

What is so special about New Zealand's Special Advisor?

"Good advice is invaluable, building it into a trust itself, is priceless."

Kate Weiss
Managing Director, Asiaciti Trust New Zealand

Role of a special advisor

'Special' is defined by the Cambridge dictionary as not ordinary or usual. This is an apt definition for the New Zealand Special Advisor Regime, the idea of a Special Advisor is not ordinary or usual in global trust administration.

The New Zealand Special Advisor is a statutory function, this means that like a Trustee it is defined in the New Zealand Trustee Act 2019 (the 'Act'). The Act provides that the Special Advisor may advise the trustee on any matter relating to the trust; but is not a trustee of the trust and does not have the powers or duties of a trustee. The idea of giving someone the statutory ability to advise the Trustee is novel and indeed welcome for professional corporate trustees.

Oscar Wilde wrote in *An Ideal Husband* "I always pass on good advice. It is the only thing to do with it. It is never of any use to oneself." Trustees around the world will always value good advice and having the ability to rely on the advice of a special advisor is invaluable to the successful running of family trusts.

Rather than complicating a trust structure, by adding more people, a Special Advisor can reduce the complexity of trusts by acting as a conduit between the family for whom a trust is created and a trustee. This provides comfort to the person setting up a trust. New Zealand trust law appreciates and recognises that trustees may benefit from advice of a person who knows families well, is in the same location as beneficiaries

or has special knowledge about the assets in the Trust.

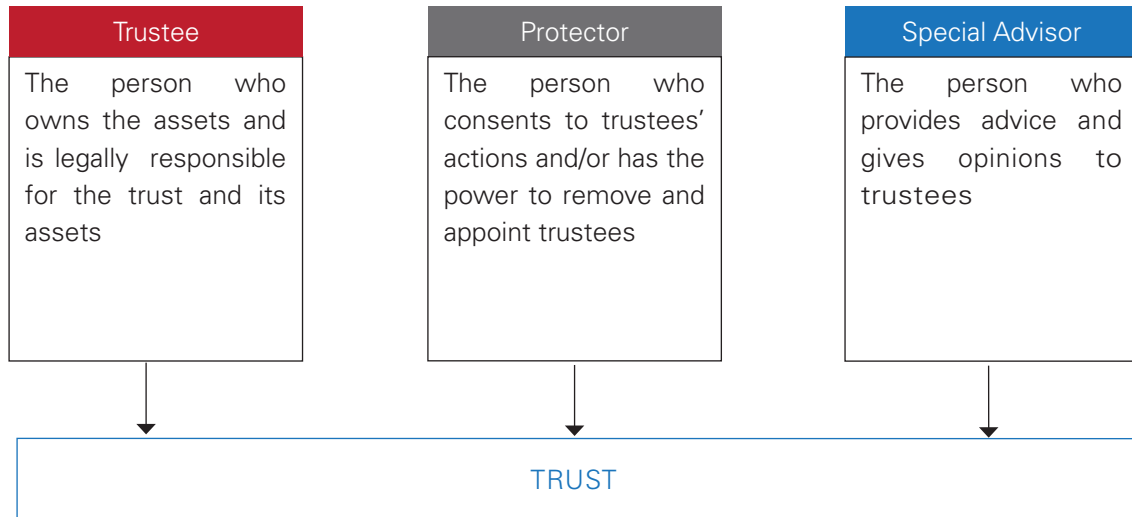
The oft quoted proverb "it takes a village to raise a child" can apply equally to the successful administration of a trust. Managing the wealth of a family can be part of raising a child, and some (if not all) of that village should be involved in the administration and management of a family's wealth.

Special advisor versus protector - what's the difference

The concept of protector is not defined under New Zealand Trust Law. In fact, in many common law jurisdictions around the world, there is no definition of protector. A protector's role can be varied but generally a protector consents to actions of trustees and/or are able to remove trustees.

Protectors are also specifically mentioned in legislation and guidance relating to FATCA, CRS, Automatic Exchange of Information and Foreign Trust Disclosure. A protector is reportable as it is considered that a protector holding the power to remove and appoint trustees is a controlling person of a trust. However, a Special Advisor is not considered to be a controlling person, so long as they do not have any power to direct the trustee's exercise of trust powers they have no control and are therefore not reportable. If the Special Advisor's role is limited to providing opinions or recommendations this does not fall within the definition of control.

Role of a Trustee, Protector and Special Advisor



What can a special advisor do

In practical terms, a Special Advisor can undertake many functions. Consider the following situations.

(1) Cash distribution

A family trust requests the trustee to make a cash distribution. As a trustee must always act in the best interests of the beneficiaries there will be many issues that the Trustee must consider when requested to make a distribution. A trustee may not have sufficient knowledge of the family and/or the specific beneficiary's circumstances in order to make such decision in a prudent or considered manner. The trustee may need to consider issues such as the internal relationships within the family trust's beneficiary class, the taxation and other fiscal issues pertaining to such beneficiaries and the settlor, the health, marital or relationship status of family members, the spending and lifestyle habits of beneficiaries, the current and projected financial status of the family, and the current wishes of the settlor or family patriarch/matriarch. Access to a Special Advisor will enable the Trustee to obtain advice on all these issues from someone who has close knowledge of and access to the family. Such family insight and advice will be invaluable to the Trustee in considering the distribution request and making a decision that is in the best interests of all beneficiaries. This also provides comfort to the family that the trustee is administering the family trust in the best interests of all family beneficiaries.

(2) Investment consultation

The family patriarch or Settlor of a trust would like the trustee to consider investing in a specialised private equity fund. Such an investment carries

a quite different risk profile and the Trustee may be uncomfortable accepting that risk and the potential liability that accompanies such risk. Consultation with, and advice from, a Special Advisor on such an investment decision will enable the Trustee to make a decision based on a deeper understanding of the family's investment strategy and with the comfort that the trustee's liability is limited. Under the New Zealand law the Trustee would not be liable if it acts in good faith upon the advice of an appointed Special Advisor.

The ability to include the appointment of a Special Advisor in the Trust Deed provides the Settlor of the trust with the comfort of knowing that a trusted family advisor, independent of the Trustee, can guide that Trustee on a range of trust administration decisions.

The professional family advisor appointed as the Special Advisor under the Trust Deed with statutory authority to advise the Trustee, is able to retain a key role in protecting the family's values, assets and succession.

The appointment of a Special Advisor to a trust is a "win-win" for all parties. The family patriarch or Settlor and the trusted family advisor retain their professional relationship. The Protector holds the power to remove and appoint trustees, and such other consent powers as may be prescribed to that role. The Trustee has the comfort of being guided by a professional who has close knowledge of the family and hence the beneficiaries of the trust. The family patriarch or matriarch as the case may be, have their "village" with the Trustee, the Protector, and the Special Advisor each filling a cooperative role in administering the family trust.

About the writer

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