TESTAMENTARY TRUSTS

Keep it in the Family

A Testamentary (or Estate) Trust is established through your Will. The mechanisms and powers for the trust are contained within your Will.

Testamentary Trusts can provide significant asset protection for your family if utilised in the most advantageous manner. These protections provide the security that when you pass away your assets will not be subjected to and/or lost to issues surrounding your beneficiaries including:

- misuse or waste;
- child's spouse separation;
- family relationship breakdown;
- bankruptcy or personal litigation.

Like a standard family (or discretionary) trust created inter-vivos (during your lifetime), the Testamentary Trust is a separate legal entity with a trustee responsible for administration of the trust. This independent legal status is a significant factor in the asset protection provided, as is the discretionary nature of the potential beneficiaries to receive entitlement.

For further information on the benefits of Testamentary Trusts refer to our further brochures or contact our office to discuss.

Consider the following examples of our how Testamentary Trusts provide asset protection and why you need to seriously consider establishing a Testamentary Trust.

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The scenarios following illustrate potential benefits of Testamentary Trusts over a range of circumstances.

Scenario 1 – Misuse or Waste (Protective Trusts):

A great fear for many parents is concerns over their children wasting, or not being able to reasonably manage, the entitlement they may receive from their estate.

CIRCUMSTANCES:

- Husband and wife in early 60's
- Have 3 children
- Have concerns 1 or more children may misuse or waste entitlement (could be general poor money management, related drug dependency, gambling, influence by contacts, etc)
- Estate is worth $1.5mil
- Both husband and wife pass away.

PASS AWAY WITH STANDARD WILL:

- All assets pass to children equally
- 2 children invest entitlement wisely, pay off debt, secure housing
- 3rd child is subjected to issues affecting their ability to manage funds, resulting in entire entitlement being spent within 12 months and no secure housing held.

PASS AWAY WITH TESTAMENTARY TRUST WILL:

- All assets pass to the Testamentary Trust
- Each child has their own testamentary trust established (which they retain and utilise for other asset protection and tax maximisation reasons)
- The 2 children the parents were confident in managing their money have powers to appoint the trustee of their trusts to make decisions on the trust (including themselves)
- The 3rd child who the parents have concern over managing the money provide the power to appoint the trustee of this child's trust to another person or entity
- This trustee then has power to manage and release funds to the 3rd child in a manner beneficial to that child with the view to ensuring that child's entitlement provides sustained benefits over a much greater period of time.

*NB: Placing restrictions on the trust of the 3rd child in this way may lead to greater opportunity to contest the Will and validity of the entitlement. This can be lessened by placing triggers within the Will that allow the 3rd child to take control of the trust if they achieve set milestones – such as attaining a certain age or completing rehabilitation program and showing financial responsibility for a set period.

Scenario 2 - Child's spouse and separation:

Many parents have often expressed concern that if they pass away and their assets pass to their child who is in a relationship that is not secure and there may be separation and a family law settlement in the future, how they can prevent half their child's entitlement from being lost to the child's spouse on separation?

CIRCUMSTANCES:

- Husband and wife have 3 children
- They have passed away with assets of $1.5m
- All 3 children are married with children of their own.

BOTH PASS AWAY WITH STANDARD WILL:

- All assets pass to the 3 children equally
- Each child receives $500,000
- There is a later family law breakdown and settlement in which half that money is to be given to the separating spouse
- The child loses $250,000.

BOTH PASS AWAY WITH TESTAMENTARY TRUST WILL:

- Separate Testamentary Trusts are established for each child
- All assets pass to the Testamentary Trust
- Each child is primary beneficiary of their own trust
- Potential beneficiaries are their spouse, children and a list of other related entities
- The Trustee utilises the trust assets and income for the benefit of the child, their children and other relations – but not the spouse
- On separation the child's spouse has significantly reduced chances of arguing the assets of the testamentary trust are assets of the relationship that should be included in the family pool of assets to be divided on family law settlement.

Scenario 3 - Family Relationship Breakdown:

A common concern for couples is if 1 partner passes away and the assets pass to the surviving partner, then if the surviving partner enters a new relationship how can they ensure the funds from the estate will pass to their children rather than being claimed or taken by the new partner?

CIRCUMSTANCES:

- Husband and wife in their 50's
- Have 3 children
- Personal assets of $1mil
- Superannuation and life insurance of $500,000.

HUSBAND DIES WITH STANDARD WILL:

- All assets pass to wife
- Wife enters new relationship
- After 20 years in new relationship there is a breakdown and family law settlement occurs
- New partner of wife had limited assets when entering relationship
- Asset pool has grown to $2mil by time of separation
- On settlement asset pool is split 50/50
- Wife (and ultimately the children as a family unit) have lost a significant portion of funds that were generated and gifted by their deceased husband and father.

*NB: A similar or even worse result could occur if the wife passed away after 20 years and the new partner, believing they are not adequately provided for under the Will, contests entitlement through the Courts.

HUSBAND DIES WITH TESTAMENTARY TRUST WILL:

- All assets of the husband pass to the Testamentary Trust – totalling $1mil of the combined $1.5mil owned by the couple
- Wife is the primary beneficiary and the 3 children are potential beneficiaries
- The wife has power to appoint a trustee
- The wife and children are able to receive income from the trust and utilise the assets as the trustee determines, including selling and buying new assets, including a family home
- Wife enters a new relationship that breaks down after 20 years
- The $1mil in trust assets has grown to $1.5mil. The wife retains $500,000 in her own name
- As the new partner has no assets the asset pool at settlement is $500,000, which the courts split 50/50
- The assets of the testamentary trust are not considered assets of the spouse or of the relationship as they have been used for the benefit of the entire original family unit, including children and grandchildren
- The assets of the trust are protected from the family law proceedings with a nett result being the family group is now $750,000 better off than if a simple Will had been drawn.

*NB: Had the wife passed away after 20 years and the new partner contested entitlement in the estate, the assets of the testamentary trust are not assets of her estate and only the $500,000 is available to be contested, instead of the $2mil if an ordinary Will had been drawn.

Scenario 4 – Bankruptcy or personal litigation

For any parent who has a child who runs their own business, is a professional with risk of being sued or is in financial circumstances such that they may be sued or go bankrupt, then you must strongly consider establishing a testamentary trust to prevent funds from your estate passing to creditors of your children. This is established by placing the estate funds into a testamentary trust, being a separate legal entity from your child.

For any person who is at risk of the above or who has worked diligently to ensure assets are not in their own name to avoid losing assets if they are sued or go bankrupt then you must seek to receive any entitlement from your parents into a testamentary trust rather than outright from the Will.

CIRCUMSTANCES:

- Husband and wife with 3 children
- Their combined estate, with insurances and superannuation is $3mil
- Husband and wife have passed.

BOTH PASS AWAY WITH STANDARD WILL:

- All assets pass to the 3 children equally
- Each child receives $1mil
- 1 child is subject to a current bankruptcy order – their entitlement is paid to the trustee in bankruptcy to pay all debts and clear bankruptcy
- Another child is a business professional who is at risk potentially for being sued and has worked with their accountant/planner throughout their career to minimise assets held in their name – receiving this entitlement jeopardises that strategy
- The 3rd child receives their entitlement and generates income for which they pay tax on.

BOTH PASS AWAY WITH TESTAMENTARY TRUST WILL:

- Separate Testamentary Trusts established for each child
- $1mil passes to each Testamentary Trust
- Each child is the primary beneficiary and has power to nominate the trustee
- Their spouse and children are potential beneficiaries
- The child who is currently in bankruptcy receives their entitlement into the testamentary trust and as their spouse and children are also potential beneficiaries any money is paid to those relations and not the bankrupt – meaning all money stays with the family and none is payable to the trustee in bankruptcy
- The child running their own business is happy to receive into the testamentary trust as it provides a structure to ensure if there are any business mishaps they will not lose this entitlement
- The 3rd child enjoys the various protections offered by receiving in the testamentary trust mentioned earlier together with the tax maximisation abilities mentioned in our 'Testamentary Trust – save $23,100'.

YOUR PARENTS' WILLS

Now you have an understanding of the potential asset protection you can provide for your family if you pass away and draw a Testamentary Trust Will, you need to appreciate how you could likewise be the benefactor of many of these protections from your parents Wills when they pass away.

In most circumstances the potential benefits your family can achieve from Testamentary Trust Wills will more immediately be from your parents. Often this can be a difficult subject for children to raise with their parents however most of our clients find that pointing out the potential protections noted in this document, as well as the tax maximisation abilities noted in our 'Testamentary Trusts – Save $23,100' brochure, are sufficient to show parents the savings achieved by Testamentary Trust Wills far exceed the costs.

Every persons circumstances will differ and do not necessarily fit the examples provided. The examples are provided by way of demonstration only. Telephone our office to book an appointment to discuss the savings that could be made with your current circumstances.

Contact Us:

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