

# Should I establish one or more testamentary trusts in my will or make gifts to an existing discretionary trust?

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Commonly, will makers want to allow:

- each of their beneficiaries to manage their inheritance independently of other beneficiaries; and
- each child to make their own choice whether to receive their inheritance absolutely or on trust.

This article provides some guidelines to be considered when making a choice between either a single or multiple testamentary trusts in your will and making gifts to an existing discretionary trust.

## Single testamentary trusts

A single trust controlled by all beneficiaries offers better asset protection than separate trusts for each beneficiary. This is because no single beneficiary is in full control of their own assets as they all have to decide unanimously. However, a single trust requires cooperation between the beneficiaries and agreement about the ongoing management of the trust. Depending on the family dynamics, a single trust may cause complications and disagreements between the beneficiaries.

It may be preferable to use a single testamentary trust if:

- 1 the testators are young and their children are under 18. It may then not be appropriate to have more than one testamentary trust as the surviving spouse will be in control of the trust for a long period;
- 2 greater protection for the assets is required eg to deal with the bankruptcy or relationship breakdown of an individual beneficiary;
- 3 the testator sees the beneficiaries as custodians of wealth as opposed to direct recipients;
- 4 the assets are not suitable to be transferred to a structure other than to a single testamentary trust – eg business interests or a large property holding;
- 5 on-going costs are an issue – as one testamentary trust for all beneficiaries will have less ongoing costs than multiple trusts; and
- 6 the income generated by the estate will be insufficient to warrant multiple testamentary trusts.

## Multiple testamentary trusts

It is often hard to anticipate what will happen in two generations and to predict the infinite number of difficulties that can arise regarding the management of the assets if a single testamentary trust is used. In contrast, creating multiple individual trusts gives greater autonomy to each beneficiary regarding how they can pass on their entitlement in their own will.

It may be preferable to use multiple testamentary trusts when:

- 1 beneficiaries live in different geographical locations eg one or more children living overseas;

- 2 siblings and their respective spouses do not get along and controlling wealth jointly may further fragment family dynamics;
- 3 there are concerns that certain beneficiaries may not agree about the administration of one trust;
- 4 the investment risk profiles of each beneficiary are different;
- 5 the testator wants to give control of a specific asset to one beneficiary;
- 6 one beneficiary has young children and another beneficiary has adult children, in which case their investment objectives may be different; and
- 7 the testator wants to give full control to one beneficiary of their own testamentary trust but to give either partial control (eg with one or more co-trustees) or no control at all to another beneficiary.

### **A combination of the two approaches**

Elements of both single and multiple testamentary trusts can be combined, for example the testator may:

- 1 gift specific assets or a set percentage of the estate to one testamentary trust for the benefit of all lineal descendants but provide that control is jointly shared between the primary beneficiaries; and
- 2 establish a separate testamentary trust for each beneficiary and their respective children and grandchildren and then gift a separate percentage share of the estate, or discreet assets to each trust. Each beneficiary will then control completely or jointly with a co-appointor the testamentary trust set up for their benefit.

### **Testamentary trust or discretionary family trust?**

A testamentary trust has the following benefits:

- 1 more tax benefits for minor beneficiaries. Income from inherited assets and from testamentary trusts is taxed at normal adult rates, so a child will have the usual tax-free threshold;
- 2 longer life span of the trust – 80 years from the date of death of the testator;
- 3 additional protection and ineligibility clauses; and
- 4 option to choose the class of beneficiaries under the testamentary trust.

However, a discretionary trust may be preferable if:

- 1 all assets are owned jointly with another person;
- 2 all assets are owned by a family trust (then there is no benefit in establishing a testamentary trust unless you plan to wind down your family trust and transfer the assets in it to yourself);
- 3 the income produced by the assets in the testamentary trust will not justify the expenses for administering the trust;
- 4 the beneficiaries, appointor, trustee and powers of the discretionary trust are suitable; or
- 5 the testator does not have and does not expect to have any minor children, grandchildren or great grandchildren.

### **How can I find out more?**

The number of testamentary trusts which should be used, and whether this type of will is suitable for your particular circumstances, depends on many factors. An explanation of the pros and cons is essential in helping you make an informed decision. At IRDI Legal, our experienced and specialised **Wills and Estates team** can assist you with all aspects of your personal succession planning and any questions you may have, including preparing and advising on Wills and Enduring Powers of Attorney. Please contact us to find out more.