

Wills & Testamentary Trusts

Estate Planning Solutions

Introduction

Having a good Will in place is essential if you want your estate assets distributed in accordance with your wishes.

It's also important to realise that you have a choice about the type of Will you can have. Life has changed and the types of Wills that people can choose from have changed accordingly. These days, considering house values alone, estates are worth considerably more than ever before so issues around asset protection and optimising tax benefits have become important. Superannuation, as a relatively new type of asset, also needs careful consideration when preparing a Will. Further, second relationships are also very common, with blended families requiring different solutions.

To cater for the increased complexity of life today, Wills can contain what are known as beneficiary Testamentary Trusts which means each beneficiary can take their inheritance in a trust that they control. Alternatively, a Will can be drawn up without beneficiary Testamentary Trusts in them, which means the beneficiaries receive the inheritance in their own name.

A Will without these beneficiary Testamentary Trusts may be appropriate - it really depends on your particular circumstances.



Do I need a Will with beneficiary Testamentary Trusts?

These Wills offer increased flexibility and potentially crucial benefits. There are a number of different Testamentary Trusts that can be created but let's look first at how normal family trusts work.

Back to basics..... what is a Trust?

Imagine a school teacher purchases lollies for her students. The teacher is the legal owner of the lollies and intends to hand them out when she decides the students "deserve" them. She has complete discretion as to who gets them and how many they receive.

In this example, the lollies are the assets in the trust fund, the school teacher is the trustee and the students are the beneficiaries.

The school principal can remove the teacher at any time and replace her with another teacher. The school principal can do this because the "rules" enable her to - she can even become the teacher & take control of the lollies.

The school principal therefore effectively controls the trust and is known as the appointor. This is the most important position because they retain ultimate control.

So, the trustee (teacher) is the legal owner of the trust fund (lollies) for the benefit of the beneficiaries (students) and the appointor (school principal) can remove the trustee at any time.

and in legal speak ...

A trust is a legal relationship between parties with the relationship revolving around the trust fund. There is always a trustee and at least one [but usually more] beneficiary[s].

The trust fund can include anything which can be owned e.g, money, real estate, shares, boats, contractual rights, intellectual property rights, a business, plant & equipment, debtors etc.

The trustee is the legal owner and the beneficiaries are the beneficial owners. The trustee has complete control over the trust fund subject to legal restrictions and the rules governing the particular relationship e.g., via a Will or trust deed.

The appointor is the person who can replace the trustee at any time for any reason. They can also appoint themselves as trustee.

And now Testamentary Trusts....

A Testamentary Trust refers to a set of provisions contained within a Will - it is not a Will in itself. Most standard Wills do not contain beneficiary Testamentary Trust provisions.

Whilst people often talk about a testamentary trust in the singular, a well-prepared Will contains a range of testamentary trust provisions to suit the circumstances of the Willmaker.

Importantly, they can cater for unforeseen events that may be impacting your beneficiaries at the time of your death. It's like putting all the tools in a tool box - they don't have to be used but they are there if they're needed.

So what are the different types of Testamentary Trusts?

1. General Testamentary Trusts - making the most of the inheritance

Having general testamentary trust provisions means each beneficiary can take their inheritance in the name of a trust that they control.

If the beneficiary chooses to take their

Wills and Testamentary Trusts

share of the inheritance in a trust, they can assume their own appointor and trustee role as a primary beneficiary and hold the estate assets on trust for the benefit of themselves and other prescribed discretionary beneficiaries (e.g., their children).

There is no limit on the number of these general beneficiary Testamentary Trusts that can be created - it's as many beneficiaries as are named in the Will.

Why would they choose to take their inheritance in a Testamentary Trust?

Bankruptcy - estate assets held in a trust are not available to a trustee in bankruptcy. If you have a Will without beneficiary Testamentary Trusts and your child is bankrupt when they inherit your estate, your hard earned assets could be forfeited.

Tax Savings - the primary beneficiary can choose to distribute income or capital to children and take advantage of the lower marginal tax rates that apply to income paid to minors from testamentary trusts.

Restricting Access over 18 - with an inheritance placed in a beneficiary Testamentary Trust access can be restricted until any age the Willmaker chooses - often 25 years.

Family Law Benefits - taking an inheritance in a beneficiary Testamentary Trust allows the Family Law Court to accurately identify what your child brought to a relationship.

2. Superannuation Death Benefits Proceeds Trust

This special purpose Testamentary Trust is designed to deal with the superannuation death benefits proceeds of the Willmaker and ensures that the superannuation death benefits are only available to those people to whom the relevant tax concessions will apply.

3. Child Testamentary Trusts

These are used to provide for younger children, with a trustee appointed, usually the guardian, to manage their financial affairs. Once they reach the prescribed age, they can become trustee and appointor of their own beneficiary Testamentary Trust as above.

4. Special Care Trusts

When the Willmaker is concerned that their child, for any reason, is unable to manage their affairs themselves they can give the power to the executor to set up a special care or disability trust.

This may be due to a mental or physical disability (including addiction) or simply because the Willmaker believes a trust would be a more sensible option for that beneficiary.

Where the person has a severe disability, a family member can set up a Special Disability Trust for their future care and accommodation needs as prescribed by Centrelink. However if they want to provide additional funds they should consider also giving the executor the ability to set up a Special Care Lifestyle Trust if that is more appropriate at the time.

A separate trustee becomes responsible for administering their share of the estate e.g., another sibling or an uncle or aunt.

5. Lifetime Benefits Trusts

These trusts are usually established to provide accommodation and an income stream for the lifetime of a beneficiary. They are often used when people have re-married and want to provide for their new spouse in their lifetime, whilst passing on ultimate ownership of assets to their children.

6. Capital Preserved Trust

These are used when the Willmaker wants their children to receive the estate's income but not be able to cash in the assets for a period of time. They may prefer to have the money managed by an independent trustee until the beneficiaries reach a certain age.

Other Issues: Equalisation Provisions

These provisions are designed to cater for issues that would potentially result in an unequal distribution amongst beneficiaries.

This is useful, for example, if there are young children who will receive a share of the superannuation death benefits due to taxation benefits, whilst older non-dependent siblings do not. An equalisation clause can make sure that those other non-dependent children receive more from the estate such that their overall share is equalised.

It's also useful where loans have been made to particular children with the loan to be forgiven on death. Again, these provisions ensure each beneficiary receives an equal share of the total assets.

Family Trust Provisions

Assets in a family trust are not owned by an individual - they are simply controlled by a trustee. Often however, people try to leave assets held within a family trust to beneficiaries when in fact they can't.

A family trust will also always have an appointor, who has ultimate control of those assets as they can replace the trustee. If the Willmaker is an appointor of any trusts it's important to pass on that position to someone else via the Will.

Like some help?

For more information please contact Irongroup Lawyers on 03 8621 9000. We would be pleased to help.