatically treating a beneficiary as being entitled to the income, the Revenue may seek to treat the trust as not discretionary.

Where a discretionary trust is created either during the disponer's lifetime or under his Will and the trust is within the Irish charge to tax, discretionary trust levies[16] may also arise in addition to the mainstream CAT.

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[11] unless they are exempt under s82(4) CATCA 2003 as a payment of maintenance, support, or education to a child under age 18 where both parents have died

[12] on the basis the taxable benefit taken for CAT is calculated as the net amount received, i.e. net of income tax, see *Taxation of Gifts and Inheritances*, Whelan & Williams; ITI FA 2019 at 10.2.5.

[13] s104 CATCA 2003

[14] s805 TCA97 Income (exceeding expenses including levies but not CGT) not distributed to a beneficiary within 18 months after the end of the year. See TDM 32-02-01

[15] A Form R185 is furnished.

[16] Also called discretionary trust tax (DTT) but in this paper referred to as levies.

Discretionary trust levies arise by deeming the trustees to have taken a benefit for inheritance tax purposes on the death of the disponer. Therefore, the territoriality rules apply in determining when a foreign discretionary trust may be subject to Irish discretionary trust levies by treating the trustees as a beneficiary.

An initial levy of 6% of the capital value of the assets in the trust generally arises on the creation of a discretionary trust. An annual levy of 1% arises on 31st December each year after so long as that trust remains discretionary. The annual levies do not arise until after the initial levy has arisen. If the entire trust is wound up within 5 years of the date of death, the 6% initial levy can be reduced to 3%.

The levies do not arise until there are no principal objects (usually the child of the disponer) under age 21 in the trust and, in the case of lifetime trusts, the settlor has died. There are exemptions to the levies under certain conditions.

Since Finance Act 2012 the date of death is the trigger point for the discretionary trust levies in respect of discretionary trusts created under a Will of a deceased. The effect of this change is that any delay in administering the estate can result in additional annual levies accumulating and possibly also a denial of the refund of 50% of the initial levy. This legislation reverses the effect of an Irish High Court decision from 2005[17] which related to the point in time at which the discretionary trust levies are initially triggered.

The change applies to all discretionary trusts created under a Will. Therefore, a specific legacy of assets into a discretionary trust will also be charged with the levy at the date of death.

Reassuringly although the charge arises at the date of death of the deceased, the valuation date for the payment of the tax remains the same (in the case of trusts of the residue that is usually the date of ascertainment of the residue). Therefore, although the levies may be accumulating, they will not be payable (and interest for late payment will not therefore arise) until after the trustees have retained assets out of which they can pay the relevant charge.

Issues to consider

As the child cannot say that they are entitled to an inheritance, because whether they are to receive one at all depends on the discretion of the trustees, the inheritance is protected from the child in a discretionary trust until the trustees exercise their discretion. While the assets remain in the discretionary trust, the trustees can apply capital and income for the benefit of the child, e.g., for living expenses, education, etc.

Although the parents can hope that older children in the family will have shown sufficient maturity by the time that the youngest child has their 21st birthday so that the trustees will have appointed out their share of the inheritance, this is unlikely to be the case for the youngest child. The difficulty is that the youngest child does not have the same chance as their older siblings to reach maturity without the additional tax cost of the levies.

[17] Revenue Commissioners v Executors and Trustees of Jeannie Hammett Irvine, Christie & Others (In re Irvine Deceased) [2005] No. 172R High Court Laffoy J.

Typically, there is a pool of money set aside by the trustees to fund the levies that would arise so that, for example, where there are three children, on the maturity of the first and second child, not the entire one -third of the trust will be appointed to them at that stage, so more is left to fund the levy for the third child. Then, when that third child is mature, the balance of the funds is given to the third child to equate to what their older siblings received and with a top up to all three children for final equality if funds are available.

3. The Fixed Trust - a sensible balance for children?

Parents may take the view that there will come a time when their child should have enough maturity or that, even if they never fully mature, the child should still take the inheritance and do what they may with it. Many Wills, therefore, provide that a child should take their inheritance at a particular age, typically age 25, in the hope that the extra seven years beyond age 18 would provide each child sufficient wisdom and sense to handle their inheritance.

This often arises where the parents are not comfortable with entrusting trustees with complete discretion over when their child should inherit. Where parents instruct that they would like their child to inherit at a particular age, it should be explained to them that reaching a particular age is not necessarily a guarantee of maturity — should a child take a sizeable inheritance in unrestricted form if they are not able to handle it? There are also "hidden" taxes that make this form of trust quite inefficient for tax.

There are different versions of such fixed trusts for a period certain, depending on:

- whether the income up to the selected age can be accumulated by the trustees or
- whether it must be paid to the child.

Legal effect

The legal effect of a fixed trust is that the inheritance is protected from the child until the selected age. Only at that stage is the child entitled to call on the trustees to hand over the inheritance to them to invest or spend as they so wish.

It is sensible to provide in a Will of this nature that the trustees are given powers to apply capital for the child's benefit while under the selected age should a need arise and the income not be sufficient.

Depending on how the Will is drafted, while the child is under the age of 18, the trustees can or must apply the income of the inheritance for the benefit of the child, e.g., for living expenses, education, etc. If the trust does not allow the accumulation of income, the income not yet applied to the child at regular intervals from the date of death of the parent to age 18 must be paid out in lump sum at age 18 and all future annual income must be paid out to the child at regular intervals from age 18 on. Therefore, the child is not protected from any sizeable income flow from age 18 and will, at 18, receive a lump sum of any income not spent up to age 18.

Tax effect

The tax effect depends on the version of fixed trust that applies. If we assume that the selected age is 25, the following applies.

Power to accumulate

Where the trustees have power to accumulate income, the trust is deemed to be a discretionary trust for CAT and income tax purposes[18]. This is the 'first limb' of the definition of discretionary trusts mentioned above. On the child's 21st birthday, as there are no other principal objects in the trust for that child's share, discretionary trust levies will arise (6% initially on the child's 21st birthday and 1% per annum thereafter, albeit that 50% of the 6% levy will be refunded on the 25th birthday, as the accumulation within the trust automatically stops then). On the child's 25th birthday the child is deemed to inherit the asset at that date and is taxed accordingly. The usual tax-free threshold is applied to the value received, and the balance is subject to inheritance tax at 33%.

The difference between this trust and a discretionary trust is that the trustees here typically do not have the flexibility to amend the trust to manage the levies by removing the power to accumulate and must therefore pay levies, even if the youngest child is mature at age 21.

Furthermore, where there are a number of children in the family, the older children do not have the benefit of relying on the youngest child being under age 21 to postpone the levies as these trusts generally provide for the fixing of the amount for each child from the outset so they are the only beneficiary for the particular share.

In addition, the winding-up of the trust on the 25th birthday is a taxable event for CGT purposes, albeit that usually there is a credit available for the CAT paid (this credit would be lost if the child sold the chargeable assets received by him within two years[19]).

The trustees are assessed for income tax and CGT purposes on the income or gains made by the trust during the period that the assets remain under the trust. The additional 20% discretionary trust surcharge arises on income accumulated. The tax effect is therefore the same as a discretionary trust, although the trustees do not have any discretion to hold back funds from the child at age 25 nor appoint out the funds before age 25 e.g., before the levies start at age 21. To the extent that income is paid out, the child is assessed to tax on the income and can claim a credit in respect of tax paid by the trustees. The child is also treated as receiving an inheritance of the amount received, which is subject to CAT (in such a case, the value of the inheritance takenshould be calculated as net of income tax[20]).

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[18] s2(1) CATCA 2003 defines any trust that accumulates income as a discretionary trust even if there is no discretion around the capital passing to the child.
[19] s104 CATCA 2003
[20] see Taxation of Gifts and Inheritances Whelan & Williams; ITI FA 2019 at 10.2.5.

No power to accumulate

Where the trustees do not have power to accumulate income, depending on the exact wording in the trust deed, it is generally Revenue's view that for CAT purposes the child is deemed to inherit an interest in possession on the death of the parent. In such a case, this inheritance is initially taxed as a limited interest calculated by subtracting from 25 the age of the child at the parent's death to arrive at a calculation of a period certain (and then applying the rules in Schedule 1, part 1, paragraph 6, CATCA 2003, to arrive at the taxable value). The usual tax-free threshold is applied to the value received, and the balance is subject to inheritance tax at 33%. On the child's 25th birthday, the child is deemed for CAT purposes to inherit a further absolute interest in the trust fund at the value at that date of the trust fund. The child's earlier fixed interest is aggregated with the absolute interest now taken. The usual tax-free threshold is applied to the value received, and the balance is subject to inheritance tax at 33%. In effect, there is a double charge to CAT on the same assets in the trust. This tax treatment is, however, uncertain as it rests on Revenue's interpretation of the legislation in light of the case of Jacob (Brigid Kathleen) v Revenue Commissioners[21], which was settled without fully determining the issue of value.

The trustees are assessed for income tax and CGT on the income or gains made by the trust during the period that the assets remain in the fixed trust with no annual exemption available to them. The child is also assessed on the income paid out and can claim a credit in respect of tax paid by the trustees.

Again, the winding-up of the trust on the 25th birthday, is a taxable event for CGT purposes, albeit that usually there is a credit available for any CAT paid. This credit would be lost if the child sold the chargeable assets received by him within two years (s104 CATCA 2003 as introduced in FA 2006).

Disadvantage

The effect of this is that the typical fixed trust is a quite tax-inefficient method, either because of the discretionary trust levies or because of the risk of double taxation for CAT. In any event, it does not afford real protection for a child, should that child still be immature at the selected age.

Recommendation

Although it may at first sight seem sensible for parents to take the "balanced" view between protection and tax efficiency in providing for their young by adopting a fixed trust structure, in the end such a structure may not afford the tax efficiency that one would assume. Also, given the nature of a fixed trust, the protection is available only until a particular age, whether a child is mature at that age or not.

It can, therefore, be more appropriate to suggest to the parents that their assets be divided into certain asset types that would be suitable to put into the bare trusts and those that should be held back in a discretionary trust. Assets suitable for bare trusts

[21] [1984] 3 ITR 104

could be those that are already restricted in some other way, whether it be investment assets in joint names with other investors or partners where others' consent is required to sell or assets that are subject to mortgages and which require the bank's consent to sell.

4. Fixed Trust - the Life Interest

The other fixed trust is one that has been in existence for hundreds of years, particularly in times where it was considered that wives needed protection and where the priority was to ensure the children would inherit after their 'mother's time' with the assets. This trust form has however become popular once again to deal with the so called 'blended family' where there is a need to protect the assets from claims by children of the first family[22] where a testator has married a second time and wishes to provide for their spouse.

The life interest trust is also popular for those who are inheriting where they are already relatively old to reduce the tax by the reduction of the amount inherited by the life interest factor. Typically, this would work in cases of siblings unable to qualify for the dwelling house exemption taking a house co-owned with a sibling testator, and cohabitants.

The legal effect of this trust is that the capital is held by the trustees with a guarantee that the income arising from the capital must be paid to the named life tenant. On the death of the life tenant, named persons will inherit the capital, called 'remaindermen'. Given that income may not be sufficient for the day-to-day maintenance of the life tenant, it is sensible to add in power to advance capital to the life tenant in certain circumstances[23], while it is also useful to add in power to advance capital to the remaindermen.[24]

The income net of expenses can be mandated to the life tenant who can be assessed on the income net of expenses[25]. If not, the trustees should pay income tax at the standard rate and pass over the net income to the life tenant, providing them a certificate of income tax deducted[26]. The life tenant is then assessed to income tax on the income received from the trust as Schedule D Case IV income and is allowed a credit for the income tax paid by the trustees.

CGT on any gains arising in the trust is charged in the hands of the trustees with no annual exemption available to them.
The CAT on the life tenant is calculated based on his or her age applied to the tables in CATCA 2003, subject to a proportional refund if the life tenant dies within 5 years. Where that CAT is paid by the trustees out of the capital of the trust fund on behalf of

[22] Under section 117 Succession Act 1965
[23] Although such powers might defeat the purpose of seeking to avoid claims against the estate unless there are veto's also applied.
[24] Although such power without a veto might encourage the spouse to take a legal right share under the Succession Act 1965 instead.
[25] Williams v Singer 7 TC 411, but the trustee must file a return under section 890 TCA97
[26] A Form R185 is furnished

the life tenant, as it reduces the capital available to produce income for the life tenant that is not treated as a benefit taken[27].

5. Other uses for Trusts for Families

Discretionary trusts are also used to park assets on death before a trigger for CAT arises so as to allow conditions for **reliefs or exemptions** be fulfilled. Bear in mind however, to the extent that there is a cost of the levies in such a case for the limited time, such levies are on the full value of assets that otherwise for CAT might be reduced by 90% i.e., agricultural or business assets.

A life interest trust is typically part of the structure known as 'purchase of a **reversionary interest**', a structure that allows market value to be paid for an asset determined on the basis that the enjoyment of that asset is postponed, thus providing a discount to current market value. This should be distinguished from a right of residence, where a trust is not involved but where there is a different mechanism to allow value pass now for tax purposes and again on the death of the person occupying the house.

Discretionary trusts also allow the so called '**generation skipping'** where a grandparent may consider with his children that the assets to be left by the grandparent are not needed by their children and so might pass to the next generation, albeit in a protected manner. This also allows the children to benefit during their lifetimes if required. In theory at a cost of the annual levies, it would take 27 years[28] for the trust levies to match the amount of CAT that the child would otherwise pay so the grandchild might inherit ahead of that and the child not inherit at all.

Traditionally also some family businesses kept the business in a discretionary trust to enable the **continuation of the business** through the generations[29], particularly if the business was not paying out dividends and the family members were able to benefit from salaried work in the business instead. The cost of the levies is as such akin to an instalment payment of the CAT that would have arisen in each generation receiving the business otherwise.

The **divorce of the child** is a significant concern for many older clients at the moment. How to protect the inheritance earmarked for that child from that child's creditors or an estranged spouse? While it is possible to provide for an inheritance to pass for the benefit of the child in a form of asset protection structure such as a discretionary trust, there is danger that the assets in the trust would still be considered by a Court as if it were owned by the child when the court is deciding what is available in the division of the family assets. The Court may seek to include the trust assets as part of the assets available to the child but award an amount payable out of other assets. Alternatively, the Court could 'judicially encourage' the trustees to appoint assets out to a beneficiary to enable a payment to be made to the other spouse. Therefore, a trust is not a

[27] See eBrief 108/22 and part 19.21 of the CAT TDM Part 19 – Miscellaneous Issues
[28] on a straight-line basis ignoring value changes or tax rate adjustments or tax on income distributed
[29] Particularly if the business or beneficiaries would not qualify for BPR.

complete protection in a divorce situation and care must be taken in how it is structured and managed, particularly if the child is to be a beneficiary.[30]

The Supreme Court case of Y.G. v N.G. in November 2011[31] provided greater certainty on the question of the 'second bite of the cherry' in Irish divorces. Previously there was a concern that where a divorced child received an inheritance after separation, their former spouse could apply to Court to amend the agreement/award made at the time of the divorce because new assets were available. This case decided that only in limited circumstances would there be an award made against such a later inheritance. The acquisition of wealth after separation (where the wealth is unconnected to any joint project by the spouses during their married lives) is not a factor of itself to vest in the other spouse a right to further monies/assets. The Supreme Court decided that its duty was to ensure 'proper provision', not to enter into a 'redistribution of wealth'. The right to a 'clean break', while not established under Irish law, is now confirmed as a legitimate expectation.

Similar principles might apply to general **creditors of a child** where a parent might leave an inheritance earmarked originally for the child into discretionary trust rather than direct to a child as the child's creditors cannot then claim that the child owns the assets in the trust.

6. Trusts for persons with Special Needs

The discretionary trust structure is ideal for those with special needs[32] who are expected to inherit and yet such an inheritance would result in social welfare benefits being lost and the assets then needing to be protected by a Decision Making Representative under the new legislation that replaces wardship[33].

Such a trust must be carefully structured to ensure that the conditions to capital tax reliefs are fully availed of. The obvious ones available for vulnerable beneficiaries are as follows

- Exemption from levies (DTT) if the discretionary trust is made exclusively for the benefit of persons who are because of age or improvidence, or of physical, mental or legal incapacity incapable of managing their own affairs.[34]

- Exemption from CAT for benefits taken for the support, maintenance, education of a child (for inheritances only where both parents have died) where the child is permanently incapacitated by reason of physical or mental infirmity from maintaining himself or herself.[35]

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[30] Assuming the trust is not considered a pre or post nuptial settlement.
[31] G v G [2011] IESC 40 Supreme Court 19 October 2011
[32] A person with a legal, mental, or other disability. The definition of special needs varies between the various exemptions that will be relevant under the trust.
[33] The Assisted Decision Making (Capacity) Act 2015 due to be commenced 26 April 2023.
[34] s17(1)(d) CATCA03 and eBrief 48/2018 and TDM CAT part 5 concerning improvidence
[35] s82(2) CATCA03

- Exemption from CAT for benefits taken exclusively to discharge medical expenses of an individual who is permanently incapacitated by reason of physical or mental infirmity (but note Revenue interpretation of the legislation that the benefit must state the qualifying purpose).[36]

- PPR relief from CGT if the beneficiary lives in a house that might later be sold[37].

- Exemption from mandatory disclosure rules, see below.

A parent can create, either during the parent's lifetime or under the Will, a specialised discretionary trust for what that child would otherwise have received as an inheritance. The trust protects the child financially and put structure to their finances. Indeed it is a useful asset protection structure for the child in the event of the child incurring liabilities (in the case of the improvident child) and for a child in receipt of a disability allowance. The trust and the benefits taken from the trust can avail of the above specific tax reliefs. The trust can be a valuable protection for the person with a disability, particularly where the State benefits can give that person a sense of dignity never mind avoiding the risk of losing the package of benefits available which would arise for any inheritance over €50,000. Given that the disability benefits may not be adequate to ensure the comfort that the parents wish to ensure for the child there is still a need to have a pool of funds set aside in the specialist trust.

The typical specialist trust usually incorporates a discretionary trust with a limited class of beneficiaries together with a shorter than usual defined trust period to avoid a trigger of Discretionary Trust Tax (levies) at the death of the person with the disability.

While there is provision in the dwellinghouse exemption for a dependent relative to take a gift of a dwellinghouse in exempt form[38], it would generally not be recommended that the house in which the beneficiary with special needs resides be appointed out to that child[39] as on any later sale of the house the proceeds would then be an asset of the child requiring management without the benefit of the protection of a comprehensive trust.

7. Protective trust

The protective trust originated in Dickensian times as a trust whereby the benefactor sought to ensure that his dependant received a living from a trust through a life interest but, concerned that the dependant might seek to borrow against the promise of the income and squander the capital borrowed, the trust would automatically convert to deprive them of the interest in the trust on certain acts arising so that the beneficiary would not be guaranteed anything into the future (and so their creditors could not claim that interest from them). In more modern times with adjustments, it has also become more fashionable for the risk-taking entrepreneur.

[36] s84 CATCA03 and CAT TDM part 22
[37] s604(10)
[38] s86(5) & (9) CATCA03
[39] Such as to hold under a bare trust if the child cannot manage the asset.

A protective trust in modern times is a combination of a life interest and a discretionary trust. It is a trust which provides that the beneficiary, who may become vulnerable to creditor claims, receives all the income from the trust fund during their lifetime but, if certain acts occur or if the beneficiary themself commits any act which would, if they were entitled absolutely to the trust fund, have the effect of depriving them of it, their interest as a beneficiary would cease and determine immediately. In such a case, instead of the trustees holding the trust fund for the beneficiary for their lifetime, they would automatically hold the trust fund on discretionary trusts for a class of beneficiaries including the original beneficiary, their spouse and children and other extended family members if so desired. The discretionary trust would continue for the balance of the lifetime of the original beneficiary and if required could automatically cease on the death of that beneficiary to pass on death to specific persons e.g., to their spouse and/or children.

The effect of this is that the funds would still be available to the beneficiary through payments to their family or on a discretionary basis to discharge outgoings actually incurred by them, yet they would not be automatically entitled to the assets in the event their creditors sought to recover from them.

On the transfer of assets from an individual to a trust to hold on behalf of that individual for life or determinable on their bankruptcy, similar to the interest in possession trust, there is a deemed disposal for CGT, CAT and SD purposes. The disposal is deemed to have occurred at the open market value of the assets transferring.

For CGT purposes the charge arises in the hands of the individual transferring the asset. For this reason, it is best to transfer assets that on disposal will produce no gain or indeed will produce a loss (which loss would be available for the client against any other gains).

For Stamp Duty purposes, even if the settlor is one of the trustees, stamp duty arises on assets settled into the trust on its creation as the trustees are receiving the benefit in their capacity as trustees. For this reason, the trust is usually set up on the start-up of the risk-taking business where the value is low on transfer into the trust.

For CAT purposes, assuming the beneficiary of the interest in possession is in fact the disponer, no CAT will arise[40].

If the trust is converted into a discretionary trust, there is an automatic trigger of capital gains tax on any increase in the value of chargeable assets in the trust even though no assets have actually been disposed of[41]. The chargeable assets are deemed to be disposed of by the trustees for their market value and reacquired by them at that value. This is a principal drawback of the protective trust as against a discretionary trust set up initially.

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[40] Section 83(2) CATCA 03
[41] Section 577(3) TCA 99

8. Other tax issues for trusts - Anti-Avoidance

Before considering pure anti-avoidance issues for trusts, it is worth reviewing the general territoriality rules for each of the taxes that mainly concern trusts as follows.

Territoriality rules for Trusts

Income tax - territoriality rules

Under income tax rules, where a trust is resident determines the extent to which the trustees are liable to income tax on the trust income however the legislation on this is scant. If a trust is resident in Ireland, it is liable to Irish income tax on its worldwide income. If it is non-Irish resident, it is liable only to Irish income tax on Irish source income (albeit we will see below the matter of attribution of income to a settlor or beneficiary under anti-avoidance legislation).

Where all of the trustees are residents in Ireland, they are liable to Irish tax in respect of income that they receive. As they are not beneficially entitled to the income, the income is taxed at the standard rate of income tax at 20%. Where the trustees are in receipt of income which is to be accumulated or which is payable at the discretion of the trustees and where that income is neither distributed nor treated for the purposes of the Income Tax Acts as being income of the settlor and where it exceeds the income applied in defraying the expenses of the trustees in the year, and where the amount is not distributed to one or more persons within eighteen months of the end of the year of assessment, the income is subject to an additional surcharge to income tax at 20% - the "discretionary trust income surcharge".

The trustees are assessed on the basis that they are each entitled to the income and so, if they are all resident in Ireland, they are assessed jointly as if the trust is Irish resident[42]. If not all the trustees are residents in Ireland, then there is an argument based on a decision of the House of Lords in the UK in the case of Dawson v. IRC that the Irish trustees are still liable to Irish tax even if in the minority. It is said that the Revenue Commissioners have reservations in relation to this decision, yet this decision could be persuasive in Ireland. It is Revenue practice to treat the trust as Irish resident if there are any Irish resident trustee(s) and if the trust is generally administered in Ireland[43].

Where income is vested absolutely in a beneficiary, the trustees typically mandate the income to the beneficiary and the beneficiary is assessed directly[44] (albeit the trustees could still be assessed if the beneficiary fails to pay[45]). Based on a number of UK cases, where the beneficiary of a trust is not resident in Ireland and where the income of the trust is mandated to that beneficiary, the Irish Revenue will not raise any

[42] Dawson v IRC [1989]STC473 decided that it is generally the trustees who are taxable in respect of trust income and not the trust as a distinct and separate entity, in contrast to CGT where the trustees are a continuing body of persons.
[43] See *Irish Income Tax 2021*, Tom Maguire (previously Judge) at 15.303
[44] Williams v Singer 1921 7 TC 387
[45] S1050 TCA97 where a return must be filed.

assessments on the trustees. They regard the income as being the income of the beneficiary and, to the extent that that beneficiary will be liable to Irish tax, they will seek to assess that income on the beneficiary. Where a beneficiary is not resident in Ireland and as such is not liable to Irish tax, the income will not be subject to Irish tax even if the trustees are Irish residents.

In the case where income is mandated on to beneficiaries, the trustees can still have a liability if they retain some of the income to meet their expenses. In such a case, the liability of the trustees will be limited to tax on the income that they have retained to meet their expenses. It is possible to avoid any such liability if all of the income is mandated to a beneficiary and if the beneficiary in turn meets expenses of the trust out of the income mandated to them.

Where the trustees are in receipt of income upon which they are taxable and where that income is subsequently paid to a beneficiary, it is treated for Irish tax purposes as taxed income in the hands of the beneficiary[46].

Where the trustees of the settlement are resident in Ireland for tax purposes, the Irish Revenue will normally regard them as being entitled to the benefit of double taxation treaties. Thus, a credit will normally be given where overseas taxation is suffered by the trustees on income that they have suffered. Whether the trustees can avail of reduced rates of withholding tax that might be provided for by Irish treaties is actually dependent on the treatment that is afforded to trusts in the countries in which the income is sourced. It will be necessary to consider the language of the relevant treaties and whether the definition of a resident of the particular state could encompass the trustees (as a body of persons) and therefore confer benefits on the trust or whether the language of the treaty prevents them claiming the benefits.

The matter of the residence and ordinary residence of the settlor and the spouse of the settlor is also relevant in the context of income tax anti-avoidance rules and attributions of income, discussed below, where the treaty relief is more difficult to apply.

The matter of the domicile and residence and ordinary residence of the beneficiaries of the trust is also relevant again in the context of income tax anti-avoidance rules and attributions of income, discussed below, again where the treaty relief is more difficult to apply.

[46] The trustees will normally issue a form R185 to the beneficiary confirming that the income they have received has already suffered tax and a credit or refund of that tax will be available to the beneficiary depending on their tax circumstances. Where the beneficiary is non-resident and would not be liable to Irish tax in respect of the income received, then depending on their country of residence a refund of this tax should be available to them. However, in turn the beneficiary must account for the tax under their own local jurisdiction and the Irish Revenue require the beneficiary to notify their local jurisdiction and prove their residence there before making the refund.

Capital Gains Tax (CGT) - territoriality rules

Trustees are treated for the purposes of CGT as being resident and ordinarily resident in Ireland unless the general administration of the trust is ordinarily carried on outside Ireland and the trustees or the majority of them for the time being are not resident or ordinarily resident in Ireland. The CGT legislation provides that where a person is carrying on a business which consists of or includes the management of trusts, and acts as a trustee of a trust in the course of that business they should be treated in relation to that trust as not resident in Ireland if the whole of the settled property consists of or derives from property provided by a person not at the time domiciled, resident or ordinarily resident in Ireland and, if in such a case the trustees or majority of them are to be treated in relation to that trust as not resident in Ireland, the general administration of the trust shall be treated as ordinarily carried on outside Ireland. Accordingly, where an Irish-based professional trustee (such as a bank) acts as trustee to a trust, that professional trustee is deemed not resident and therefore is not subject to Irish capital gains tax (except on a disposal of Irish specified assets such as Irish real property) if it satisfies the following conditions:

- The trustee is acting in the course of a business which consists of the management of trusts; and
- The trustee is acting as trustee of the particular trust in the course of its business, and
- The whole of the property in the trust consists of or is derived from property provided by a person who was not domiciled, resident or ordinarily resident in Ireland at the time he provided the property.

For CGT purposes, trustees can be assessed to CGT in respect of disposal of assets held by them if the trustees are regarded as being resident in Ireland for tax purposes or if the assets consist of certain specified assets (principally Irish land or buildings) held by non-resident trustees.

For CGT purposes, the trustees of the settlement are treated as being a single and continuous body of persons (distinct from persons who may from time to time be the trustees)[47]. Thus, changes in the actual persons who are trustees of a trust, of itself, are not looked on as resulting in any disposals for tax purposes. There are provisions which apply where trustees who are residents for tax purposes in Ireland cease to be so resident in Ireland. In circumstances where trustees become neither resident nor ordinarily resident in Ireland, the trustees are deemed to dispose of the assets constituting the settled property of the settlement immediately before they cease to be resident (there are some exceptions where the assets continue to be used for trade purposes in Ireland).

Where the trustees of the settlement are resident in Ireland for CGT purposes, the Irish Revenue will normally regard them as being entitled to the benefit of double taxation treaties. Thus, a credit will normally be given where overseas taxation is suffered by

[47] Section 574(1) TCA 97

the trustees on gains that they have suffered. It will be necessary to consider the language of the relevant treaties and whether the definition of a resident of the particular state could encompass the trustees (as a body of persons) and therefore confer benefits on the trust or whether the language of the treaty prevents them claiming the benefits.

The matter of the domicile and residence and ordinary residence of the settlor is also relevant for CGT purposes in the context of CGT anti-avoidance rules and attributions of gains, discussed below.

The matter of the residence and ordinary residence of the beneficiaries of the trust is also relevant for CGT purposes again in the context of CGT anti-avoidance rules and attributions of gains, discussed below.

CAT - territoriality rules

Capital acquisitions tax ("CAT") is a tax on gifts or inheritances[48].

Gifts or inheritances of Irish property held in trusts (whether moveable or immoveable) are liable to tax whether or not the disponer (the settlor) is resident or domiciled in Ireland. Foreign property is liable to tax where either the disponer or the beneficiary is resident or ordinarily resident in Ireland at the relevant date.

Where a discretionary trust is established inter vivos after 1/12/99, the residency status of the donor at the date of the creation of the settlement, the date a gift is taken from the settlement and the date of death of the disponer is relevant.

Irish CAT arises on gifts taken under a discretionary trust -

- where the donor is resident or ordinarily resident in the State at the date of the disposition under which the donee takes the gift; or
- where the donor was resident or ordinarily resident in the State at the date of gift; or
- in the case of a gift taken after the death of the donor where the donor was resident or ordinarily resident in the State at the date of that death;
- where the donee/beneficiary is resident or ordinarily resident in the State at the date of gift;
- in any other case, gift tax will arise in respect of the property comprised in the gift which is situate in the State at the date of the gift.

In the case of gifts other than under discretionary trusts and in the case of all inheritances, Irish CAT arises on benefits taken whether under a discretionary trust or direct:

[48] Basis of legislation is the Capital Acquisitions Taxes Consolidation Act 2003 ("CATCA03")

- where the donor was resident or ordinarily resident in the State at the date of death / date of benefit;
- where the donee/beneficiary is resident or ordinarily resident in the State at the date of death / date of benefit;
- in any other case, gift tax will arise in respect of the property comprised in the gift which is situate in the State at the date of death / date of benefit.

Benefits from dispositions created prior to 1 December 1999 must be considered separately as the old rules concerning domicile still apply to these, unless it could be stated that there has been a separate settlement created post 1 December 1999 bringing the trust assets into the new territoriality regime.

Special rules[49] apply for non-domiciled temporary Irish residents where the donor/beneficiary has not been resident in Ireland for five consecutive years of assessment prior to the year of assessment in which the benefit is taken.

Special rules[50] also apply to ensure the situs of property cannot be artificially changed by transferring the Irish situate property into a foreign-controlled company.

There are only two double taxation treaties in place for Irish CAT, with the United Kingdom and with the USA. These are limited treaties, however. A further unilateral relief is also available for similar taxes arising in other jurisdictions.

Territoriality rules for Discretionary Trusts

The rules of capital acquisitions tax apply in determining the territorial limits of discretionary trust tax. If the trust created is a discretionary trust, all trust assets will only be chargeable to discretionary trust tax where the disponer is resident or ordinarily resident in the State at the date of establishment of the discretionary trust or at the date of transfer of the assets to the trust. Otherwise, only the property deemed to be situated in the State at the date of the initial charge and thereafter on 31 December in each year is taxable. The domicile or residence of the beneficiaries of the trust is not relevant for the purposes of assessing the charge to discretionary trust tax.

Gifts or inheritances taken prior to 1 December 1999 were generally taxable based on the domicile of the disponer at a particular time (for instance when a discretionary trust was set up, when a benefit was appointed out of a discretionary trust or on the death of the disponer).

These 'old rules' of domicile continue to apply to trusts set up pre-1 December 1999.

[49] CATCA03 ss6(4) and 11(4)
[50] CATCA03 ss6(5) and 11(5)

Anti-Avoidance

General Anti Avoidance Regime ("GAAR")

The GAAR provisions of section 811 TCA 97 should also be considered in the context of foreign trusts.

A transaction is regarded as a tax avoidance transaction if Revenue form the opinion that:

- The transaction gives rise to a tax advantage; and
- The transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage.

Similar to the definition under the mandatory disclosure regime mentioned below, a tax advantage means any advantage arising out of or by reason of a transaction[51] relating to a reduction, deferral or avoidance of any assessment or charge to tax, including a potential or prospective charge or assessment or refund or a payment of an amount of tax, or an increase in any amount of tax refundable or otherwise payable to a person including any potential or prospective amount so refundable or payable, or the avoidance of any obligation to deduct or account for tax is considered a tax advantage.

When advising on the creation of a trust, appointment from a trust or winding up of a trust, practitioners should be cognisant of these general provisions.

Income tax - Anti-avoidance and income earned by minor children

Where there is a settlement of assets that produce income for the benefit of a child, there is first a presumption[52] that the income earned is to be taxed in the hands of the settlor. However, there are exceptions depending on whether the income is accumulated for tax purposes or distributable and whether the disposition is revocable or irrevocable, also if the settlor is the parent of the child or otherwise and if the income source is that of a trade.

Under section 796(2) TCA 97, section 795 does not apply where any person (including a parent) transfers property to trustees for a minor child:

- Where the income is accumulated;
- the settlor and spouse cannot benefit from the income or capital during the life of the child;
- the trust cannot be determined by the act or default of any person; and
- where there is no penalty for the settlor in failing to comply with the trust provisions;

[51] Including a transaction where another transaction would not have been undertaken or arranged to achieve the results or any part of the results achieved or intended to be achieved by the transaction.

[52] Under section 795 TCA 97

in which case the income is not deemed to be that of the settlor. However, if taxable income has accumulated and monies are actually paid out when a child is a minor then that payment will be treated as taxable income to the extent taxable income has been earned in the trust.

Therefore, if money is paid by the partnership to the trust to pay income tax on the partnership income earned by the trust for the child, that income will be deemed to be settlor's income and taxable in the settlor's hands.

In the case of bare trusts, the trustees should file the returns on behalf of the children where the children are deemed to earn the income themselves (i.e., the trustees are filing only on behalf of the minor as they are assessable under s1045 TCA97).
Apart from reporting, consideration should be given to the tax effect of a foreign trust in the context of Irish and other taxes and anti-avoidance provisions.

Each jurisdiction will have its own anti-avoidance legislation and some legislation, such as that of the UK, is mirrored in the Irish provisions in relation to certain aspects of attribution of offshore income and gains. DTAs should be considered but unfortunately, these are often silent in relation to the effect on trust income and gains in the attribution context.

Income tax and Transfer of assets abroad - Sections 806 & 807A TCA 97

Section 806 TCA97 seeks to prevent the avoidance by individuals resident or ordinarily resident in Ireland of a liability to income tax "by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income become payable to persons resident or domiciled out of the State". Together with s807A TCA97, this is generally referred to as 'transfer of assets abroad' rules.

This section is designed to counter individuals' resident or ordinarily resident in the State avoiding tax by means of a transfer of assets as a result of which income becomes payable to a person who is resident or domiciled outside the State.

In the case of an Irish resident settlor setting up a trust where the trustees are non-Irish residents, the income of the trust will be subject to income tax for the settlor if the settlor has retained 'power to enjoy' that income. For example, John who is Irish resident/ordinary resident sets up a trust where the trustees are non-Irish residents putting cash into the trust. The trust provides that John and his family are discretionary beneficiaries of the capital of the trust, but that John is entitled to the income during his lifetime. John's son is not Irish resident. The trustees invest the cash in shares. The dividends from the shares are paid to the trustees who appoint income to John's son at John's direction. The income of the trust is assessed on John as he has power to enjoy the income.

Even if income is not enjoyed by the individual, if a capital sum is received by the individual, then the income tax on the sum had it been income in form is chargeable on the individual. Capital sums include loans or repayments of loans and any other sum payable otherwise than as income, not being paid for full consideration.

For example, Sean who is Irish resident/ordinary resident sets up a trust where the trustees are non-Irish residents putting cash into the trust. The trust provides that Sean and his family are discretionary beneficiaries of the trust. The trustees invest the cash in shares. The dividends from the shares are paid to the trustees who accrue the income and pay it in capital form to Sean. The income of the trust is assessed on Sean as he has received a capital benefit.

Section 807A TCA97 applies to charge to income tax an individual, who is domiciled and resident and ordinarily resident in Ireland, where the individual receives a benefit from the transfer abroad but was not subject to the section 806 charge because the individual did not make the transfer of the assets in the first place.

Where the settlor is not an Irish resident or ordinarily resident individual, the Irish resident and ordinarily resident beneficiary can be liable for the income when income becomes payable to him/her.

The criteria are:

- The settlor is not Irish resident/ordinarily resident
- The income is actually paid to the individual beneficiary
- The individual beneficiary is domiciled, resident and ordinarily resident in Ireland
- The transfer or its associated operations caused the income to become payable to the individual beneficiary directly or indirectly by way of benefit for the individual or enabling a benefit for the individual.

For example, a mother domiciled resident and ordinarily resident in the UK sets up a trust for her children placing assets in that trust that invested, accrue income. The beneficiaries initially have no connection with Ireland. Later however one beneficiary settles in Ireland and becomes Irish resident and ordinarily resident. Any income payable to that Irish resident is subject to Irish income tax under section 807A TCA97. Any income from previous years while the individual had been Irish resident and ordinarily resident will also be taxable for the individual if they receive that income in the current year. However, if that income is received in capital form and is charged to CGT, it is not accounted for as income for the income tax charge[53].

Capital Gains Tax and attribution of gains - Sections 579 & 579A TCA97

In an effort to prevent the avoidance of CGT by the use of trusts, the capital gains tax code through Sections 579 and 579A TCA97 imposes a charge to capital gains tax on gains in a non-Irish resident trust by way of attribution of the gains of the trust on either the settlor of the trust or the beneficiaries of the trust. A non-resident trust for these purposes is one which is non-resident in Ireland for CGT purposes.

In summary, if the trust is held offshore where gains are made by the trustees when managing the trust, this anti-avoidance legislation can trigger CGT in the hands of an

[53] TCA97 s807A(6)

Irish beneficiary[54] whether they receive benefits or not (in the case where there has been an Irish settlor[55]) and otherwise on the payment of capital benefits to that beneficiary.

Under these provisions where any chargeable gains are realised in a trust in any tax year where:

- the trustees are non-Irish resident;
- the settlor or one of the settlors is either resident or ordinarily resident in Ireland or was when they made the settlement ;
- the settlor has an interest in the settlement[56];
- a beneficiary is domiciled in Ireland and either resident or ordinarily resident in Ireland in the tax year.

then those chargeable gains in the non-resident trust are attributed to the beneficiary as to an apportioned part based on a 'just and reasonable' principle. Gains are attributed to all beneficiaries each tax year according to the value of the interest of each beneficiary under the trust in that year and, to the extent the gains are attributed to 'non-Irish' beneficiaries, no Irish CGT charge arises. However, if the settlor is resident or ordinarily resident in Ireland and chargeable gains are treated as accruing to the beneficiary, even if the settlor is not a beneficiary, the settlor will be accountable for these gains and not the beneficiary[57].

A settlor is treated as having an interest in the settlement if a relevant beneficiary can in any circumstances receive a benefit from relevant property or relevant income which terms are all defined[58]. Effectively if the settlor, the settlor's spouse or civil partner, a company controlled by either or a company associated with a company so controlled can receive a benefit from the property which was originally settled or receives income originating from the settlor, then the settlor has an interest in the settlement.

To cover the position where:

- the settlor (or spouse) does not have an interest in the settlement; or
- has an interest but was not domiciled and was not Irish resident/ordinarily resident in the tax year or the year s/he made the trust.

section 579A TCA97 provides that the receipt of a capital payment by a beneficiary who is domiciled in Ireland and receives payment when resident or ordinarily resident in Ireland will trigger the attribution of gains arising in that year or in any prior year since 11/2/99 up to the limit of the capital payments received.

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[54] Beneficiary must be domiciled and either resident or ordinarily resident in the State.
[55] Settlor must be domiciled and either resident or ordinarily resident in the State at the time of the creation of the settlement or in the year of the gain.
[56] TCA97 s579A(c)
[57] TCA97 s579A(2)(f)
[58] TCA97 s579A(c)

The attributed gains are calculated based on Irish CGT computational rules as if the trustees had been chargeable to the Irish CGT and the amount of the capital payment received is then subject to the CGT calculated. It is not entirely clear how the Double Taxation Treaties apply. Where the trustees of the settlement are resident in Ireland for CGT purposes, the Irish Revenue will normally regard them as being entitled to the benefit of double taxation treaties. It is argued that the gain attributed to the beneficiary should equally have the benefit of treaty relief on the basis that the calculation is made as if the trustees are resident in Ireland and would have the benefit of treaty relief.

A capital benefit is one that is not subject to income tax and is widely defined as including payment in money or in specie or at the beneficiary's direction or to the extent the beneficiary becomes beneficially entitled in possession (e.g., the beneficiary takes a benefit in the trust of a life interest or an interest for a period certain). It also includes loans and free use of capital.

9. Administration

Before setting up a trust the settlor and the trustees should be advised as to the ongoing administration burdens of running a trust and practical issues to consider.

For instance, in the case of a trust set up during the lifetime, an 'inter vivos' trust, the settlor needs to ensure that the trustees have the full running of the trust without interference from the settlor. Otherwise, there is a danger that the trust structure could be challenged as a sham and the assets then held for the settlor on resulting trust.

If putting a single asset into the trust, such as a house or land, bear in mind that there will be ongoing running costs to the trust. For instance, apart from the costs of tax reporting, outgoings for the trustees in getting advices, there will also be annual insurance costs, potentially LPT costs, and general maintenance costs for the property. If the property is rented, there may be fallow periods of rental and still these costs will arise. It is therefore sensible to put aside a pool of cash also into the trust at the same time as the property to meet these costs.

Selecting the trustees can be something that becomes the greatest obstacle to getting a trust in place or a Will finalised. The role is not taken on by professionals as much these days, whether because of the open-ended liability risk[59] or the considerable time that might arise over and above professional advice when managing family matters. More typically this becomes a role filled by relatives, where they then will employ advisers. A letter of wishes is, therefore, recommended to assist such relatives in practical issues that might arise.

The rights of beneficiaries to information from a discretionary trust is also a contentious matter. While caselaw in Ireland established[60] that discretionary beneficiaries are entitled to see trust accounts when called upon, there is more controversial caselaw

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[59] Though there are indemnity clauses usually provided to protect trustees and insurance can be taken out for protection, also professional trustee companies that have limited liability status can be used.
[60] Chaine Nickson v Bank of Ireland [1976] IR 393

from abroad around other trust papers[61], most particularly the letter of wishes which generally should be treated confidentially[62]. With GDPR, the trustees must take care in relation to responding to any requests for personal data to ensure their response complies with both trust law and data protection law.[63]

Setting up a trust or bringing a trust into the Irish jurisdiction will require certain reporting for tax purposes.

Mandatory Disclosure

The Mandatory Disclosure Regime[64] for certain types of tax avoidance arrangements in place since 2011 was updated significantly in respect of transactions commenced after 23 October 2014. The purpose of this regime is to serve as an 'early warning' mechanism for Revenue in respect of what they perceive to be aggressive tax planning.

Under the current regime, the promoters of schemes as defined are required to provide Revenue with information about schemes and proposals for schemes where a "tax advantage"[65] for a taxpayer is one of the "main benefits" of the scheme and where it falls within certain "specified descriptions".

The Mandatory Disclosure regime applies where there is a scheme with a tax advantage that falls within one or more of the defined categories known as "***specified descriptions***". Some of these categories/hallmarks, whilst intended to be quite objective are nevertheless open to interpretation, some are generic in nature[66] and others more specific[67].

Included in these categories under the latest Revenue Guidelines is a category very relevant to trusts concerning inter vivos discretionary trusts and Will discretionary trusts. While at first reading all such trusts are included, there is an 'out' for Will trusts "*established under the laws of an EU member state and the trustees are resident in an EU member state*"[68] and therefore the regime does not apply to a person advising

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[61] Re Londonderry Settlement [1965] Ch 918
[62] Breakspear and others v Ackland and another [2008] All ER 260
[63] See Dawson Damer v Taylor Wessing LLP [2019] EWHC 1258 (Ch) and legal advice privilege.
[64] Chapter 3 of Part 33 TCA97 deals with the Mandatory Disclosure Regime for certain types of tax avoidance arrangements. Guidance in this area was introduced by way of Regulations and Guidelines issued by the Revenue and Guidance Notes.
[65] In effect an Irish tax advantage – guidelines indicate that, although the disclosure requirements apply to promoters outside Ireland also, this is only to the extent that the scheme enables or is expected to enable an Irish tax advantage to be obtained.
[66] The promoter wishes to keep the transaction confidential from Revenue; or confidential from other promoters; fees likely to be charged on a premium or contingent basis; standardised documentation is involved; the transaction falls into specified transaction types.
[67] Loss schemes (individual and corporate); employment schemes; income into capital schemes; income into gift schemes; discretionary trusts.
[68] Section 817DA(10) TCA97, Tax & Duty Manual Part 33-03-01 para 4.3.10 and the CAT section bullet point 4 of Appendix 1 of the same TDM.

on the creation of a Will trust where that trust is established under the laws of a Member State of the EU and the trustees are resident in such a jurisdiction.

The specified description, effectively now of inter vivos trusts and non-EU Will trusts, targets schemes that seek to gain a tax advantage through the use of a discretionary trust, wherever located.

Revenue through the Guidelines formally recognises that some discretionary trusts are trusts created under a Will many of which will not have obtaining, or seeking to obtain, a tax advantage as one of the main benefits of the will trust. However, Revenue are of the view that where a promoter has given advice to an individual in relation to creating a Will trust where obtaining, or seeking to obtain, a tax advantage is one of the main benefits of the transactions to which the trustees of that trust are to be party, the advisor must disclose the scheme unless it falls into the Revenue list of routine day to day tax advice (which includes advising on the creation of a Will) set out in the Appendix to their guidelines[69]. It is not clear if a 'regular' Will, being part of a disclosable transaction with more complicated structuring within the estate of the testator that will be effected by the Will, must thereby be tainted by the transaction and be disclosable even if it is an Irish/EU Will. Therefore, all practitioners assisting in the creation of trusts under Irish Wills should be cognisant of the mandatory disclosure regime.

Advice in relation to the creation of a Will trust is implemented in the view of Revenue when the taxpayer enters into a Will which follows that advice, notwithstanding that the taxpayer may amend the Will at some point in the future so that the Will trust may never actually come into being. The date on which a disclosure relating to bespoke advice must be made is linked to when that advice is implemented. This therefore requires promoters to disclose the contents of a Will that has not yet come into being and may never come into being. This is a matter that private client practitioners have grave concerns in doing in principle. Letters of engagement may need to be adjusted to facilitate this disclosure.

Appendix 2 of Tax & Duty Manual Part 33-03-01 includes a Schedule to Regulations, Transactions to which certain subsections of 817DA do not apply.

> "18. A transaction with trustees of a special trust for permanently incapacitated individuals, within the meaning of section 189A of the Principal Act.
>
> 19. A transaction with trustees of a trust where the trust is of a type specified in section 17 of the Capital Acquisitions Tax Consolidation Act 2003 (No.1 of 2003), or a trust which is established under the laws of another Member State which would be of a type specified in that section if the trust were established under the laws of the State.[70]"

[69] Guidelines Appendix 1 examples include "Advising on the creation of a will trust where that trust is established under the laws of a member state of the European Communities and the trustees are resident in such a jurisdiction."
[70] In effect discretionary trusts for persons with special needs

DAC6 Cross Border Mandatory Reporting

The Cross Border mandatory disclosure regime known as DAC6[71] requires intermediaries and taxpayers based in Ireland or with a connection to Ireland to report information to the Irish Revenue on reportable cross-border arrangements. It is somewhat similar to the Irish mandatory reporting regime but only applies where there is a cross-border element within the EU.[72]

The concept of tax advantage as the main benefit applies and, instead of specified descriptions, there are 'hallmarks', some of which of themselves do not require the application of the main benefit test.

A cross-border arrangement is defined as an arrangement concerning either more than one Member State or a Member State and a third country where at least one of the following conditions is met:

- Not all of the participants in the arrangement are residents for tax purposes in the same jurisdiction;
- One or more of the participants in the arrangement is simultaneously resident for tax purposes in more than one jurisdiction;
- One or more of the participants in the arrangement carries on a business in another jurisdiction through a PE situated in that jurisdiction and the arrangement forms part or the whole of the business of that PE;
- One or more of the participants in the arrangement carries on an activity in another jurisdiction without being resident for tax purposes or creating a PE situated in that jurisdiction;
- Such arrangement has a possible impact on the automatic exchange of information or the identification of beneficial ownership.

A reportable cross-border arrangement is a cross-border arrangement that falls under certain 'hallmarks'. These are grouped into the following five categories:

- A Generic hallmarks linked to the 'main benefit' test;
- B Specific hallmarks linked to the 'main benefit' test;
- C Specific hallmarks related to cross-border transactions (with some linked to the 'main benefit' test);
- D Specific hallmarks concerning automatic exchange of information and beneficial ownership; and
- E Specific hallmarks concerning transfer pricing.

Given that a trust is already obliged under separate legislation to report beneficial ownership[73], it is assumed that the creation of a trust does not fall under Hallmark D.

[71] EU Directive 2018/22 (DAC6) as implemented under Finance Act 2019 as amended
[72] See full discussion in 'EU Mandatory Disclosure: Crunch Time for DAC6 Filings' – David Fennell – Irish Tax Review (2020) Vol. 33/4
[73] CRBOT

The payment of funds from an Irish trust to a beneficiary who resides elsewhere in the EU could be considered an arrangement that might fall into Hallmark C (should for instance there be relief from double taxation on the same income/capital claimed in multiple jurisdictions) and so practitioners should ensure that this legislation is reviewed in the context of any set up of a trust and ongoing management of this, particularly where a beneficiary may move residency during the course of the administration of the trust.

Section 896A TCA97

Section 896A TCA97 imposes a reporting requirement for professional persons including, among others, solicitors, accountants, financial institutions, financial intermediaries, financial advisers, tax practitioners (CTAs), trust service providers and companies. The reporting requirement arises where a professional person is "concerned with" the establishment of a settlement, where the settlor is Irish resident and the trustees are non-Irish residents.

A person "concerned with the making of a settlement" would include any third party who:

- is engaged or involved in the making of the settlement;
- facilitates or arranges the making of the settlement;
- provides services to or for a settlor or trustee in the making of the settlement;
- is involved in or arranges the transmission of funds in relation to the settlement.

The information to be returned to Revenue is the names and addresses of the Irish resident or ordinarily resident settlors, the non-resident trustees and the dates of the settlements. Reports must be submitted within 4 months of the date on which the relevant settlement was created.

Other filings and reporting

In addition to the reporting by the CTA, the taxpayer may have to carry out further reporting which the CTA may need to advise on such as

- The trust should be registered with Revenue once it earns income tax and to obtain a PPSN for the purposes of opening a bank account. A form TR1 is required for this purpose. Subsequently, the trust should file annual tax returns for income earned.
- Section 917A TCA 1997 provides a reporting requirement where a person transfers property to the trustees of a settlement otherwise than under a transaction entered into at arms' length where the trustees are neither resident or ordinarily resident in Ireland. The transferor has an obligation to report the

payment under the provisions of this section within 3 months of the creation of the trust.

- Section 917B TCA 1997 provides a reporting requirement on the establishment of an offshore trust where the settlor is domiciled in Ireland and is either resident or ordinarily resident in Ireland. The settlor will have an obligation to report the establishment of the trust under the provisions of this section within 3 months of the creation of the trust.

- Where a person who is resident or ordinarily resident in Ireland causes funds to be transferred to a discretionary trust, wherever the trustees are resident, within 4 months of the creation of the trust, the person must file under Section 46(15) CATCA03 a return giving details of the terms of the trust, the names and addresses of the trustees and the objects of the trust and an estimate of the market value transferred.

- Section 806 TCA 1997 mentioned above does not apply where the individual shows in writing or otherwise to the satisfaction of Revenue that the purpose of avoiding a liability to income tax was not the purpose or one of the purposes for which the transfer or associated operations or any of them was effected or that the transfer was a bona fide commercial transaction[74]. If Section 806 is not to apply by virtue of the transfer of assets so that income is assessable on the transferor, that transferor will be required to write to Revenue to seek satisfaction from Revenue in relation to this matter. This should be done before the filing date for the year of assessment in which the trustee earns income.

Regulatory Financial Reporting - AEOI

There has been a significant increase recently in tightening up the anti-money laundering legislation globally and ensuring that there is a greater automatic exchange of information ("AEOI") between states in the context of anti-money laundering, including tax avoidance and tax evasion.

Trusts and in particular where there are foreign elements to trusts have become a significant issue for trustees in the context of AEOI.

Central Register of Beneficial Ownership of Trusts (CRBOT)[75]

On the creation of a trust in Ireland, the trustees are required to register within 6 months the details of beneficial owners (as defined for AML purposes, not for trust purposes) in CRBOT, unless already registered in another EU member state.

[74] s.806(8)(a) TCA 1997
[75] See full discussion on CRBOT in my article in the Irish Tax Review Issue 1, 2022

Apart from specific exclusions[76], a trust must be registered if it is considered an express trust[77].

Registration is not of the assets in the trust,[78] rather the details of who are the settlors, the trustees and the beneficial owners and the nature and extent of their respective interests in the trust. There are also requirements to register those with controlling interests in the trust, such as protectors. In the case of the beneficiary who does not have a current beneficial interest, they must be registered as a future interest. In the case of a discretionary trust, the class of beneficiaries is to be outlined, but all the beneficiaries in that class need not be registered. Details of those that are identifiable however should be kept on the trustees' internal register separately.

The trustees will not be able to open a bank account or engage with advisers, such as CTAs filing tax returns for the trust, without being registered, and there is an obligation on the financial institutions and CTAs and other advisers (known as designated bodies) to check the trust is registered else they are not allowed to engage the trust. This check is done by the trustees providing the designated person an access number who then checks on the register.

The recent EU case that resulted in the closure of the RBO from the public view[79] does not affect this trust register as it was always restricted in access beyond the regulatory bodies to only designated bodies with the access number and those that can prove 'legitimate interest'. The question of what is legitimate interest is narrowly applied in Ireland – a person applying for information on the basis they have legitimate interest in that information must show that they are engaged in the prevention, detection or investigation of money laundering or terrorist financing offences and that the subject of the access request is connected with persons convicted of an associated offence or holds assets in a high risk third country.

We are awaiting more details from CRBOT as to how the cross-border element of disclosure of interests might arise. This has not yet been agreed. Concerns had been expressed about there being a 'back door' into the non-public Irish register through public EU registers.

To the extent a CTA as a designated person is engaged by a non-Irish trust registered elsewhere in the EU, the CTA will need to check the register in that EU country and to establish if the information required in Ireland is on the other member state register. This seems to defeat the purpose of there being a minimum standard type register for all businesses in the EU as envisaged by the Directive. The CTA may have to translate the other register and check that all the details provided are the same as the details that would have been provided if registered in Ireland. Obviously, it would be much

[76] Approved occupational pension schemes, approved retirement funds, approved profit-sharing schemes, employee share ownership schemes, trusts for restricted shares, Haemophilia HIV trusts, unit trusts.

[77] So not statutory trusts, resulting trusts

[78] Generally, unless the nature and extent of the beneficial owner's interest in the trust can only be set out by reference to particular trust assets.

[79] C-37/20 and C-601/20 EUCJ

more satisfactory if there is an EU recognised certificate of registration of the minimum requirements which ought to protect the designated person in each country.

FATCA Ireland and Private Clients including Trusts

The Foreign Account Tax Compliance Act (FATCA) was signed into US law in March 2010, effective from January 2013 as part of the US Hiring Incentives to Restore Employment (HIRE) Act 2010. Its purpose is to increase revenue to the US Internal Revenue Service (IRS) by identifying offshore US accounts that could be used for tax evasion by US residents including where such accounts are held through trusts. It requires institutions outside the US to pass information to the US tax authorities. In turn the institutions require the beneficiary or the trustee to disclose information concerning their status.

The status of a trust depends on various factors but NOT on whether the trust has US connections to the settlor, beneficiaries, or the ownership of US assets.

As a trust will need to declare its status to any Financial Institution with which it has dealings (banks, stockbrokers, etc.), the trust will need to determine its own status and either claim exemption, register as a Financial Institution (and then report itself) or self-certify that it is an NFFE.

If it is a Financial Institution the trust must be registered and obtain a GIIN and use this number as evidence for other Financial Institutions that it is FATCA compliant. It must then complete a due diligence on the composition of its trust and file a return detailing information about US residents/citizens who are beneficiaries or control the trust or file a nil return annually if there are no US connections as beneficiaries or controllers.

If it is not a Financial Institution, it must determine if it is a passive NFFE as defined and self-certify this on a form W-8[80] for giving to Financial Institutions with which they hold accounts to avoid those institutions withholding 30% tax.

If the trust does not hold a Financial Account however this should be noted on the trust file to explain why the trust has not either registered as a Financial Institution or self-certified as a passive NFFE.

Once the trust has determined its status, a note of this should be kept with the trust deed. The status can change if circumstances change.

A trust will be a Financial Institution where the trust is professionally managed (i.e., has a corporate trustee) and where the trustee has engaged a financial institution to manage the financial assets of the trust (e.g., a stockbroker manages the trust portfolio). Certain charitable and pension trusts, however, are excluded from FATCA.

[80] Form W-8 See Appendix

Common Reporting Standard - OECD

In July 2014, the Organization for Economic Cooperation and Development (OECD) released the new global 'standard' for the automatic exchange of information (AEOI) between offshore and onshore jurisdictions in tax matters – known as the Common Reporting Standard (CRS)[81]. The CRS reach is truly global - over 100 countries including all the EU member states have adopted the new reporting standard. Ireland adopted this with effect from 1 January 2016.

Ireland requires financial institutions to submit CRS information to Revenue by 30 June each year[82]. Ireland had agreements in place with 77 Participating Jurisdictions as at 21/12/15.

The CRS broadly aims to obtain financial information directly from the reporting financial institutions (FIs) which include information related to all reportable accounts and also the personal data of the account holders. The information that is to be exchanged covers interests, dividends earned, account balances, income from insurance and sales proceeds from financial assets. It is also mandatory for personal data of account holders to be released, which includes, name, address, residence, tax identification number and place of birth.

The CRS draws extensively on the intergovernmental approach to implementing FATCA, mentioned above. Terms such as a Passive NFE, Controlling Person and Reporting or Non-Reporting Financial Institution are common to the CRS and FATCA. However, the CRS differs from FATCA to the extent FATCA is based on citizenship and withholding of taxes.

Core concepts of

- Terms such as Financial Institutions and passive and active NFFEs, Controlling Person and Reporting or Non-Reporting Financial Institution are common to the CRS and FATCA
- Both FATCA and CRS operate on a calendar year basis and the reporting between countries will take place within a 9-month period
- Both will issue a series of common guidance in interpreting rules.

However, CRS differs from FATCA in relation to

- the basis of residence of an individual under CRS capturing the reporting (where FATCA focuses on the citizenship of the individual). Residence of trusts over multiple jurisdictions was considered in the Guidance issued in July 2014. Irish Revenue require the collection of information by the FI of the country of residence and TIN of all non-resident customers, not only residents of

[81] http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-information-in-tax-matters.htm
[82] See Revenue website under business and self-assessment/financial services/aeoi

jurisdictions with which Ireland has an exchange of information agreement[83]. It is expected that there might be reporting in more than one jurisdiction.

- there will not be withholding of tax (where FATCA withholds 30% for failure to report)
- there will not be a registration procedure for reporting FIs etc. on the basis the national tax authority will collect the data and report to the jurisdiction where a person with (or person with a beneficial interest in) a reporting account is resident.
- Charities are not excluded from this model if they are FIs.
- Trust protectors will be treated as account holders irrespective of their level of control of the trust
- FATCA is based out of the US with various IGAs agreed between countries but still effective in the US without the IGAs against FIs with a presence in the US. CRS will be a series of treaties on a multinational or binational basis.
- The trustees should assess if the trust is an FI as it then must make formal reports.
- A discretionary beneficiary who receives a distribution must be reported by a Reporting FI in the year the distribution is received and is to be treated as an account holder for subsequent years unless permanently excluded from receiving future distributions from the trusts.

10. Topical trends

Family partnerships are still very popular structures for families interested in transferring assets to their children for tax purposes (whether under a bare trust or direct once over age 18) and still maintaining control. These should be considered in the context of transferring the tax-free threshold, or indeed accumulated small gifts. If however that partnership borrows, care should be taken as the guarantee of a parent for that borrowing that is called on becomes a taxable benefit taken by the child.

Where parents wish to leave assets to children that might qualify for exemptions after certain time periods, such as business assets or agricultural assets, they could park the assets in a discretionary trust at a cost of levies until the time periods are up. However, a child might not be interested in retaining such assets long-term so the levy cost is unnecessarily incurred. A combination of **disclaimers and trusts** can maintain flexibility to allow the child to make a choice in relation to the route to take without incurring the cost of the levies.

The sale of a **reversionary interest** is generally a tax-efficient way of releasing equity allowing protection for an elderly client by ensuring reasonable value being obtained, security of living in the house and tax efficiency for the purchaser of the reversionary interest. The structure can be complicated and involves trusts and a payment in advance of monies which will be offset by the perceived reduction in CAT (as there would then be no CAT on the death of the life tenant). It is best confined to the house

[83] Pending further review by Revenue with the Data Commission

only to ensure that Principal Private Residence Relief is available for CGT purposes in the hands of the Reversioner on a later sale.

Approved Retirement Funds are taxed at source on the death of the ARF owner (or later on the death of the spouse of that ARF holder) and the tax amount is determined by who is to inherit. If the ARF is to pass to a spouse or child under age 21 no income tax arises. CAT will arise for the child in such a case. If the ARF passes to a child over age 21 income tax at a fixed rate of 30% arises for the child and there is a specific exemption from CAT for the child. However, if the ARF passes to someone other than a spouse or child, income tax arises at the marginal rate of the deceased and furthermore, CAT will arise, effectively a double charge to tax. Therefore, if an ARF passes to a trust that is discretionary there will be an income tax charge at the marginal rate plus a CAT charge on the appointment of the money from the trust later to the beneficiary. It is therefore important to ensure that ARFs are left specifically under Wills if the residue is passing into a trust.

Trusts with offshore connections with onshore beneficiaries are typically now being brought **onshore** to avoid the various anti-avoidance rules applying and to reduce any additional taxes that might arise. Therefore, if a taxpayer has a trust set up while outside Ireland and decides to come to Ireland permanently, the taxpayer might consider either winding up the trust or changing the trustees to Irish-based trustees. To the extent that the trust is brought onshore, taxes should be considered and also the structure of the trust to ensure that the trust will comply with Irish law while holding assets here.

Foreign assets are more of a feature as investments even in equities for taxpayers are looking to markets beyond the traditional UK shares into the US and further afield. Care should be taken to ensure that if a foreign asset is left under a Will to a trust, will this trigger taxes locally in a more punitive manner because of the existence of a trust. For instance, many countries in the EU will treat the trust as a separate entity that is subject to a tax on a benefit received similar to the way Ireland would tax a stranger receiving a capital benefit. Care should also be taken in relation to the typical US succession planning device of a living trust, put in place there to avoid lengthy and costly probate, but with an Irish connection potentially triggering stamp duty and CGT on the transfer of assets into the trust in the first instance and discretionary trust levies on the death of the settlor.

Conclusion

Trusts are not of themselves tax devices, despite the bad press they may get. They have very significant useful purposes, predominantly protection. The tax benefits of yore are now countered with the potential of additional taxes so it is important to ensure that the use of trusts in planning for protection will not trigger unnecessary taxes.

Disclaimer

The material contained in this paper and related slides is for general information purposes only. While every care has been taken to ensure that the information in this

paper and related slides is accurate and up to date, you should seek specific legal and/or taxation advice in relation to any decision or course of action.

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