

Testamentary Trusts – An Introduction

What is a Testamentary Trust?

A testamentary trust is a trust created by a Will. It is generally a discretionary trust – one where the Trustee has full discretion about who benefits, and to what extent, under the trust.

Why would I use a Testamentary Trust?

Testamentary trusts can make sure the inheritance reaches the intended recipients. An independent trustee can guarantee that vulnerable beneficiaries, such as very young children or the ill, incapacitated, unstable or disabled, will be provided for.

Properly drafted, trusts can also guard against the often-divisive aftermath of divorce, and ensure that in the event of remarriage, assets will be passed on to the children or grandchildren of the testator.

Testamentary trusts are also a wise precaution if the beneficiaries may face legal action or bankruptcy, such as those in professions frequently subject to litigation, or high-risk business. This form of protection is often referred to as Asset Protection.

Can a Will-Maker Restrict the Terms of a Testamentary Trust?

The terms of testamentary trusts are contained in the Will. They can include restrictions on any or all of the beneficiaries or conversely, grant them extensive control. In effect, these can enable you as the Will-maker, or testator, to rule from the grave. It is up to the testator whether they vest control in the beneficiaries or in the hands of an independent trustee. Giving control to the beneficiaries allows a greater degree of flexibility; but a managerial trustee may be better if the beneficiaries are not able to control their own finances.

How do Testamentary Trusts Work?

Testamentary trusts are drafted to mimic the operation of a discretionary trust such as a family trust: the testamentary trust will have a broad range of discretionary beneficiaries, usually the members of an extended family. The trustee of the testamentary trust selects from the class of beneficiaries which person or people who will receive a gift of trust income or trust capital.

Until the trustee elects to distribute to a beneficiary, no person has a vested interest in the assets of the trust.

Careful drafting of the testamentary trust will ensure that the beneficiary selected, who becomes a beneficiary, only has an interest in the trust to the extent that the trustee has determined.

The trustee of the testamentary trust may be the executor of the deceased estate or may be some other person, who will be appointed by the Will or pursuant to a formula contained in the Will. Often the trustee will be the person to whom the Willmaker, but for the testamentary trust, would bequeath their assets or a good part of them.