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ABOUT CALDWELL MARTIN COX

Caldwell Martin Cox is a law firm established for over 50 years with offices in Narellan, Camden, Picton and Tahmoor.

Our specialist lawyers advise clients in most areas of law, including the purchase and sale of land, family law, criminal and traffic law, litigation and dispute resolution, business law, commercial law and wills and estates.

We have over 30 members of staff, including seven solicitors, two licensed conveyancers, paralegals and support staff. Each Partner of the firm is an Accredited Specialist in their particular area of law.

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1. Family Law
2. Conveyancing
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Guide to Testamentary Trusts



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Guide to Testamentary Trusts

A Testamentary Trust can be the answer to every parent's dilemma – how can I best protect my assets and benefit my children?

What is a Testamentary Trust?

It is merely a trust that is created by your Will and therefore only takes effect on your death. However, this type of Will does not leave your assets to your children outright, but keeps them in a trust to best advantage your beneficiaries.

How does a Testamentary Trust work?

There are a number of ways:

- You can appoint a non-beneficiary Trustee (for example, your brother or sister, or even your Solicitor or Accountant) to hold your estate “on trust” with a discretion to distribute income or capital to your family.
- You can appoint one or more of the beneficiaries as Trustee to exercise those powers of distribution.
- You can create a number of trusts within your Will with each of your children as Trustees of their own trust, with power to distribute income and capital to themselves, their spouse, their children and their grandchildren.

Important Note:

There is a real doubt that the “asset protection” referred to under the following heading “What are the benefits of a Testamentary Trust?”, will be available if you appoint your children as trustees of their own individual trusts. The law looks for some separation between trustee and beneficiary in order to give any degree of protection against marriage break-up.

What are the benefits of a Testamentary Trust?

A Testamentary Trust is a flexible method of dealing with your estate. It can be created to suit your individual requirements and can allow your children to use it for their own specific benefit. One size does not fit all.

This form of trust provides some degree of asset protection. Because the assets are held “in trust”, they are not owned by the beneficiaries. The assets therefore may not be available to creditors or to spouses in a marriage break-up.

It also provides a wonderful vehicle to benefit children who, for a variety of reasons, may not be able to properly handle money themselves. It allows the trustee to hold the funds for the benefit of the child.

A Testamentary Trust is the “tax effective Will”. In a normal Will, assets are left to a child or children and they invest those funds to earn income. That income is added to their income from a salary and they pay tax at the usual marginal rate. The additional income may put them into the highest tax bracket and they will therefore pay about half of that income in tax.

A Testamentary Trust, on the other hand, allows the Trustee to distribute the income of the trust fund to any or all of the named beneficiaries. So, if your child has children or grandchildren who are not working, it is possible to distribute income to each of them, thus claiming the tax free threshold for every child and thereby saving thousands of dollars in tax every year.

A Testamentary Trust allows for the transfer of your assets to a trust, free of Stamp Duty and free of Capital Gains Tax. Because the transfer takes place via your Will, no Stamp Duty is payable and it is not a trigger for Capital Gains Tax.

It is also possible for your superannuation and life insurance policy entitlements to be directed into your Testamentary Trust. This gives your beneficiaries the benefits and flexibility that flow from a Testamentary Trust, rather than receiving the funds from outside the protection of the trust.

Does a Testamentary Trust last forever?

A trust can continue for a maximum of 80 years from your death and can thus benefit a number of generations of your family during that time. However, if for any reason the Trustee wishes to cancel the trust, they have the power to do so by “vesting” the trust. For example, your Trustee may decide in the future that superannuation may be a better vehicle to invest funds after the children have started earning an income themselves.

Proper Advice

As with all legal issues, it is essential that we tailor your Testamentary Trust to suit your specific circumstances. It can be a difficult concept to grasp, and we would be happy to spend the time to explain it fully, to enable you to maximize the benefits for your family.

Caldwell Martin Cox offers the services of Angus Cox, a Law Society Accredited Specialist in Wills and Estates, to assist you in your Estate Planning needs.