

Is my family or discretionary trust included in my estate?

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If you have assets in a family or discretionary trust or you're looking to create a family or discretionary trust, then the way the trust would be dealt with under your Will or estate should be considered. Trusts come in all shapes and sizes. This blog will focus on family or discretionary trusts.

Common examples of trusts

Discretionary trusts (also known as family trusts or inter vivos trusts)

A discretionary trust typically involves a trust where the assets are held by the trustee who may distribute trust property to a range of beneficiaries or persons who fall within specified classes of beneficiaries.

The key aspect of this is that the trustee retains a discretion to determine who they distribute trust property to. The beneficiaries are usually not entitled to any specific part of the trust property unless and until the trustee decides to distribute income or capital to that particular beneficiary.

Unit trusts

A unit trust is a trust where the entitlements to income or capital are divided into fixed and specified units. The beneficiaries who own the units in the trust are entitled to the right to income or capital attached to those units.

Self-Managed Superannuation Funds (SMSF).

There are also numerous other types of trusts.

The trust deed of each trust will set out the rules and conditions that apply for that particular trust. Due to this, while two different trusts may both be considered to be 'discretionary trusts', the rules and conditions that apply under their trust deeds can be vastly different. Other trusts will not fit neatly into the definition of either a discretionary trust or unit trust.

The terms of the trust deed need to be carefully considered when determining what your Will can and cannot control. Every trust deed is different and advice should be sought to understand how your Will may affect your trust.

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Common roles in discretionary trusts

Some of the common roles in a discretionary trust include:

Trustee

The Trustee is the 'day-to-day' controller of the trust.

The trustee can be an individual or company. They typically (although it depends on the terms of the trust) decide how funds in the trust are invested and how trust assets are distributed. The assets of the trust will usually be recorded in the name of the trustee (for example, if real estate is owned in a trust, the trustee will be recorded as the registered proprietor).

Beneficiary

The beneficiaries are the persons or companies who may benefit from the trust.

Depending on the terms of the trust, they may be entitled to receive income or capital from the trust. A trust deed may specify that certain individuals are beneficiaries, or it may specify that classes of persons or companies are beneficiaries.

Appointor

The appointor role is usually included in discretionary trusts (and is less likely to be required in other types of trusts) and is the person who can remove any trustee from their office as a trustee and appoint another person as the trustee.

Not all family or discretionary trusts will have an appointor. In other types of trusts this role can be called another name. The term principal is used in some trusts, or a primary beneficiary can occasionally possess the same rights.

What does my Will control?

When a trustee of a discretionary trust dies

If a trustee is an individual, the role usually cannot be passed to a successor under the trustee's Will. In many discretionary trusts, the trustee has no right to nominate their successor and instead, the appointor (who can appoint a new trustee) is left to decide who becomes the new trustee of the trust.

In some discretionary trusts, particularly where the trust does not have an appointor role, the trustee may be entitled to nominate their successor either by deed or under their Will.

Whether a trustee has any right to nominate their successor will depend on the terms of the trust deed.

The trust deed would need to be carefully considered to determine whether the role of trustee passes to a person nominated by the trustee or whether the trustee has no right to nominate their successor.

If a trustee is a company and one of the shareholders of that company dies, then the company shares of that deceased shareholder would pass to the beneficiaries nominated in their Will. By gifting control of those shares, the beneficiary may obtain control of the trustee company, in effect giving them control of the trust. Care should be taken to ensure the shares in the trustee company pass to the person(s) intended under a Will.

When a beneficiary of a discretionary trust dies

A key characteristic of most family or discretionary trusts is that no beneficiary is entitled to the capital or income of the trust unless the trustee exercises their discretion to distribute capital or income to one of the beneficiaries.

The beneficiary is only entitled to distributions from a discretionary trust if the trustee decides to distribute to them. As a result, a beneficiary of the trust is unlikely to be able to exert any control over the assets held within the trust, through their Will.

The trust will usually continue to exist in accordance with the terms of the trust deed, even when the principal beneficiary dies.

An exception to this is if a particular beneficiary has any unpaid present entitlements within the trust. Unpaid present entitlements arise in the administration of a trust where income is distributed to a particular beneficiary to comply with taxation obligations but the income remains within the trust. These amounts that the beneficiary is entitled to but remain unpaid as at date of death, are an asset of the deceased beneficiary and can be gifted in accordance with their Will.

When an appointor of a discretionary trust dies

Many discretionary trust deeds will allow for the appointor to nominate their successor by deed or under their Will.

The appointor will usually be able to state in their Will, who they would want to take over this role if they die. The trust deed may also state that if the appointor has not expressly nominated their successor, their 'legal personal representative' (usually their executor) will automatically become the appointor.

It is extremely important that an appointor of a discretionary trust consider:

- whether they are entitled to nominate their successor (as per the trust deed); and
- if so, who they wish to nominate in that role.

Failure to address this correctly can result in an unrelated or unintended person obtaining control over the trust by providing them with control over selecting who can act as the trustee.

The provisions contained in the trust deed need to be carefully considered.

Get help from a Wills and Estates lawyer

This blog is general in nature and specific tailored advice should be sought to understand the effect of your Will on a family or discretionary trust.

If you have a trust or an interest in a trust, careful consideration is required to ensure that it is adequately addressed as part of your estate plan. When setting up a trust, steps should be taken to investigate what needs to be addressed within your Will or as part of a properly considered estate plan.

Contacting E&A Lawyers

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

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