

# Legalquotes *News*

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## TESTAMENTARY TRUSTS IN WILLS – WHAT ARE THE BENEFITS?

Today, it seems that life is becoming more complex and hectic on almost a daily basis. In the past, family relationships appeared to be much simpler. There was mum, dad and two kids from the same marriage. In this situation, it was expected that a person's Will would also be a fairly straight-forward document. The Will would appoint each spouse as the executor and leave all the property to that person provided that they survived the deceased spouse for a period of time and if they predeceased, then the children would inherit absolutely between them, usually in equal terms.

However, as today's society and family backgrounds become more complex, Wills will also become more complex. Today, family backgrounds include multiple marriages, divorced children, children with substantial business interests or liability issues and also assets being held in complex corporate and trust structures. Necessarily, a person's Will in this situation will also need to be more complex to deal with these complex relationships.

In these circumstances, it is often useful to include a testamentary trust in a Will. Put simply, a testamentary trust is a trust that is contained in a Will and which takes effect upon the death of the person. A trust is a relationship between two persons, one being a trustee whose job is to administer or hold assets on trust for another person, called the beneficiary. The trustee must look after the assets (often investing the assets) for the benefit of the beneficiary. Trusts can be created during a person's lifetime (inter-vivos trusts) or on death (testamentary trusts).

Testamentary trusts are useful for complex

relationships and family situations because they provide several benefits.

Firstly they provide asset protection benefits. In law, the beneficiary is deemed not to have absolute ownership of assets left pursuant to a discretionary trust for him or her and as such, if that beneficiary is liable or potentially liable to being sued, those assets left on trust under the terms of the testamentary trust will generally not be available to the creditor of that person.

A testamentary trust can also assist beneficiaries with certain problems/issues. For example, a beneficiary may have a gambling problem. The benefit in using a Testamentary Trust is that a Willmaker can leave substantial assets to that problem beneficiary on trust so that the beneficiary can benefit from the assets, but not waste them.

Testamentary trusts also give taxation benefits because the trustee is able to take into account an individual beneficiary's tax circumstances before deciding on distributions of capital and/or income from the trust.

The benefits of a testamentary trust are often best illustrated by way of an example:-

Mary's husband died two years ago and left his entire estate to her. When Mary passes away her estate will be worth approximately \$600,000.00. Mary has three children, Kim, Paul and Darran, and wants to leave her estate to be divided equally between them. If Mary makes a "simple" will then usually, within a year of her passing, each child should receive about \$200,000.00. However, Mary is

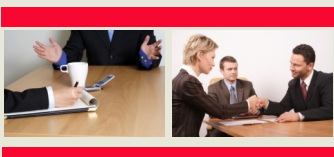


concerned about Paul and Darran. Paul is a recovering alcoholic who has gambling problems and has never handled money well. Darran is in a volatile business partnership and may be getting divorced for the third time. Mary is concerned that if Paul and Darran get \$200,000.00 in "one hit" the money may be wasted. Kim is good at handling money and knows the issues facing Paul and Darran.

Mary has her lawyer draft a testamentary trust with Kim as trustee. Under the terms of the testamentary trust, Kim has a discretion as to how and when the money (\$200,000.00) each will be given to Paul and Darran. Kim decides to give Paul only \$20,000.00 per year plus interest for the next 10 years so that he will not waste all the money straight away. Kim waits until Darran has sorted out his business and marriage problems (2 years after Mary's death) then gives Darran his share.

As this last situation has Family Law implications it is important to get legal advice.

If you would like personal advice about whether a testamentary trust is right for you, please contact one of our experienced estate planning lawyers on 1300 727 813.



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