

EXPLANATORY MEMORANDUM

Testamentary Trusts

Several benefits exist in establishing a testamentary trust under the terms of a Will:

1. An inheritance may be protected against creditors in the event of a beneficiary's bankruptcy;
2. An inheritance is unlikely to be distributed pursuant to a Family Court order in property settlement proceedings, in the event the beneficiary becomes part of divorce proceedings;
3. Families can ensure adequate funds are provided for a beneficiary and at the same time protect the funds by keeping them out of the beneficiary's control; and
4. Considerable tax savings can arise. For example, under section 102AG of the *Income Tax Assessment Act 1936* (Cth) children under the age of 18 years who receive income from a testamentary trust are taxed on that income as an adult and therefore enjoy the normal tax free threshold and marginal tax rates which apply to adults.

Please note, however, that a testamentary trust offers no protection against a Family Provision application and like all provisions of a Will, may be attacked in such an application.

Redchip's testamentary trust contains trustee powers allowing the Trustee to apply the funds in trust to the maintenance, advancement, benefit or education (by travel or otherwise) of any infant Beneficiary. The Trustee is also granted very wide powers in relation to investing the funds in trust.

OTHER ISSUES TO CONSIDER

1. The Trustees of the testamentary trust do not have to be the executors of your estate;
2. the guardian of your infant children will need to work with the Trustees, so choose people for these roles who don't have obvious conflicts of interest;
3. you can make specific gifts of property to beneficiaries that take effect before the balance of your estate goes into the testamentary trust; and
4. your creditors will be paid out of the estate before any assets go into the testamentary trust.

KEY ROLES IN A TESTAMENTARY TRUST

Trustee

The Trustee (or the Directors of the nominated corporation) sees to the administration of the testamentary trust assets in accordance with the terms stipulated by you and within the powers afforded to them.

The Trustee has the day to day management of the testamentary trust assets and should be someone who is financially savvy but who will also administer the Trust Fund in accordance with your wishes.

You should consider appointing more than one Trustee to jointly perform this role.

Principal

The main function of a Principal is to remove/replace the Trustee if and when required. This could, for example, arise if the Principal believes that the Trustee is not administering the Trust in accordance with their powers or in accordance with your wishes.

Given that this is the main function of a Principal, we suggest that you nominate a person that is distanced from the Trustee but who still has the ability to monitor the administration of the Trust Fund and who is not afraid to exercise their power.

Alternative Principal

The Alternative Principal is a person that the Will Maker nominates to act in the role of the Principal if the Principal were to be removed from that role. The most common scenario's where this happens is if the Principal resigns from their role or passes away.

Beneficiary

These individuals, class of individuals or entities are entitled to receive a distribution of the income and/or capital of the testamentary trust assets, which is made at the discretion of the Trustee.

MEMORANDUM OF WISHES

A Memorandum of Wishes is a document that sits alongside your Will and is for the eyes of your Trustee only. The contents of the document is not binding on the Trustee, however the purpose of the document is to provide direction and guidance to your Trustee.

Directions that are commonly included in a Memorandum of Wishes prepared by Redchip include:

1. a direction that you wish for your children to be treated equally;
2. upon the death of any of your children, that their share is to be received in equal proportions by that child's children;
3. if you have young children, the type of education (including religious and extracurricular education) that you wish for them to receive; and
4. any other directions you wish to include.