Estate Planning Fact Sheet

Testamentary Trusts – The Basics

A testamentary trust is a type of trust which is created by a will. 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.

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.

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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 and stamp duty.

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