Let’s chat

Testamentary discretionary trusts – June 2021

With:
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Information provided is general in nature; precise application depends on specific circumstances

What is a testamentary trust

- Relationship relating to an asset holding arrangement
- Someone (the **trustee**) holds assets for the benefit of other (the **beneficiaries**)
- Not a legal entity!
- ‘Assets belonging to the trust’ is short form for assets are held by Person A for the benefit of Persons A to Z
- Testamentary means created by Will
- Also because created by Will, there are tax benefits
  - Contrast with a trust created whilst someone is living
  - Distributions to minors are taxed at adult rates rather than the first $416 tax free

What is a testamentary trust

- All Wills create a trust
- Executor holds assets for the people benefiting under a Will
- These trusts are simplified, and are often ‘fixed trusts’
- Testamentary **discretionary** trusts are different as there is discretions to who can benefit
- Testamentary trust only created on death of Willmaker

What is a testamentary trust

- Testamentary discretionary trust
- Beneficiary class available, and trustee decides who benefits
  - Named person/s
  - Lineal descendants
  - Sometimes wider family such as parents, siblings, nieces and nephews
  - Sometimes related entities
  - Sometime spouses
- Who is included depends on the circumstance
- Preference is to keep to lineal descendants and charities with option to add more
- Potential abuse of trustee v legal obligations imposed on trustee
- Legal right of beneficiaries of a testamentary trust limited due to discretionary nature

Benefits

- Beneficiary bankruptcy risk reduced
- Potential to plan for family relationship breakdown
  - *Bernard v Bernard*
- Tax planning
  - Grandchildren example
- Succession planning

Disadvantages

- Complex to understand
- Appreciation of abuse of position
- Only really useful for tax planning if sufficient assets form part of testamentary trust
- Ongoing costs:
  - Updating Will if changes of law
  - Maintaining testamentary trust
- Still doesn't solve estate challenges

Who to include

- Asset protection
  - Family law
  - Bankruptcy
  - Estate risk
- Tax planning
  - Flexibility
  - Related structures
- Succession planning
  - Passing down
- Trust with others

Who to include

- Family members
- Multiple persons
  - One from each side of the family
- Independent persons
- Backups
- Potential for abuse remains
  - Albeit there may be legal avenues
- Practicalities

To trust or not to trust

- Flexibility and potential abuse
- Lack of flexibility and reduced potential to abuse
- Who do you trust
- Do not recommend stringent rules:
  - ‘No selling assets’
  - ‘No capital distributions’
  - ‘Fixed age when taking over’
  - ‘Fixed income stream’

The Appointor

- Person who can change the trustee
- Useful succession planning tool
  - Staggered passing of control to children
  - Trusted persons remain as appointor but children appointed as trustee:
    - Whether solely as trustee
    - Whether jointly as trustee

When and how many

- When:
  - Couple but lack estate assets – on death of both but may not hurt to have in case there are changes in circumstances (i.e. insurance or superannuation)
  - Couple assets will form part of estate – on death of initial (so survivor can benefit as well as children)
- How many:
  - 1:
    - Simple
    - Bring everyone together
  - 2 or more:
    - Want to separate assets into separate trusts (needs foresight and vigilant reviewing)
    - Multiple recipients:
      - Children
      - Family members

Contact details

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