

# DISCRETIONARY TRUSTS

## TYPES OF BENEFICIARIES

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**This guide provides information for financial advisers whose clients are looking at creating or have already created a Discretionary Trust.**

A Discretionary Trust is a flexible trust. The trust will generally have two types of beneficiaries, a class of potential/discretionary beneficiaries and the default/named beneficiaries.

There are key differences between the two types of beneficiaries both in how they benefit and how amendments can be made.

### **POTENTIAL/DISCRETIONARY BENEFICIARIES**

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The trust deed will include a broad class of beneficiaries that could potentially benefit. If and when they will benefit is at the discretion of the trustees.

None of the beneficiaries have a percentage allocation that the trustees must consider prior to making a distribution. The only restriction is that the trustees cannot distribute to a beneficiary that does not fall within the classes within the deed.

### **DEFAULT/NAMED BENEFICIARIES**

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The default/named beneficiaries are the beneficiaries actually named within the deed. These beneficiaries have an appropriate share that must equal 100% in total.

**!** The default/named beneficiaries are only included so that any remaining trust assets at the end of the trust period can be distributed.

During the trust period, the trustees can only consider a distribution to the default/named beneficiaries if they are also included within the class of potential/discretionary beneficiaries.

### **AMENDING THE DEFAULT/NAMED BENEFICIARIES**

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It may not be possible to amend the default/named beneficiaries. The trustees would need to review the trust provisions to see what amendments are possible and how these are made. The settlor/trustees should consider the following:

- i. Is amending the default/named beneficiaries required? i.e. if the beneficiary that they are looking to add is already included in the class of potential/discretionary beneficiaries then the amendment would not be necessary.
- ii. Will amending the default/named beneficiaries allow the trustees to distribute to that beneficiary? If the beneficiary is **not** included in the class of potential/discretionary beneficiaries, the trustee would still be unable to make a distribution to that beneficiary.
- iii. Any tax implications of changing the beneficiaries

**!** Amending the default/named beneficiaries does not limit the discretion that the trustees have when considering making a distribution.

## **ALTERNATIVE OPTIONS**

A settlor that is wanting to amend default/named beneficiaries could consider the following alternative options:

### **1. Adding to the Class of Beneficiaries**

The settlor could add to the class of potential/discretionary beneficiaries. This would allow the trustees increased discretion as to who is able to benefit and when.

### **2. Letter of Wishes**

A letter of wishes is an instruction from the settlor to the trustees to provide guidance on which of the potential/discretionary beneficiaries should benefit and when. This document is not legally binding and the trustees are still able to use their discretion when making any distributions.

### **3. Making an Appointment to a Beneficiary\***

The trust deed may include a power of apportionment provision. This could allow either a revocable or irrevocable appointment of the trust fund to one or more of the potential/discretionary beneficiaries. This appointment is usually made via a deed. Once the appointment has been made, the trust fund would be held for those beneficiaries.

\* The trustees would lose the ability to use their discretion and could only distribute to the beneficiaries that now held the beneficial interest.

## **IMPORTANT NOTES**

For financial advisers only. Not to be distributed to, nor relied on by retail clients.

Please note that every care has been taken to ensure that the information provided is correct and in accordance with our current understanding of the relevant law, as at September 2024.

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