

A BRIEF OVERVIEW

Testamentary Discretionary Trust.

Generally when a person dies, the executor:

1. Collects the deceased's estate assets;
2. Pays the debts of the estate; and
3. Distributes the estate in accordance with the deceased's will or the rules of intestacy (where there is no will).

A testamentary discretionary trust (TDT) is a gifting option.

An estate can pass directly to a beneficiary or to a trust/TDT for a class of beneficiaries.

The TDT is created by the will. The will contains all of the terms and conditions of the trust.

The TDT commences after the death of the testator (the person who made the will) when the executor completes the estate administration and passes the estate assets to the nominated trustee (ie: controller) of the TDT.

MAIN BENEFITS OF A TDT

Asset Protection

The assets held in the trust are generally protected from the personal liabilities of a trust beneficiary. For example, if a beneficiary has a personal debt then assets of the trust cannot be accessed to pay the debt.

The situation may be different where a beneficiary is involved in Family Court proceedings, as the Family Court has extremely wide powers to make orders concerning assets (including trust assets).

Tax Planning

A TDT can provide tax savings because the trustee has discretion to distribute income to beneficiaries on lower tax rates, reducing the overall tax payable.

It has the extra advantage that children (provided they come within the class of beneficiaries and are under 18) are treated like adults for tax purposes (compared with child beneficiaries of family discretionary trusts).

Opportunity to provide for beneficiaries with special needs

A beneficiary may not be capable of managing his or her inheritance because of special needs. For example, where a beneficiary has a disability, is a spendthrift or has a drug, gambling or other addiction.

The trustee can make distributions and manage the funds on the beneficiary's behalf.

Flexibility/Control

Over time the needs of the beneficiaries may change. The flexibility of the TDT allows the trustee to make distributions in a way that suits the circumstances prevailing at the time.

DISADVANTAGES OF A TDT

Flexibility/Control

The main disadvantage is that the beneficiary does not have direct control of the inheritance they receive. Even where a beneficiary is a trustee they must deal with the assets within the trust and not as their own asset. Some beneficiaries would prefer to have direct control of the assets.

Complexity

The goal of some clients with their estate planning is to keep it as simple as possible. Some people perceive the inclusion of a TDT in a will as a complicating factor.

Discretion of the trustee

The discretion of the trustee to make distributions may be seen to be too vague and uncertain.

Set up costs

It costs more to prepare a will including a TDT.

Ongoing Costs

When the testator dies and the TDT is established it is necessary to prepare and lodge return

ASSISTANCE

Please contact us if you need any further information or advice.

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