

# Wills and Testamentary Trusts

## Estate Planning solutions

### Introduction

Having a good Will in place is essential if you want your estate assets distributed in accordance with your wishes.

It's also important to realise that you have a choice about the type of Will you can have. Life has changed and the types of Wills that people can choose from have changed accordingly. These days, considering house values alone, estates are worth considerably more than ever before so issues around asset protection and optimising tax benefits have become important. Superannuation also needs careful consideration when preparing a Will. Further, second relationships are also very common, with blended families requiring different solutions.

To cater for the increased complexity of life today, Wills can contain what are known as beneficiary testamentary trusts which means each beneficiary can take their inheritance in a trust that they control. Alternatively, a Will can be drawn up without beneficiary Testamentary Trusts, which means the beneficiaries receive the inheritance in their own name.

A Will without these beneficiary testamentary trusts may be appropriate - it really depends on your particular circumstances.



### Do I need a Will with testamentary trusts?

These Wills offer increased flexibility and potentially crucial benefits. There are a number of different testamentary trusts that can be created but let's look first at how normal family trusts work.

### Back to basics... what is a Trust?

Imagine a school teacher purchases lollies for her students. The teacher is the legal owner of the lollies and intends to hand them out when she decides the students "deserve" them. She has complete discretion as to who gets them and how many they receive.

In this example, the lollies are the assets in the trust fund, the school teacher is the trustee and the students are the beneficiaries.

The school principal can remove the teacher at any time and replace her with another teacher. The school principal can do this because the "rules" enable her to - she can even become the teacher & take control of the lollies.

The school principal therefore effectively controls the trust and is known as the appointor. This is the most important position because they retain ultimate control.

So, the trustee (teacher) is the legal owner of the trust fund (lollies) for the benefit of the beneficiaries (students) and the appointor (school principal) can remove the trustee at any time.

### and in legal speak ...

A trust is a legal relationship between parties with the relationship revolving around the trust fund. There is always a trustee and at least one (but usually

more) beneficiary[s]. The trust fund can include anything which can be owned e.g. money, real estate, shares, boats, contractual rights, intellectual property rights, a business, plant & equipment, debtors etc.

The trustee is the legal owner and the beneficiaries are the beneficial owners. The trustee has complete control over the trust fund subject to legal restrictions and the rules governing the particular relationship e.g., via a Will or trust deed.

The appointor is the person who can replace the trustee at any time for any reason. They can also appoint themselves as trustee.

### And now testamentary trusts....

A testamentary trust refers to a set of provisions contained within a Will - it is not a Will in itself. Most standard Wills do not contain beneficiary testamentary trust provisions.

Whilst people often talk about a testamentary trust in the singular, a well-prepared Will contains a range of testamentary trust provisions to suit the circumstances of the Willmaker.

Importantly, they can cater for unforeseen events that may be impacting your beneficiaries at the time of your death. It's like putting all the tools in a tool box - they don't have to be used but they are there if they're needed.

### So, what are the different types of testamentary trusts?

#### 1. General testamentary trusts - making the most of the inheritance

Having general testamentary trust provisions means each beneficiary can take their inheritance in the name of a trust that they control.

# Wills and Testamentary Trusts...

If the beneficiary chooses to take their share of the inheritance in their own trust, they can assume the appointor and trustee role as a primary beneficiary and hold the estate assets on trust for the benefit of themselves and other prescribed discretionary beneficiaries (e.g., their children).

There is no limit on the number of these general beneficiary Testamentary Trusts that can be created - it's as many beneficiaries as are named in the Will.

## Why would they choose to take their inheritance in a testamentary trust?

**Bankruptcy** - estate assets held in a trust are not available to a trustee in bankruptcy. If you have a Will without beneficiary testamentary trusts and your child is bankrupt when they inherit your estate, your hard-earned assets could be forfeited.

**Tax Savings** - the primary beneficiary can choose to distribute income or capital to children and take advantage of the lower marginal tax rates that apply to income paid to minors from testamentary trusts.

**Restricting Access Over 18** - with an inheritance placed in a beneficiary testamentary trust, access can be restricted until any age the Willmaker chooses - often 25.

**Family Law Benefits** - taking an inheritance in a beneficiary testamentary trust allows the Family Law Court to accurately identify what your child brought to a relationship.

## 2. Superannuation Death Benefits Proceeds Trust

This special purpose testamentary trust is designed to deal with the superannuation death benefits proceeds of the Willmaker and ensures that the superannuation death benefits are only available to those people to whom the relevant tax concessions will apply.

## 3. Child Testamentary Trusts

These are used to provide for younger children, with a trustee appointed, usually the guardian, to manage their financial affairs. Once they reach the prescribed age, they can become trustee and appointor of their own beneficiary testamentary trust as above.

## 4. Special Care Trusts

### Special Care Lifestyle Trust

When the Willmaker is concerned that a beneficiary, for any reason, is unable to manage their affairs themselves, they can give the power to the executor to set up a special care trust.

This may be due to a mental or physical disability (including addiction) or simply because the Willmaker believes a trust would be a more sensible option for that beneficiary.

### Special Disability Trust

Where the person has a severe disability, a family member can set up a Special Disability Trust for their future care and accommodation needs as prescribed by Centrelink. However, in case the beneficiary is not deemed eligible by Centrelink at the time, we incorporate a Special Care Lifestyle Trust as well to ensure the executor remains in control.

A separate trustee becomes responsible for administering their share of the estate e.g., another sibling or an uncle or aunt.

## 5. Lifetime Benefits Trusts

These trusts are usually established to provide accommodation and an income stream for the lifetime of a beneficiary. They are often used when people have re-married and want to provide for their new spouse in their lifetime, whilst passing on ultimate ownership of assets to their children.

## 6. Capital Preserved Trust

These are used when the Willmaker wants the beneficiary to receive the

estate's income but not be able to cash in the assets for a period of time. They may prefer to have the money managed by an independent trustee until the beneficiaries reach a certain age. This is often a solution used by blended families where want to provide for their new spouse in their lifetime, whilst passing on ultimate ownership of assets to their children.

## Other Issues: Equalisation Provisions

These provisions are designed to cater for issues that would potentially result in an unequal distribution amongst beneficiaries.

A common reason to include an equalisation clause is when one child is given a large sum of money to use as a deposit towards a house purchase but perhaps their sibling has not received the same or equal amount. An equalisation clause can make sure that the child that has not received or received a lesser deposit amount, receives more from the estate such that their overall share is equalised.

It's also useful where loans have been made to particular children with the loan to be forgiven on death. Again, these provisions ensure each beneficiary receives an equal share of the total assets.

## Like some help?

For more information on types of Wills please call us for an obligation free chat on **03 8621 9000** or send us an email [info@irongrouplawyers.com](mailto:info@irongrouplawyers.com).

With our depth of experience, fixed prices and focus on providing positive outcomes for clients, we would be pleased to help.