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TESTAMENTARY TRUSTS

"Trust" is a technical term which refers to a legal relationship that exists when a person holds property for the benefit of another. The property is vested ("legally held") in the name of one or more persons (trustee/s) but it is an ownership on behalf of other parties, known as the beneficiaries, who are entitled to benefit from the property held by the trustee/s.

A Testamentary Trust is a trust created by or within a Will. It is created when a Will Maker ("testator") vests or places property:

a) in the ownership of another ("trustee"); and

b) for the benefit of nominated persons ("beneficiaries")

in the expectation that the wishes of the testator will be carried out.

Why a Testamentary Trust?

There are many advantages to the use of a Testamentary Trust. When properly structured, the benefits include:-

(a) Asset Protection – Because the beneficiaries do not inherit the property personally or immediately, the assets may be protected from creditors and against the effect of marriage breakdown or bankruptcy of the beneficiaries;

(b) Income Tax Advantages – In particular, it is a means within a Will to distribute income to children under 18 years, allowing them to have the benefit of the adult tax free threshold of $6,000.00. This comes about because a distribution from a Testamentary Trust is "excepted" income from the penalty tax rates that would otherwise apply to other types of income received by children under 18 years;

(c) Flexibility – A Testamentary Trust may be structured to cater for many situations especially where the trustee/s are given wide powers. For instance, it may :-

   i) maximise investment possibilities so that the most appropriate investment may be made at the right time;

   ii) preserve the classes of income received by the trustees (income streaming);

   iii) ensure that provision is made for beneficiaries who are either incapacitated or handicapped;

   iv) defer Capital Gains Tax as the vesting of property into a Testamentary Trust is not a disposition on which Capital Gains Tax is payable; and

www.butlers.com.au

Email: legal@butlers.com.au

All mail to:
PO Box 460
Nedlands WA 6909

Nedlands (Head Office)
83-85 Stirling Hwy
Nedlands
WESTERN AUSTRALIA

Fremantle
3/18 Parry Street
Fremantle
WESTERN AUSTRALIA

Bunbury
119 Beach Road
Bunbury
WESTERN AUSTRALIA

Visiting Asia incl. China, Malaysia & Singapore.

Associated firm
Malaysia
Jerald Gomez & Associates
Penthouse, D2-U6, Solaris Dutamas
1 Jalan Dutamas
50480 Kuala Lumpur
MALAYSIA

Telephone calls answered 24 hours
Telephone: (08) 9386 5200
Country calls: 1800 675 200
International: 618 9386 5200

Facsimile: (08) 9386 4650
International Facsimile: 618 9386 4650

v) allow for the control of the rights to use trust property while deferring legal ownership of that property.

Who can be a Trustee of a Testamentary Trust?

Any person over the age of 18 (including a company) who is not :-

a) a bankrupt or an insolvent under administration;

b) a person whose affairs are under the control of a guardian or administrator appointed under the Guardianship or Administration Act.

c) a deceased person; and

d) a person who has had his legal rights removed for any other reason.

Duties of a Trustee

The general duties of a trustee are as follows:-

a) to preserve trust property and properly invest trust property;

b) to act impartially between beneficiaries; and

c) not to profit from the administration of the trust.

What powers should a Testamentary Trustee have?

The powers given to a Testamentary Trustee depend entirely on the wishes of the testator. Examples of the powers are the power to sell or to postpone the sale of property; the power to open and operate bank accounts; the power of investment and the power to apply income generated by the trust.

How much does it cost to set up a Testamentary Trust?

As at January 2007, we find that we are usually able to prepare a Will incorporating a Testamentary Trust or trusts for a fee of between $450.00 - $750.00 plus GST. We advise that the quoted charges are for the preparation of the document and signing only and do not include time spent advising you, reviewing related documents, additional meetings or phone calls, disbursements etc.

We are happy to discuss with you any further questions you may have in relation to a Testamentary Trust or the benefits of having a Testamentary Trust in your Will.