

Every will can contain a testamentary trust, says legal expert

By Keeli Cambourne, Deputy Editor SMSF Adviser and Matthew Burgess, Director, View Legal

Testamentary trusts can refer to any arrangement set out under a will where the intended beneficiaries are not absolutely and immediately presently entitled, says a specialist SMSF legal expert.

Matthew Burgess, director of View Legal, said while comprehensive testamentary trusts have continued to gain popularity, every valid will does contain a form of testamentary trust.

"The term 'testamentary trust' refers to a comprehensive discretionary trust embedded into a will instrument, although the structure lasts only for the length of administration of the estate which is normally only a few months," he said.

"They are not testamentary trusts in the way in which they are normally understood, and don't offer any ongoing tax, asset protection or flexibility advantages."

The language commonly employed in creating this type of trust within a will often includes phrases such as 'as to 50 per cent of my net estate, UPON TRUST for my child once they attain the age of 25 years absolutely,' according to his explanation.

One way to determine if a will has a comprehensive testamentary discretionary trust included is to apply "the weight test" which refers to the length of the will.

A comprehensive testamentary discretionary trust will is usually around 30 pages in length, while a "bare" or basic testamentary trust will is rarely more than 10 pages long, and can often be as short as two pages.

Mr Burgess said an example of where a basic testamentary trust exists is where the beneficiary receives a direct gift that is subject to them attaining a certain age.

"It can also be where a gift is given to a beneficiary who does not have legal capacity because they are under the age of 18, or are over the age of 18 and lack mental capacity.

It can also be where a specific gift is given to a beneficiary, however, the administration process of the estate has not been completed," he said.

"In relation to the first two categories, the ATO usually allows the beneficiary to enjoy access to the excepted trust income provisions."

However, if the trust falls into the third category, the ATO will usually only allow a maximum of three years for the trust income provisions to be applied, and sometimes it can be as short as 12 months, as explained in Taxation Ruling IT 2622.

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"The case of Walker v Walker [2022] NSWSC 1104 explores many of the key principles in this area," Mr Burgess said.

"It appears to support a conclusion that the administration process of an estate will be completed, at least for the purposes of present entitlement for tax, at a point in time even earlier than what the ATO has historically suggested in the IT."