



TESTAMENTARY DISCRETIONARY TRUSTS – IS THIS FOR YOU?

1. WHAT IS A TESTAMENTARY TRUST (TDT)?

A Testamentary trust is a trust created under a person's Will and commences to operate only on the death of the Will maker (the "testator"). This is distinct from a trust established during a person's lifetime (an "inter vivos trust").

A testamentary trust is funded with assets from the testator's estate and enables assets to be transferred at the trustee/executor's discretion for the overall benefit of one or more beneficiaries.

2. WHY ESTABLISH A TESTAMENTARY TRUST WILL?

A TDT Will is often established for one or more of the following reasons:

- When the testator has substantial assets, and plans to grow that wealth for the benefit of beneficiaries;
- When the testator requires after-death continuance of trusts, business assets or property; and
- Where a specific beneficiary is vulnerable and needs protection.

One of the main reasons for establishing a testamentary trust is asset protection. A TDT Will can restrict access to the assets and income of the estate by beneficiaries. The discretionary beneficiaries do not have a legal interest in the income or capital of the testamentary trust until the trustee makes a distribution in their favour. The beneficiaries only have "a mere expectancy" and do not have a proprietary interest in the assets of the estate.

3. BENEFITS OF A TDT WILL

Asset Protection:

TDT Wills can protect beneficiaries from statutory or personal disability including;

- Bankruptcy;
- At-risk professionals, e.g. doctors, engineers or builders;
- A spendthrift child who has a gambling problem or who does not understand finances can be protected;

- An intellectually challenged beneficiary who is unable to manage his or her own affairs can be protected;
- Family law disputes (note that the Family Court's power is increasing and careful management of the estate and testamentary trusts are required to minimise family law risks).

Flexibility:

A TDT Will is flexible to meet changing circumstances and can continue for a maximum of 80 years. The beneficial enjoyment of the trust assets can change from year to year to suit the particular needs of beneficiaries as required.

Taxation Benefits:

From a taxation perspective, the potential benefits of a TDT Will are:

- The ability to split income to different beneficiaries to optimise taxation benefits;
- Greater tax savings in providing income to a child or grandchild under 18, such as applying income towards their education, maintenance or advancement.

Given that taxation rules are constantly changing, it is prudent to review one's estate and succession plans at least every three years.

Two Examples of What Not to Do:

1. When Michelle I died she left everything to her only child Jodie. She was married to Gavin. Gavin was a perpetual student. He had completed one course after the next but failed to settle on a career. They used Jodie's inheritance to pay off the mortgage and travel. When Jodie eventually came round to her mother's opinion, that her husband was a "bludger", their relationship soured and finally fell apart. In the property settlement Gavin received roughly half of their assets, much of which had come from Michelle.
2. Simon was a chartered accountant in a partnership that audited a large company. The audit area failed to detect some significant fraud committed by the company principals. When the company went into liquidation, an action was commenced against Simon's partnership for damages. Fortunately Simon owned very little in his name, preferring to keep assets well out of his (and his creditor's) legal reach. When his wife and father both died in the one year, his strategy fell apart. Both left assets to him personally in their Wills. Those assets were left totally exposed.

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