



## >>TESTAMENTARY TRUSTS

There are many benefits associated with a testamentary trust including asset protection and taxation. This Plain English Guide answers some of the more commonly asked questions about creating a testamentary trust, but remember that your solicitor is available to answer any other questions or provide advice when you need it.

### >>What is a testamentary trust?

A testamentary trust is a trust created by a will. Instead of all of the assets of a deceased estate being distributed to the beneficiaries, some or all are retained in a trust for the benefit of the beneficiaries. The use of a testamentary trust allows the benefits of a discretionary trust upon the death of a person.

### >>What are the benefits of a testamentary trust?

#### 1. Asset protection

Testamentary trusts are not owned by the beneficiaries and therefore can offer a level of protection from creditors of the beneficiaries and/or your spouse, in the event of a marital breakdown.

#### 2. Tax minimisation

Testamentary trusts allow the taxable income of the estate to be taxed more effectively through flexibility of distribution. The income can be distributed to those beneficiaries that pay the lowest rate of tax.

Adult tax rates apply to children under 18 years of age. Children are not taxed at the penalty tax rates that normally apply to unearned income of children. This applies to any beneficiaries of the testamentary trust and can include the grandchildren of the deceased.

### 3. Stamp Duty and Capital Gains Tax

No stamp duty or capital gains tax is imposed on the transfer of assets on death to a testamentary trust. People often do not transfer their investment assets to a trust due to the stamp duty and capital gains tax payable, despite there being advantages of owning assets in a trust. The death of a person is a tax effective time to allow the transfer to occur.

### >>Who should use a testamentary trust?

A testamentary trust should be established only if some or all of the benefits mentioned above can be obtained, and the benefits outweigh the cost of administering the trust.

However, a will incorporating testamentary trusts should be considered if:

- you have substantial assets;
- any of your potential beneficiaries might need the asset protection advantage of a testamentary trust, or,
- your intended beneficiaries could benefit from the taxation advantage of testamentary trusts.

We would be happy to discuss the pros and cons with you in more detail.



### >>Who has control over the assets of the testamentary trust?

The control of the testamentary trust lies with the trustee (or sometimes an appointor) of the testamentary trust, as set out in the will, and this can be any person, group of people, or company. Often the surviving spouse is the trustee (or appointor) until death and then control is passed to the children.

Consideration should be given to appointing an independent person as trustee of the testamentary trust if asset protection is important. Where the trustee is also a beneficiary of the testamentary trust, and an administrator is appointed due to financial difficulty, the administrator may be able to direct the assets of the testamentary trust to creditors.

### >>Do all assets of the estate need to be transferred to the testamentary trust?

No. Any specific assets can be distributed to any beneficiary, rather than being passed to the testamentary trust. Frequently the will is structured such that the family home, personal belongings and household effects of the deceased are passed to the surviving spouse or children, as there is usually no benefit to be obtained by transferring them to the testamentary trust. Investment or business assets would usually be left to the trust.

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### >>Can the testamentary trust be wound up when circumstances change?

This depends on the wording of the will. However generally the trustee has the power to vest the testamentary trust at any time.

### >>Can more than one testamentary trust be established?

Yes. It is common for the will to create a separate testamentary trust for each ultimate beneficiary. This allows each beneficiary to take control over their share of the estate. This avoids the need for two or more beneficiaries to jointly control one testamentary trust, which may result in conflict. However, there may be assets that need to be shared by two or more testamentary trust, and consideration needs to be given as to how this is to be controlled.

### >>How can Coleman & Greig help you?

If you consider that your will might benefit from a testamentary trust, you should contact us to discuss the matter further. By gaining a better understanding of your individual circumstances, your Coleman & Greig solicitor can assist you in tailoring a solution that best meets your needs.

