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LawTalk Blog



Help! I've been made trustee of a Testamentary Trust

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If you're considering a [Testamentary Trust Will](#) you need to make sure that you choose a suitable trustee or trustees to carry out your wishes. Furthermore, if you've been appointed a trustee of a Testamentary Trust, it's worth knowing your obligations. What does being a trustee of a Testamentary Trust involve?

Often the trustee of a Testamentary Trust also acts as an executor of a deceased person's estate. You might be familiar with the [duties of an executor](#). An executor will usually need to obtain a [Grant of Probate](#) to administer the estate. The executor's duties include arranging the funeral, gathering up all the assets, paying any debts, and distributing the net estate in accordance with the Will. That might involve the executor swapping hats to be trustee and setting up Testamentary Trusts with the residue of the estate. At that point the trustee takes over from the executor.

Duties of a trustee of the trusts established by a Will include observing the terms of the trusts contained in the Will, as well as general trust law.

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Typically each of the beneficiaries of the trusts is entitled to an equal share of the capital remaining when they reach 25. As trustee, you have no power to withhold a beneficiary's share at that age, no matter how immature you think they are or under the influence of "friends" with dollar signs in their eyes.

As a trustee, you should open a bank account for each of the trusts in your name "as trustee for" the trust. The bank would ask you to produce the Grant of Probate, incorporating the Will. You will also need to transfer the assets in each trust to yourself as trustee to hold them on the terms set out in the Will. It is very important that you do not hold any trust assets as beneficial owner, that is, in your own name without indicating that you hold the assets in your capacity as trustee. Similarly the trust assets should not be held in any of the beneficiaries' names. Otherwise you will not only be in breach of your duties as trustee, but there may be personal income tax and Centrelink consequences.

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You have a duty to invest the assets in each trust for the long term benefit of the beneficiaries. You should take specialist advice from a financial planner. Such advice might include retaining part or all of the deceased's existing investments. It is also important to take accounting advice, tax advice and legal advice. Professional advisers work together to achieve the best outcome for trustee clients. Specialist estate lawyers are usually well placed to recommend other suitable professional advisers. The costs involved are payable by the relevant trust. You are not expected to be out of pocket for carrying out your duties.

As trustee, you typically have powers under the Will to advance capital or income to the beneficiaries before they turn 25. Such payments may only be made for the "maintenance, education or benefit" of a beneficiary, for example, in respect of school fees, clothes, health care and holidays.

You would pay any school fees directly to the school and other expenses could be paid to the parents or guardians of the children. You may decide not to advance anything and to wait to pay all the beneficiaries' inheritances when they turn 25. It is generally up to you. However, as can be seen by the ongoing litigation involving Gina Reinhart and her children, a beneficiary may still challenge the exercise of your discretion through the courts on the grounds that you did not exercise your discretion:

- in good faith;
- after real and genuine consideration; and
- in accordance with the purposes for which the discretion was granted.

As trustee, you would need to file tax returns on behalf of the beneficiaries whilst they are under 18 and pay any tax on any income and capital gains on their behalf from the trust. There may not be any tax to pay because minor beneficiaries of a testamentary trust receive their own tax-free threshold and this has been substantially increased in recent years. The favourable tax treatment of minor beneficiaries of a testamentary trust is an important factor for many clients in choosing testamentary trust Wills. The tax situation is in marked contrast to that of minor beneficiaries of a lifetime trust such as a family trust. In that case, "penalty" tax rates apply to discourage all but a small distribution to minors.

You will need to instruct a suitably experienced accountant or tax agent to prepare annual financial statements and tax returns for each trust.

"It is important that you take appropriate legal advice to ensure that you comply, and continue to comply, with your duties and obligations, for as long as the trusts last."

As trustee, you have significant duties and obligations, as well as powers which you may exercise. It is important that you take appropriate legal advice to ensure that you comply, and continue to comply, with your duties and obligations, for as long as the trusts last.

Sometimes a trustee resigns for various reasons, including ill health. The trustee would ensure someone else will take over that responsibility. A trustee might also be asked to act for a certain period; the most common situation being until a child is mature enough to take on that responsibility.

As trustee of a Testamentary (discretionary) Trust, you will have a class of beneficiaries from which to favour certain individuals. You may decide to favour the same people every year and some may never receive your attention. You may be in a position to pay yourself as beneficiary. I usually help clients with Testamentary Trust Wills to prepare written advice to trustees offering guidance on how they should exercise their discretions, which could be seen as ruling from the grave!

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