Are there alternatives?

The law does give your family a more limited "second chance" if your will does not establish a testamentary trust. Within three years of death, a trust can be established from your estate which enjoys the same advantages as a testamentary trust.

However, there is a limitation on the amount that can go into the trust, which can limit its usefulness. It can also be more cumbersome and expensive to create the trust in this way.

New trends

More of our clients are choosing to create a testamentary trust rather than a will leaving all their estate to a surviving spouse and then children. Typically, the trust is controlled by the surviving spouse, with the spouse and all children as beneficiaries. After the surviving spouse dies, separate trust funds are created for each child and his or her family.

We also see many clients who want to create education trusts for grandchildren through their wills, taking advantage of the taxation advantages mentioned above.

Need to know more?

The flexibility of testamentary trusts makes them valuable for people in many different situations. Fleming Muntz has lawyers experienced in tailoring testamentary trusts to your specific needs, as well as all other

aspects of estate planning. We would be pleased to meet with you to discuss how we can help.

Important information

These brief notes are for your general information. They are not a complete guide to the subject and cannot take account of your own particular circumstances. It is *very important* that you take competent professional advice before you make decisions or take any action.

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Testamentary Trusts

- **What is a testamentary trust?**
- **Why is it used?**
- **What assets make up the trust?**
- **Are there alternatives?**
- **New trends**

What is a testamentary trust?

A "testamentary trust" usually refers to a discretionary family trust established by your will after death, rather than by a deed during your lifetime.

Why is it used?

Most commonly, clients create a testamentary trust in their will because they can reduce – often significantly – the amount of tax that beneficiaries pay.

However, it can also be set up so that a beneficiary receives money from the testamentary trust fund, without actually "owning" or controlling it. This can be useful in several circumstances, including:

- Bankruptcy of a beneficiary
- Spendthrift beneficiaries
- Beneficiaries with special needs

These advantages are discussed in more detail below.

Taxation advantages

There are two ways that a testamentary trust can reduce the amount of tax paid by your beneficiaries.

- The first is the same advantage enjoyed by ordinary family trusts: income can be split between different

beneficiaries to manage the total tax payable.

- The second is exclusive to trusts established by your will and means that significantly more income can be distributed to children or grandchildren under 18 years of age tax-free or at low rates of tax.

For example, consider what would happen if you died leaving a dependent spouse, three infant children and an estate of $500,000.00 that earned income at 8%, or $40,000.00, pa.

Compared with a simple gift to your spouse, a carefully administered testamentary trust could save your family over $6,000.00 each year, giving them an extra $120.00 per week. This benefit could carry on for many years.

Bankruptcy

Unfortunately, bankruptcy is not uncommon. People in some occupations accept a high risk of bankruptcy; in other cases one spouse will guarantee the other's business debts and be liable when the business fails. However, we can all be at risk to a greater or lesser extent simply by driving on the road or entertaining people in our home.

If one of your beneficiaries becomes bankrupt, but has received an inheritance through a testamentary trust rather than directly, it will generally be protected from creditors.

Spendthrift beneficiaries

Sometimes people are concerned that a beneficiary would squander an inheritance unwisely. This can happen for a variety of reasons and can be permanent or temporary.

A carefully prepared testamentary trust placed under the control of a family member or friend can allow your beneficiary to enjoy the benefits of the inheritance, without being able to waste the entire amount.

Beneficiaries with special needs

It is not uncommon that people with special needs are unable to manage their own financial affairs. If you want to ensure that the person with special needs will be well cared for, the flexibility of a testamentary trust – especially if combined with a clear recital of your wishes – can offer an effective solution.

What assets make up the trust?

You decide what assets make up the trust when you make your will. It need not be your entire estate, but can only be assets that you actually own or which come to your estate.

For instance, jointly-owned properties will automatically pass to the survivor, while life insurance and superannuation proceeds will only go to your estate if you have specifically said so. A careful review of your assets will help you understand what can become part of the trust.