



Incorporating Testamentary Trusts into your Will

This Solution Brief discusses the top 8 reasons to incorporate testamentary trusts within your Will

Our comprehensive Will includes “testamentary trust” provisions and incorporates more sophisticated strategies, to help achieve the following outcomes:

Wealth protection

When assets pass directly to a beneficiary, the assets immediately become available to any person who makes a claim against that beneficiary. This includes the creditors of a beneficiary in financial difficulty, a separated or divorced spouse, or other relatives of that beneficiary.

If the assets pass into a testamentary trust instead, the assets benefit from a **higher level of protection** from such claims.

Ongoing control over the assets within a testamentary trust can be structured with great precision.

Keeping your assets within your family line

When an asset passes directly to your spouse, it is not ordinarily possible for you to ensure (“from the grave”) that your children will be adequately provided for – particularly if your spouse remarries or has subsequent children.

A testamentary trust can be used to give your spouse control over the annual income from the assets (and possibly some capital). At the same time, it can ensure that your assets ultimately pass to your children (and in turn their children, i.e., down your blood line). At the very least, a testamentary trust will ensure that your children will have a say in **how and when** the assets are disposed of and what happens to the proceeds.

Giving assets to your kids over time (the ‘second chance trust’)

It is well recognised that giving children significant money at a young age is not good for them. A testamentary trust can provide a **high level of control and certainty** as to when a child gains access to particular assets – and for what purpose.

It is possible to **stagger the gifting of assets over time**, for example when your child reaches the age of 21, 25, 30, etc. You can also tie the release of the assets to particular events or uses, for example the purchase of a house, tertiary education or overseas travel.

Staggering when your children receive assets also gives them a **“second chance”** if they make financial mistakes early in life. They do not need to lose all of their inheritance as a result of one bad decision.

Income flexibility – reduce and spread the burden of tax

When an asset passes directly to a beneficiary, that beneficiary then becomes taxable on all the income associated with that asset. However, if the asset passes to the trustee of a testamentary trust, the trustee can choose how and to whom to distribute that income from year to year.



This enables the trustee of a testamentary trust to take advantage of the **lower marginal rates** of tax of one or more potential beneficiaries.

Marginal rates of tax for kids – turn kids into adults for tax purposes

Income that is distributed to your children who are under the age of 18 years from an ordinary trust is subject to what is often termed the “kiddie tax”. This tax usually applies at a rate of approximately 46% because the child does not get the benefit of the tax-free threshold and the graduated marginal rates of tax.

However, children under 18 **do** qualify for these tax concessions in respect of income they may receive from a testamentary trust created by your Will. Put another way, it enables the surviving spouse to support the kids with pre-tax income.

This can potentially **save a large amount of tax** over the life of the testamentary trust, although care must be taken in how the testamentary trust is administered and how income distributions to children are recorded.

Capital gains tax and stamp duty benefits

When you die and an asset passes directly to a beneficiary, a transfer of all or part of that asset to another person by that beneficiary will trigger CGT and stamp duty. This is because the beneficiary has a “fixed interest” in the asset from the time of your death.

For example, if two children are each given an equal share in two houses and they decide to take one house each, CGT will be triggered on 50% of each house. This is because each child is deemed to transfer a half interest in each house. In some states there are also stamp duty consequences of this type of transaction. The CGT and stamp duty consequences mean that the net value of the assets ultimately received by the beneficiaries is significantly reduced.

However, if both houses pass into a testamentary trust, each child can take a single house without triggering CGT or stamp duty. This can **greatly reduce the cost** of restructuring entitlements under your estate and ensures that the **full value of your assets** ends up in the hands of your beneficiaries.

Reducing tax on your super

A testamentary trust can also deal with any super or life insurance proceeds payable on your death.

Without proper planning, tax of up to 32% (but usually around 16%) may apply to the value of your super death benefits payout.

A testamentary trust provides your Executors with the maximum flexibility to deal with any super paid to your estate to **minimise taxes**. It also provides other benefits for your super money, such as **wealth preservation** and **income flexibility**.

Reduced likelihood of claims against the estate

When assets are given outright to your beneficiaries, it is relatively easy for a disgruntled beneficiary to prove they have not been adequately provided for.

However, a testamentary trust does not have a single beneficiary but rather a range of potential beneficiaries, which can be structured to include a potentially disgruntled beneficiary. It is then more difficult for a disgruntled beneficiary to bring a claim until the trust has been fully administered.

The discretion for how to divide up the assets in a testamentary trust is left to the trustee, who may decide to exclude the disgruntled beneficiary or minimise the share they receive **in accordance with your specified wishes**.



What next?

If you would like to speak to someone about incorporating a testamentary trust into your Will, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.