Testamentary Trusts

A practical introductory guide for will-makers and families

What is a testamentary trust?

A testamentary trust is a trust created by a will. It generally begins after the will-maker dies and the estate has been administered. Instead of an inheritance passing directly to a beneficiary, some or all of it may be held and managed through the trust under the terms set out in the will.

Testamentary trusts can be tailored to a family?s circumstances. They are not automatically suitable for every estate, and careful drafting is important.

Why might a family consider one?

- Greater flexibility over when and how beneficiaries receive or use inherited assets.
- Potential protection for vulnerable, young or financially inexperienced beneficiaries.
- A framework for managing assets where a beneficiary has disability, addiction, relationship or creditor concerns.
- Possible taxation advantages in some circumstances, subject to current tax law and professional tax advice.
- Long-term stewardship of family wealth and assets intended for future generations.

How the structure works

Key roles

- The will-maker chooses the trust terms through their will.
- The executor administers the estate and transfers relevant assets into the trust when required.
- The trustee controls and manages trust assets, makes permitted distributions and must follow the will and trust law.
- The beneficiaries are the people or organisations who may benefit from trust income or capital.
- An appointor or other control role may be included, depending on the chosen structure.

Discretionary and protective features

Many testamentary trusts give the trustee discretion to distribute income or capital among a defined group of beneficiaries. Others are more protective and impose tighter controls. The right balance depends on the purpose of the trust, the people involved and the assets being managed.

The will should clearly address trustee powers, replacement and succession, eligible beneficiaries, distribution standards, record-keeping and when the trust ends.

Choosing a trustee

A trustee should be trustworthy, financially capable, willing to act impartially and able to manage administration over time. Options may include a family member, trusted adviser, professional trustee or a combination. Conflicts, age, location and succession planning should be considered.

Benefits, limits and responsibilities

Potential benefits

- Control and flexibility suited to the beneficiary?s needs.
- Continuity of asset management over a longer period.
- Potential separation of trust assets from a beneficiary?s personally owned assets.
- Ability to include guidance for education, housing, health or other support.
- Potential tax planning opportunities where available and appropriately advised.

Important limits and risks

- Asset protection is not absolute. Outcomes depend on the drafting, trustee decisions, control of the trust and the relevant law.
- Family law, bankruptcy, tax and succession outcomes are fact-specific and may change over time.
- Trusts create ongoing administration, accounting, tax return and record-keeping obligations.
- Poor trustee selection or unclear terms can lead to conflict, delay and expense.
- A structure that is too rigid may become impractical as family circumstances change.

Professional advice matters

Estate planning, tax, superannuation and asset ownership need to be considered together. A solicitor can coordinate the will and trust provisions with advice from your accountant or financial adviser.

Preparing for your appointment

Questions to consider

- Who should benefit, and are any beneficiaries minors or vulnerable?
- What assets may pass through the estate, and which assets pass outside the will?
- Who should act as executor and trustee? Who should replace them if needed?
- How much discretion should the trustee have over income and capital?
- Are there family law, creditor, disability, tax or overseas considerations?
- When should the trust end, and what should happen to remaining assets?
- How should superannuation, life insurance, companies and family trusts fit into the plan?

What to bring

- A current list of assets, liabilities and ownership structures.
- Details of family members, intended beneficiaries and any special circumstances.
- Existing wills, powers of attorney, trust deeds, company documents and superannuation nominations.
- Questions or concerns you want the estate plan to address.

Discuss your estate plan with Monardo Legal

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