

A guide to using Testamentary Discretionary Trusts

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Date: Sunday June 26, 2022

Testamentary Discretionary Trusts are a very useful and beneficial tool that can be provided for your family in your Will. But it is important that your family is also aware of those benefits and does not immediately fear that using the Trust will be too complex or difficult. In this article, we explore:

- how to set up a Testamentary Discretionary Trust;
- the types of professionals that can assist you;
- how income and/or capital from the assets in the Trust can be accessed;
- how distributions can be made; and
- how to wind up a Trust.

Benefits of using a Testamentary Discretionary Trust

The major benefits are in the areas of wealth protection and tax advantages. But those benefits are obviously only effective if they are used by your family. And this is where they need proper legal and financial advice to assist them in understanding how the Trust can be used to enjoy those benefits.

You can read more detail about the benefits in our blog, "Benefits of a Testamentary Trust Will versus a simple Will".

What needs to be done to use the Trust?

The Trust is created by your Will. Subject to the terms of your Will, upon your death a Testamentary Discretionary Trust might be created. A well drafted Will might also allow some flexibility in opting to have some or all of the available assets pass to the Trust or to the individual beneficiary or a combination of these two options.

Once probate of the Will has been granted, effectively the Trust is then available to be established.

The first step usually is to set up a bank account in the name of the Trust so that funds may be transferred to that account. The terms of the Trust are set out within the Will and, as such, a copy of the Grant of Probate is seen as being the "Trust Deed" establishing the Trust for the purpose of opening the bank account and for other asset transactions.

The Will usually has provision for a name of the Trust being either that chosen by the Will maker or by the Trustee. That name might be used as part of the name of the bank account depending on the requirements of the particular bank.

It is necessary to obtain a tax file number for the Trust when opening a bank account and this is usually done by an accountant or other financial advisor. A tax file number is needed to avoid withholding tax being applied to the interest earned on the account.

Having established a bank account, the estate can then transfer cash funds to the Trust's account. The estate can also then transfer assets such as property, shares and so on, to the Trust.

Should an accountant or financial advisor be involved?

We certainly recommend that these professional financial services be sought, particularly from advisers familiar with the use and operation of Testamentary Discretionary Trusts.

There are many issues to consider in whether assets be transferred directly from the estate to the Trust or whether certain assets might be sold by the estate and the proceeds then transferred to the Trust. Given our knowledge in this area, we will work with the advisor to identify options and give guidance towards the best outcome.

Are the funds and assets of the Trust then "locked up"?

The simple answer is, no.

The Trustee of the Trust will often be the family member having the benefit of the Trust and they will usually be given discretion to distribute both income earned by the Trust and capital or assets of the Trust.

Depending on any specific provisions included in the Will, the discretion is open-ended in that:

- there is no limit to the amount that may be distributed;
- there will usually be many persons to whom the Trustee may choose from to receive those distributions;

- there is no requirement that distributions from the Trust must be directed to any one person or persons; and
- distributions to multiple persons do not have to be equal.

Must there be distributions made from the Trust?

Although it is not required based upon tax laws relating to trusts, income earned on the assets held by the Trust ought to be distributed before 30 June in each year. Any income distributed will then be taxed in the hands of the person receiving the distribution.

If income is not distributed in this manner, the tax rates applying to accumulated income in the Trust are significant. We can assist by working with your financial advisor or accountant to identify any tax implications associated with the Trust.

When can the Trust be wound up?

A windup can take place at any time by the Trustee and must occur before the 80th anniversary of the commencement of the Trust.

The important step a Trustee must take before deciding to wind up the Trust is to ensure that there is a clear understanding of any tax implications arising from winding up the Trust and distributing the assets of the Trust to the beneficiaries. Again, appropriate professional financial advice would be needed to make that decision.

Get help from a Wills and Estates lawyer

There can be significant benefits to a Testamentary Discretionary Trust. Ensuring it’s the right fit for you and your specific circumstances is crucial. If you’d like more information about creating or operating a Testamentary Discretionary Trust, our estate planning team members are able to assist.

Contacting E&A Lawyers

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

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