

PUT YOUR SEATBELTS ON



Simple planning techniques to help avoid future conflict

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No one sets out on a car journey with the intention of crashing, and yet everyone puts on their seat belt before setting out. It pays to be prudent and so why would one take unnecessary risks if they can be easily avoided? This is as true in everyday life as it is in business, and even more so when establishing a trust structure that needs to contend with family dynamics, cross-border planning, and complex asset classes.

The origins of trusts are well known and, although there have been huge changes to trust laws and tax legislation through the centuries, the underlying characteristics of a trust remain the same. A settlor (often a matriarch or patriarch) transfers the legal ownership of assets to a trustee to hold, administer, and manage for the benefit of the trust's beneficiaries who will usually consist of members of the same family. The settlor's rationale for settling the assets will often be to protect the assets from a wide range of future uncertainties (political, economic, family conflict, spendthrifts, creditors, future marriage, and divorce, etc) and to provide an enduring legacy for future generations of their family. Despite a settlor's good intentions, matters can sometimes go awry, and families can find themselves in conflict and their trustees drawn into contentious situations.



Thankfully, conflict amongst beneficiaries, and/or with the trustee, is by no means a certainty, yet it is a possibility. Much like wearing a seatbelt when travelling in a car, it would be prudent to prepare for the worst even if the likelihood of it happening is remote. Failing to implement effective planning, like not wearing a seatbelt, can lead to quite painful consequences. Advisors and trustees should proactively look to build protections into trust documents that provide for uncertainties and potential conflicts. To be clear, this is not a suggestion that structures should be over-engineered, as doing so can tie families and trustees in knots, making them difficult and expensive to administer. As we know, each family's circumstances are unique and as such their structure should be as well.

Most advisors and trustees will have witnessed poorly thought-out drafting which will have hampered the administration of a structure and potentially lead to conflict amongst the beneficiaries.

So, what are the more rudimentary pitfalls that can easily be avoided?

At both the drafting stage and throughout the life of a trust it is essential that a trustee is transparent and has clear communication channels with its beneficiaries. Not only will this ensure that the trustee is known to a good proportion of the beneficiaries, but it will also ensure that a trustee is in good standing with the beneficiaries and more able to act decisively and proactively when a matriarch or patriarch passes away.

Where a protector's powers are widely drafted, care needs to be taken in terms of the protector's residence, but it is also important to ensure that the protector's duties can be properly discharged.

We have even very recently seen a settlor wishing to establish a trust with a protector committee with an even number of members (which of course only works whilst all parties agree and are alive).

Depending on where a family is from, and where a protector is resident, the protector may have wide powers of direction or veto. Overly restrictive protectors' powers can severely hamper a trustee's ability to make decisions and administer a structure. They can also lead to increased costs and make a trustee dependent on a protector's ability to respond in a timely and decisive manner. It is worth remembering that the power to hire and fire is often the most powerful, while also allowing the trustee the flexibility to administer a structure in a cost-effective manner. A family should be able to trust the trustee to exercise its discretion, as the trustee will have hopefully been through a rigorous selection process (and not chosen purely on cost).

As professional trustees, we know that families evolve over time and, for a trust to remain relevant, it is important that it too evolves to accommodate the family's shifting strategies, aspirations, changes of residence, family dynamics, etc. It is important that a trustee has



the ability to adapt and that the trust instrument provides the flexibility to do so.

Appointments made to a trust committee (or any role which includes the appointment of a successor trustee) should be carefully thought-out and drafted into the trust deed, ensuring a succession process that allows for continuity and effective administration. With modern drafting, a trust should not be left in a position where an essential role is not filled on account of a failed succession process. The cost of resolving this can be expensive, especially if the trustee needs to involve the courts to remedy the situation.

Depending on why a trust was established and the family's risk appetite, it is quite viable that a trustee may be asked to hold an asset that is outside its comfort area from a fiduciary perspective. This may give rise to tension between the trustee and the beneficiaries. A way to potentially avoid this happening in the future may be

to draft reserved powers into a trust instrument or a specified asset clause with a robust and carefully drafted anti-Bartlett clause (as confirmed in *Zhang Hong Li & Ors v DBS Bank (Hong Kong) Ltd & Ors* [2019] HKCFA 45).

In addition to the above, the effectiveness of a properly implemented family constitution should not be underestimated. Having the family all buy into the constitution and operating as a cohesive unit in conjunction with the trust structure, is invaluable in helping resolve potential conflicts, ensuring succession mechanisms, and setting out how persons will interact with and benefit from the structure.

Distance between beneficiaries on account of global migration, marriage, and differing aspirations between generations all add to the likelihood of family conflicts. However, transparency, engagement, modern estate planning techniques, professional trustees, modern trust legislation, and well-thought-out drafting are all contributing mitigants that will hopefully help to ensure a conflict-free dynastic trust structure.

