Testamentary Trusts

Explaining Testamentary Trusts

A Testamentary Trust is a Trust established under a Will. There is no standard format for a Testamentary Trust and they are adapted to suit the needs of a particular family. Common areas which require thought are as follows:-

1. Whether to have one or several Trusts established under the Will;
2. The selection of the trustee or trustees;
3. The method of appointing replacement trustees;
4. Whether the beneficiaries be limited to your descendants only or whether their spouses might be included;
5. Whether some classes of beneficiaries are restricted to income and some to capital;
6. Whether beneficiaries should include an expanded form so as to include related companies and Trusts (these provisions are commonly found in the normal trading Discretionary Trust).

Different families have differing priorities, which to them, make the utilisation of Testamentary Trusts important. Some of these priorities are:-

1. **Creditor protection** - to protect the bequest from creditors of a beneficiary. They can also protect the bequest from the debts that a beneficiary may incur by guarantees given by that beneficiary of their spouse's business debts.
2. **Divorce of a child** - Assets held in the Testamentary Trust are not assets of any individual and the Family Court cannot make an order requiring the distribution of those funds.
3. **Education** - Grandparents in particular are interested in leaving bequests via a Testamentary Trust for payment of boarding school and tuition fees for their grandchildren. This is a more tax effective method of providing for their education rather than leaving additional bequests to their own children for the purpose of educating the grandchildren.
4. **High risk beneficiaries** - Where one of the beneficiaries is in a high risk profession or business where negligence claims are likely.
5. **Remarriage of spouse** - For use where families wish to provide for their spouse but are concerned that the spouse may remarry and divert the family assets to the new family or, as sometimes happens, uses the family assets in risky or unprofitable ventures at the suggestion of the new spouse.

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6. **Spendthrift children/gambling difficulties** - You can provide for such a child through a trust ensuring his/her share is kept intact

7. **Tax benefits** - Income splitting through trust; distribution tax free to children under 18 up to marginal rate.

8. **Will challenges** - If your beneficiaries receive your estate in a trust, and it remains in the trust, as it is not in their estate it cannot be subject to a Will challenge when they die.

If you would like further information concerning Testamentary Trusts, please contact Phillip Sorensen at Groom & Lavers Solicitors.

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