

TESTAMENTARY TRUSTS

Estate planning is the planning and documentation of your wishes for the distribution of your wealth following death, including assets you own personally as well as assets you control.

Estate planning is a specialist area and it is therefore important you obtain professional legal advice in relation to all areas of your estate plan. However we outline below some of the issues you should consider when establishing a testamentary trust.

A testamentary trust is established under a Will and activated as a result of death of the testator (person making the Will). Only those assets that form part of the testator's estate can be placed into a testamentary trust. Therefore if you establish a family trust to hold your assets, the assets held within the family trust will not form part of your estate. The trustee has absolute discretion over the distribution of income and capital to beneficiaries. In some circumstances, the law will set up a testamentary trust when beneficiaries are unable to hold or deal with property in their own name i.e. in the case of minor beneficiaries (young children under 18).

A trust must 'vest' (distribute the trust assets) within 80 years from the date of death of the testator. It is possible to create a vesting date that is linked to the death of a person such as a beneficiary or some other event.

ADVANTAGES OF TESTAMENTARY TRUSTS

- Allows for income and capital to be split between beneficiaries, at the time and in amounts as determined by the trustee. This makes it possible to reduce tax, as distributions to beneficiaries under the age of 18 years are taxed at adult rates rather than the usual children's penalty tax rate (which can be as high as 66%). The trustee can take into account the other income of beneficiaries prior to distribution to minimise tax and maximise the distribution to beneficiaries.
- The trustee controls the estate assets until the beneficiaries are of sufficient age to hold the assets in their own name.
- Estate assets can be prevented from being vested directly into a beneficiary's own name. This may help protect assets in the event of a family breakdown. Assets in a trust will not be included by the Family Court in the division of matrimonial property in the event of a marriage breakdown and property dispute. (The Court, however, may take into account the presence of a trust in calculating what they consider to be an equitable distribution of the non-trust assets.)
- The benefit of an insolvent or potentially insolvent person can be provided for. By having an independent third party trustee the assets in the trust may be out of the reach of creditors but at the same time available for family members and, in particular, the children of a bankrupt person.
- The trustee has total flexibility to invest in whatever assets they wish (subject to the trust deed) and can draw on capital or income at any time.

DISADVANTAGES OF TESTAMENTARY TRUSTS

- In incorporating a trust arrangement into a will, it is difficult to perceive what the needs and requirements of beneficiaries will be in 10, 20 etc years time. Wills are prepared on the basis of the testator's current circumstances as well as their wishes for the future. It is therefore important for testators to consider a mechanism in a trust whereby the trust funds can be distributed fairly quickly and, if necessary, the trust is brought to an end.
- In the case of beneficiaries who are in receipt of social security benefits, assets held in a testamentary trust for their benefit are no longer exempt assets. This may result in a reduction of social security entitlements.

We recommend you discuss the area of Testamentary Trusts with your solicitor to determine their potential appropriateness to your overall situation.