

Testamentary Trusts

Testamentary trusts are a common part of a modern estate plan and are renowned in the industry for their flexibility, tax savings and the asset protection that they offer your beneficiaries.

Contact Us

If you need further assistance or advice, please do not hesitate to contact our Estate Planning team on (03) 9843 2100.

The Basics

A testamentary trust is a type of trust which is created by a will. Essentially they allow your beneficiaries to take their inheritance via a trust structure rather than in their personal name. This can in turn provide various benefits for your beneficiaries, such as:

- allowing your beneficiaries to split and stream income generated by their inheritance amongst their own family, for example minor children, who are currently able to receive up to \$18,000 tax free per year;
- providing added protection to your beneficiaries against third parties in the event of a risk period such as bankruptcy, personal liability or relationship breakdown; and
- providing protection for your beneficiaries from themselves, by dictating precisely how your beneficiaries are to receive their inheritance, for example, in stages, or with access to income rather than capital. This may be relevant where a beneficiary suffers from a mental illness, financial instability or are just too young to manage their finances.

Where you are not trying to protect a beneficiary from themselves, flexibility can be a valuable feature in a Will, as it is hard to predict the circumstances of the beneficiary and the laws at the time of death of the willmaker. Your beneficiaries can be given the flexibility of:

- whether they would like to create a trust or receive their inheritance outright;

- choosing who they would like to benefit from income and capital distributions from the trust.
- altering the terms of the trust; and
- winding the trust up altogether.

In particular, where the use of a trust will have unwanted tax or other implications, the ability to alter its terms or distribute to an individual is very handy.

The terms of the trust would be contained in your Will and the trust is only created on death. As a result the trust assets will consist of assets within your estate as opposed to jointly held assets, superannuation or assets within existing trusts. Furthermore, the estate will need to be administered before the trust can be created.

A number of factors need to be considered prior to deciding whether to include testamentary trusts in your Wills including:

- the size of your estate;
- the number of beneficiaries you would like to provide for; and
- the personal circumstances of your beneficiaries, including but not limited to, their age, occupation, whether they are married with children and whether they are suffering from any disability.

It is also important to consider the tax implications such as capital gains tax (CGT) and stamp duty.

Testamentary Trusts *continued*

Frequently Asked Questions

The answers to these questions depend largely on the specific terms of your will. It will be important to obtain personalised advice at the time of making the decision about the trusts and take into account the personal circumstances of the beneficiaries, as well as any relevant laws in operation (eg. tax).

1. When does the trust come into existence?

Not until after the death of the willmaker.

2. When does the executor and beneficiary decide about using the trust?

After the date of death of the willmaker, and before any assets are transferred out of the estate.

3. How much does it cost to operate the trust?

A flexible testamentary trust operates much like a family trust so there will be similar accounting costs involved. These costs are deferred until the trust operates after death.

4. How do I quantify the potential tax savings?

For a broad calculator to estimate the possible income tax concessions, please contact us. For the savings on stamp duty or CGT, you will need specific advice.

5. What factors will be relevant to determining if a trust should be used?

Trusts can provide particular benefits for:

- people in at risk professions;
- beneficiaries who are vulnerable;
- people who want to set aside assets for their children or other descendants;
- guarding against risks of remarriage by surviving spouse;
- non-resident beneficiaries; and
- people who want to set aside part of their inheritance for charitable purposes.

6. What changes can be made to the terms of the trust?

The terms of the will needs to be checked. A Moores will has quite broad discretion about the terms of the trust that can be changed, but you cannot expand the class of beneficiaries.

7. Are there other tax and duty considerations?

Yes. They can include:

- loss of main residence exemptions for CGT and land tax – specific types of trusts are required for these to continue;
- tax on super death benefits paid into the wrong type of trust;
- assets acquired after the date of death within the trust may not qualify for the CGT or duty concessions; and
- if the trust has to make a family trust election, this could have other tax implications and may be significant in the case of a second marriage.

Under the current position of the Tax Office, there is CGT rollover from the deceased to the executor to a testamentary trust and to a beneficiary of a testamentary trust.

Each State has different stamp duty laws. Most States have an exemption for assets passing under the terms of a will. The Victorian State Revenue office has confirmed in recent times that they accept the duty concession exists for transfers to testamentary trustees. In respect of later transfers out of the trust, then the position differs from State to State. There is an exemption from trustee to beneficiary in Victoria (subject to certain conditions).

8. Do all the assets have to go into the trust?

Not under a Moores will.

9. Can I put other assets apart from the inheritance into a testamentary trust?

Yes, but it is usually not a good idea. The risk is that the assets that qualify for the income tax concession (ie – those from the estate) will intermingle with the other assets and this might make it harder to claim the income tax concession.

10. Where do I get more advice?

The decision about the use and terms of a testamentary trust involves a consideration of your financial needs and legal advice. You should consider seeking advice from a licenced financial advisor, accountant and lawyer who are appropriately qualified to consider these aspects of your particular circumstances.