



Benefits of a Testamentary Trust Will versus a simple Will

Author: [Chris Alfonso](#)

Email: chris@ealawyers.com.au

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Testamentary Trusts are estate planning tools which are useful for a range of reasons, including for wealth protection and due to the tax advantages. While the [benefits of a Testamentary Trust are not limited to only certain people or certain situations](#), we have narrowed down some of the key beneficiaries who would benefit from receiving their gift by way of a Testamentary Trust, rather than through a relatively simple Will.

Family law separation

Where a child or other beneficiary to a standard Will is going through [family law separation proceedings \(or may do so in the future\)](#), any inheritance they receive may be exposed to those proceedings.

The structure of a Testamentary Trust may be arranged in such a way as to reduce the risk that a child's inheritance will be considered 'matrimonial property'. If the inheritance was through a standard Will, it increases the likelihood that it would form part of the property pool for distribution during separation proceedings.

A properly structured Testamentary Trust may result in the inheritance instead being considered a 'financial resource', which would be taken into account during family law proceedings but is not automatically divisible.

Business owners, company directors, bankruptcy or other potential exposure to liability

A beneficiary may owe money to creditors of their business. If the inheritance were paid to them directly, then the inheritance would be exposed to the creditors.

If the inheritance is instead received by way of a Testamentary Trust, the creditors would not be able to access the inheritance while it is held in the Trust.

This extends to other roles or other potential exposure to liability that a beneficiary may have including:

- director's liability as a director of a company'
- personal guarantees offered as a director of a company; and
- potential bankruptcy.

Children under 18 years

Where a minor is a beneficiary under a relatively simple Will, it will usually say that the minor will receive their inheritance upon turning 18 years of age (or some other age selected).

The problem with this is that it is impossible from the outset to know what position the child will be in at that time. The child could be:

- financially immature;
- going through a tumultuous relationship;
- facing bankruptcy; or
- otherwise irresponsible.

By providing the inheritance by way of a Testamentary Trust, then you should have confidence that the Trust (by way of the nominated trustee) will decide when the child is ready to receive their inheritance. At that time, the trustee can provide control of the Trust to the child or distribute the capital in the trust to the child. In other words, you are trusting the trustee to decide what time is appropriate, rather than leaving it to chance.

High-income earners and Trust tax rates

A Testamentary Trust is usually a Discretionary Trust, allowing the trustee to decide how the income of the Trust is distributed.

If the intended beneficiary is a high-income earner, then instead of earning that additional income themselves, which would be taxed at a higher marginal income tax rate, the trustee may distribute the tax to another beneficiary who may be taxed at a lower marginal tax rate.

Minor tax rates

In addition, a distribution from a Testamentary Trust to a minor is subject to the standard marginal income tax rates, including the usual \$18,200 tax-free threshold. A minor is not subject to the higher marginal tax rates that they would be exposed to for distributions from a normal Family Trust.

Large embedded capital gains tax liabilities

If an asset exposed to capital gains tax passes from the deceased to the beneficiary, it will not trigger the payment of capital gains tax at that time.

The capital gains tax liability will remain embedded with the asset.

If at a later time, the asset is sold or capital gains tax is otherwise payable, then if this liability is incurred within the Testamentary Trust structure, the capital gains tax can be shared among beneficiaries. This will likely result in a lower tax burden spread across the beneficiaries than if the capital gain was realised by a single beneficiary.

Spouse who may re-partner

If a spouse were to pass away at a relatively young age, leaving children, then rather than leaving all assets to the surviving spouse they may prefer that some of their assets be preserved for their spouse and children.

If left solely to the surviving spouse under a simple Will, then those assets may be exposed to a future third party if the surviving spouse were to re-partner (and if that new partner had children of their own).

By providing that some assets pass into a Testamentary Trust, it may help to preserve part of the deceased spouse's assets while still allowing the surviving spouse the benefit of the income generated in the Trust.

For any jointly held assets (including property held as joint tenants or any joint bank accounts), these will automatically become the surviving joint owners upon the death of one joint owner. Further planning may be required, depending on your particular circumstances, if it is intended that part of these jointly held assets are to be dealt with under the Will or gifted into a Testamentary Trust.

Get help from a Wills and Estates lawyer

Contacting E&A Lawyers

For more information or to arrange a consultation with a lawyer, you can call or email us.

[02 9997 2111](tel:0299972111)

info@ealawyers.com.au

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