

Legalquotes News

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DOES YOUR WILL HAVE A TESTAMENTARY TRUST?

Testamentary trusts are the “buzz words” of the moment. But what is a testamentary trust, and when should one be included in your Will?

Put simply, a testamentary trust is a trust, the terms of which are set out in a Will.

Depending on who you listen to, everyone should have a testamentary trust included in their Will. However, the reality is that testamentary trusts are best used for specific circumstances only.

The main circumstances where testamentary trusts can be of benefit are:-

1. Spendthrift beneficiaries.
2. Beneficiaries with special needs, such as mental or physical disability.
3. To protect inheritances given to beneficiaries who may be at risk of being sued, such as professionals (doctors, dentists, lawyers, engineers, etc).
4. To protect inheritances in family law matters.
5. To provide tax benefits for beneficiaries.

While the above is not an exhaustive list of the circumstances in which a testamentary trust may be of benefit, it does give a good idea as to the sorts of circumstances where they can be appropriate and effective.

Apart from the taxation advantages for beneficiaries, the basic benefit afforded by testamentary trusts, is that of protection for the gifts held on trust. This

benefit arises because of the unique nature of testamentary trusts, particularly discretionary testamentary trusts. In these types of trusts, the beneficiary of the trust (i.e. the person who has been left a gift on trust by the Willmaker) is not actually presently entitled to any capital or income of the trust (depending on the terms of the trust) until the trustee makes a decision to give such a benefit to the beneficiary. This means that in the various circumstances noted above, the money left on trust is not actually the beneficiary’s money until a distribution is made by the trustee. The effect of this is that this money is not available for distribution amongst creditors, as part of family law proceedings, or available for spending by spendthrift beneficiaries, to name a few examples.

As an example, if money was left to a beneficiary outright, and not on trust, and that beneficiary was party to family law proceedings, that inheritance would be taken into account by the Family Court as part of the property settlement and some (or all) of it may end up with the beneficiary’s former partner.

You should carefully consider whether a testamentary trust may be useful and appropriate for your particular circumstances. Rankin Nathan Lawyers has solicitors experienced in advising clients on these matters and drafting such trusts where required.

Example:

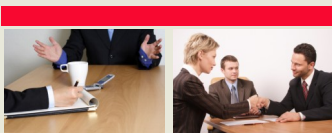
Mary’s husband died two years ago and left his entire estate to her. When Mary passes away her estate will be worth



approximately \$600,000.00. Mary has three children (Kim, Paul and Darran) and wants to leave her estate 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 asks Rankin Nathan to include a testamentary trust in her Will 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 ten years so that he will not waste all the money straight away. Kim waits until Darran has sorted out his business and marriage problems (two years after Mary’s death) and then gives Darran his share.



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