

Testamentary Trusts – An Introduction

Asset protection in a Testamentary Trust

Many are concerned about protecting their assets. They want to make sure that the assets remain within the family and are used to benefit family members.

In particular, people are concerned about:

- their beneficiaries becoming bankrupt, especially those that are involved in highly leveraged businesses;
- their beneficiaries becoming divorced and their assets being split in the divorce;
- spendthrift children;
- ensuring that the surviving spouse will pass on their assets to their children upon that person's death; or
- looking after disabled children.

The significant advantage of a testamentary trust is that the assets be owned by the trustee, and the benefit of the income and capital of the trust passes to the beneficiaries (who might include the trustee, but for asset protection purposes, this may not be appropriate).

This separation of control and benefit allows testamentary trusts to protect assets from any legal action involving the beneficiaries and/or misuse of those assets.

The terms of the testamentary trust are set out in the Will. These terms can restrict the ability of any of the beneficiaries to control the activities and investments of the trust or give them complete control.

Will-makers need to decide whether to sacrifice the independence of the beneficiary to ensure that the inherited assets are protected and used sensibly for the benefit of the primary beneficiary and their family. We prefer that people give their beneficiaries full control of their testamentary trusts. This allows the beneficiaries to use the trusts for income splitting and asset protection.

However, if a will-maker wishes to ensure that their assets are invested and managed for the benefit of the beneficiaries, then it is appropriate to have an independent person in control of the testamentary trust. This should only be done after careful consideration of the implications.