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Fact Sheet: Testamentary Trusts

What is a Testamentary Trust?

A Testamentary Trust is a legal arrangement that comes into effect upon the death of the Testator (the person making a Will). The Testamentary Trust is specified in a person's Will. It allows for the management and distribution of assets for the benefit of specific individuals or groups.

Why create a Testamentary Trust?

Some of the reasons you might create a Testamentary Trust include tax advantages, asset protection, control over the distribution of assets, and the ability to provide for specific needs of beneficiaries over time. A Testamentary Trust is commonly used where there are minor children, dependents with special needs, blended families, a family business, or risks of family disputes over asset distribution.

Who can create a Testamentary Trust?

Generally, anyone of sound mind and who meets the legal requirements to create a Will can include a testamentary trust.

How do you set up a Testamentary Trust?

A testamentary trust is established by including specific provisions in a valid Will. Your lawyer can assist you with this when drafting your Will.

Who can be a Trustee?

A Trustee can be an individual, corporate entity, or a combination of both. Common choices include family members, friends, or professional trustees, such as your lawyer.

What can be included in the Testamentary Trust?

Your Testamentary Trust can cover various assets such as cash, real estate, investments, and personal property.

Who can be a beneficiary?

Anyone you choose. Beneficiaries are determined by the person creating the will. They can be specific individuals, a group of individuals under one classification (eg biological grandchildren), or organisations (eg, a charity).

Can the terms of a Testamentary Trust be changed?

The terms are set in the Will and can only be changed under specific circumstances if the Will is changed. The terms can only be modified by the Testate (person making the Will which includes the terms of the Testamentary Trust).

What happens if a beneficiary or trustee dies?

Contingency plans should be outlined in the Will. Alternate beneficiaries or trustees may be named, and the legal process for such situations should be addressed in the Will.

DEFINITIONS

The following are some common words used in relation to a Testamentary Trust:

Testator: The person creating the will and establishing the Testamentary Trust.

Trustee: The individual or entity appointed to manage and administer the trust on behalf of the beneficiaries. The trustee has fiduciary responsibilities and must act in the best interests of the beneficiaries.

Beneficiary: An individual or entity entitled to receive benefits from the trust. Beneficiaries can include family members, friends, or organisations.

Primary beneficiary: The main recipient of the trust's benefits, often a spouse or child.

Contingent beneficiary: A beneficiary who will receive benefits only under specific conditions, such as if the primary beneficiary predeceases the testator.

Guardian: An individual appointed to take care of minor children or dependents in the event that both parents die.

Elise Thomson, Principal Lawyer

Other Terms

The following are some other terms you may see associated with a Testamentary Trust:

Per Stirpes: A term meaning if a primary beneficiary predeceases the testator, their share will pass to their descendants (usually children) equally.

Successor Trustee: An individual or entity named to assume the role of trustee if the original trustee is unable or unwilling to fulfill their duties.

Discretionary distributions: Authority granted to the trustee to make decisions regarding the timing and amount of distributions to beneficiaries based on their individual needs.

Spendthrift provision: A clause that restricts a beneficiary's ability to transfer or sell their interest in the trust, protecting the assets from the beneficiary's creditors.

Termination event: A specified event or condition that triggers the termination of the trust, such as when the youngest beneficiary reaches a certain age.

No-contest clause: A provision discouraging beneficiaries from challenging the terms of the trust by stating that a contestant who challenges the trust forfeits their inheritance.

What are some of the reasons to create a Testamentary Trust?

Individuals may choose to create a testamentary trust in their will under various circumstances, depending on their specific goals and concerns. Some common circumstances where a testamentary trust might be considered include:

- **Providing for minor children:** Testamentary Trusts can be used to provide ongoing financial support for minor children until they reach a certain age. The trust can hold and manage assets on behalf of the children.
- **Asset protection:** Testamentary Trusts can be used to protect assets from potential creditors or legal claims against an Estate.
- **Taxation:** Testamentary Trusts are sometimes used for tax planning, potentially targeting tax advantages, especially through income distribution to beneficiaries.
- **Special needs planning:** A Testamentary Trust may be used to ensure there's ongoing financial support and care available for dependents who have special needs. The Trust can help ensure this support doesn't impact government help.
- **Blended families**: Testamentary Trusts may be used to structure the distribution of assets to provide for both biological and stepchildren.
- **Succession planning:** Business owners may include Testamentary Trusts to manage the transition of a family business among heirs.
- **Asset distribution:** A Testamentary Trust can provide greater control over how your assets are distributed, through specifying conditions or age-based milestones for beneficiaries to receive their inheritance.
- **Provision for grandchildren:** They can be used to provide for grandchildren to receive financial support or inheritances at specific points in their lives.
- **Vulnerable beneficiaries:** A testamentary trust can provide professional management and guidance on the inheritance if a beneficiary is financially inexperienced or vulnerable.
- **Gifting:** Testamentary Trusts can allocate a portion of an estate to charitable organisations and causes.
- **Family wealth preservation:** Testamentary Trusts can be used as a tool for preserving family wealth across generations, controlling distribution and minimising estate taxes.
- **Dispute mitigation:** Clear instructions and a structured framework for asset management and distribution through a Testamentary Trust can minimise the risk of family disputes over the distribution of assets.
- **Creditor protection:** A Testamentary Trust can also be used to shield assets from potential claims by creditors, thereby protecting the inheritance for intended beneficiaries.

NEED MORE HELP?

At **Thomson & Associates** we offer a caring and understanding approach to our Will and Estate services, and can assist you with advice on the preparation of a Testamentary Trust and to answer any other questions you may have.

You can book an appointment directly through:

Website: thomsonandassociates.com.au

Phone: (08) 7082 3728

Email: reception@thomsonandassociates.com.au