



ADLV LAW
FIERCELY ON YOUR SIDE

SOLUTION BRIEF

Testamentary Trust Options

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Testamentary Trusts come in all shapes and sizes. From the very simple, to the super sophisticated. We discuss some of the more common options you may wish to consider for your Testamentary Trusts below.

01

Beneficiary or ‘independent’ Trustees

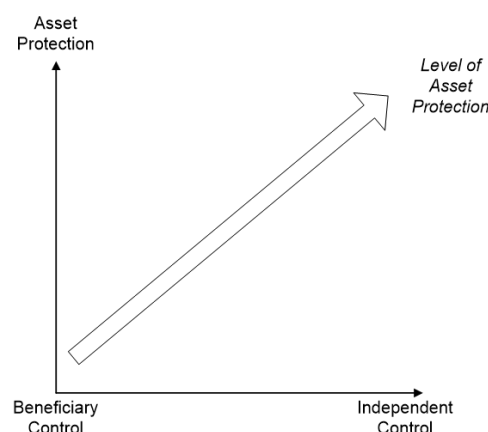
The ‘Trustee’ is the person who administers the Trust after you have died. They are responsible for managing the assets and making distributions of income and assets to beneficiaries.

A ‘beneficiary controlled Trust’ is one that is controlled solely by the beneficiary, i.e. the beneficiary is the Trustee and has complete control over the Trust’s income and capital, and can wind-up the Trust whenever they like.

At the other end of the spectrum is an ‘independently controlled Trust’. Under this scenario, the beneficiary is not a Trustee, and does not have any right to interfere with management and distribution decisions. These decisions are made by one or more ‘independent’ people (who cannot themselves benefit under the Trust). The independent Trustees may be other family members, or professional advisers.

In between these two extremes are Trusts in which both the beneficiary and one or more other independent persons exercise joint control.

The key thing here is the balance between asset protection and control. The more control the beneficiary has over the Trust, the less asset protection the Trust provides. Conversely, to get the highest level of asset protection, the beneficiary would need to be excluded from control.



02

Release Conditions

If you involve an independent trustee in a Trust, you then need to think about when (if ever) the beneficiary will gain complete control – and be able to bring the Trust to an end. We refer to this as a ‘Release Condition’.

Some people only want to provide asset protection for a specific period of time, for example until the beneficiary reaches 35 after which time the beneficiary gains complete control of the Trust. Others want to give the beneficiary control after a certain event, for example when they have entered into a property settlement with a former spouse.

Another option is to provide the beneficiary with control over a percentage of the Trust’s assets at a nominated age, and the remaining Trust’s assets when they reach a later age. This is often referred to as a ‘second chance trust’, because the beneficiary can lose the first amount of money and still receive a second tranche.

03

Reserved Capital

When some or all of the Trust’s assets are restricted from being accessed by the beneficiary, they are referred to as ‘reserved capital’. As noted above, the capital may be reserved until a particular time, but it may also be reserved for a second level of beneficiaries. For example, 30% of the Trust’s assets may be reserved for the children of the nominated beneficiary.

04

Purpose Trusts

Another condition that can be imposed within a Trust is the purposes for which the Trust income or capital may (or must) be applied. This may be combined with an allocation of an amount of Trust capital specifically for that purpose.

For example, you may specify that 30% of the Trust's capital is to be retained in the Trust to fund the education of grandchildren, until the youngest grandchild reaches the age of 25. You can specify a maximum allocation per grandchild, and also specify what costs are to be covered. You can also leave these things to the discretion of the Trustees.

Other common 'purposes' include:

- Providing housing for a particular person (for example, your spouse during their lifetime, with the house then passing to your children after your spouse's death);
- Ensuring health care for a group of family beneficiaries. For example, some capital may be preserved to meet the healthcare costs of children and grandchildren, either through paying for health insurance, or self-insuring; and
- Aged care for a group of family beneficiaries. For example, a portion of the Trust's capital or income may be allocated to fund aged care housing, or a supplement to the pension.

05

Income and capital

Lastly, it is worth noting that a Trust can have both 'income' and 'capital'. Income is what the Trust earns each year. Capital is what you gift to the Trust through your Will and can also include any income that is accumulated rather than distributed and any additional gifts made to the Trust.

You can deal with income and capital separately. For example, you can give your spouse the benefit of the Trust's income during their lifetime, and then leave the capital to your children. You can also deal with only particular parts of the income.

06

What it means to be a ‘nominated beneficiary’

What we have been discussing above are the conditions around how the beneficiary will gain complete control over the Trust’s income and assets. This does not mean the beneficiary receives nothing until these conditions are satisfied. The Trustee must still administer the Trust for the benefit of the nominated beneficiary, by applying some or all of the income and assets of the Trust to help meet expenses and other key expenditure of the beneficiary.

07

Summary

In summary, you can incorporate the following into Testamentary Trusts under your Will:

- Dates or events on which a beneficiary gains control over income and/or capital;
- Conditions on which a beneficiary gains control over income and/or capital;
- Specific purposes to which income and/or capital may/must be applied; and
- Specific limitations on what cannot be done with income and/or capital.



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TALK TO US

What next?

If you would like to speak to someone about the appropriate terms for your Testamentary Trust, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.

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