

HOW A TESTAMENTARY  
TRUST WILL CAN HELP  
*you and your family*



## TRADITIONAL WILLS

The Traditional Will allows you to:

- Appoint an executor, someone who carries out the provisions of your will,
- Appoint a guardian to care for any young children,
- Make specific gifts to individuals or charities,
- Distribute the rest of your estate; and
- Name alternative beneficiaries in a situation where your first preference beneficiary dies before you.

## SOME PROBLEMS THAT ARISE WITH TRADITIONAL WILLS

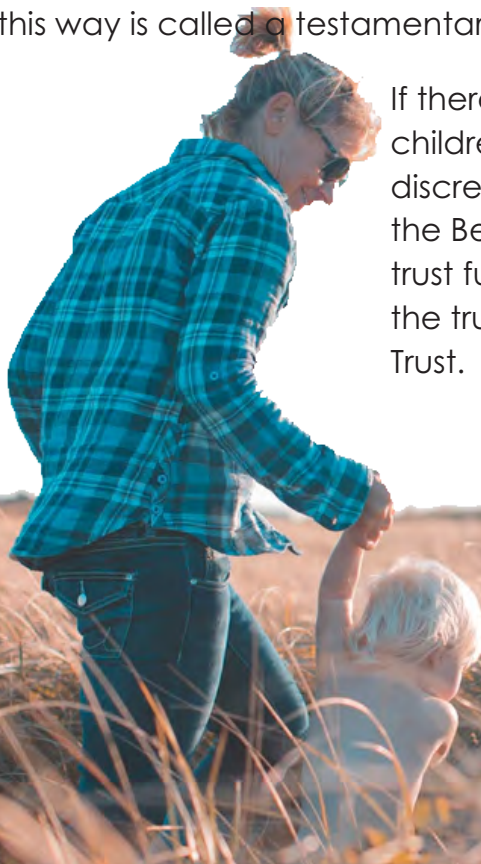
The beneficiaries of a Traditional Will have no choice other than to take their gift in their own name or refuse it altogether. This lack of choice may cause tax and other problems.

## POSSIBLE SOLUTION - A TESTAMENTARY TRUST

A testamentary trust is simply a trust established in a will and does not come into existence until the Will maker dies. Until then your Will has no effect and you can change it at any time.

Where a will maker requires that his estate and property (or part of it) be held on trust by a Trustee for a nominated person (eg your child) or a number of persons (Beneficiaries) the will maker can do so in his or her will by simply saying that a trust is to be created on his death for a specific purpose and for the benefit of the named Beneficiaries. The terms of the trust including the trustees powers are then set out in detail in the will. A trust created in this way is called a testamentary trust.

If there are a number of Beneficiaries (such as 3 children of a marriage) the Trustee can be given the discretionary power to determine the entitlement of the Beneficiaries to the income and capital of the trust fund. Where these powers are given to a trustee the trust is said to be a Testamentary Discretionary Trust.







## **TESTAMENTARY TRUST WILL**

The Testamentary Trust Will does everything a Traditional Will does, plus it gives your Trustee and perhaps the beneficiaries the flexibility and choice they need to protect and make the most of their gift from you.

The use of a Testamentary trust provides the controllers of your estate with a range of benefits and choices including:

- The potential to minimise tax payable by your Beneficiaries by:
  - › permitting your Trustee to distribute the income and realised capital gains to a range of people to gain the best tax outcome; and,
  - › allowing income received by the Trustee for children under the age of 18 years to be taxed at normal marginal rates instead of top marginal rates (as is the case with discretionary trusts created by Deed during a person's lifetime). Up to \$18,200.00 of income is tax free each year for each child. This benefit is not available to children of trusts created during your life (i.e. not by a will).
- Your children may be married and you may want to quarantine their interest in your estate from their matrimonial property. In some situations their interest in your estate is not treated as part of their matrimonial property for the purposes of identifying and apportioning the property of the marriage
- If you give property to a Beneficiary (by a traditional will) and that person is then declared bankrupt the property given would, in the ordinary course, be available to the trustee in bankruptcy and would be regarded as part of the bankrupt's estate and property. However if your bequest is to the beneficiaries of a testamentary trust and the property held on trust has not passed absolutely to the named beneficiary that would not be the case and the trust property would not be regarded as part of the Bankrupt's estate (and therefore available to creditors).

## **WHAT IF A BENEFICIARY DOES NOT WANT THE TRUST?**

If your beneficiaries are old enough and, you can give them the power to make a determination of this sort, they can choose to use the trust or to wind it up. You can give similar powers to your trustee.

## **WHO IS IN CONTROL OF THE TRUST?**

The Trustee is responsible for carrying out your wishes for the trust and that is why the powers and obligations of the Trustee are set out in some detail in the will. You can make provision that when the beneficiaries reach a specified age they can take control of their trusts as trustees and make determination about the duration of the trust and distributions of income and property held on trust.

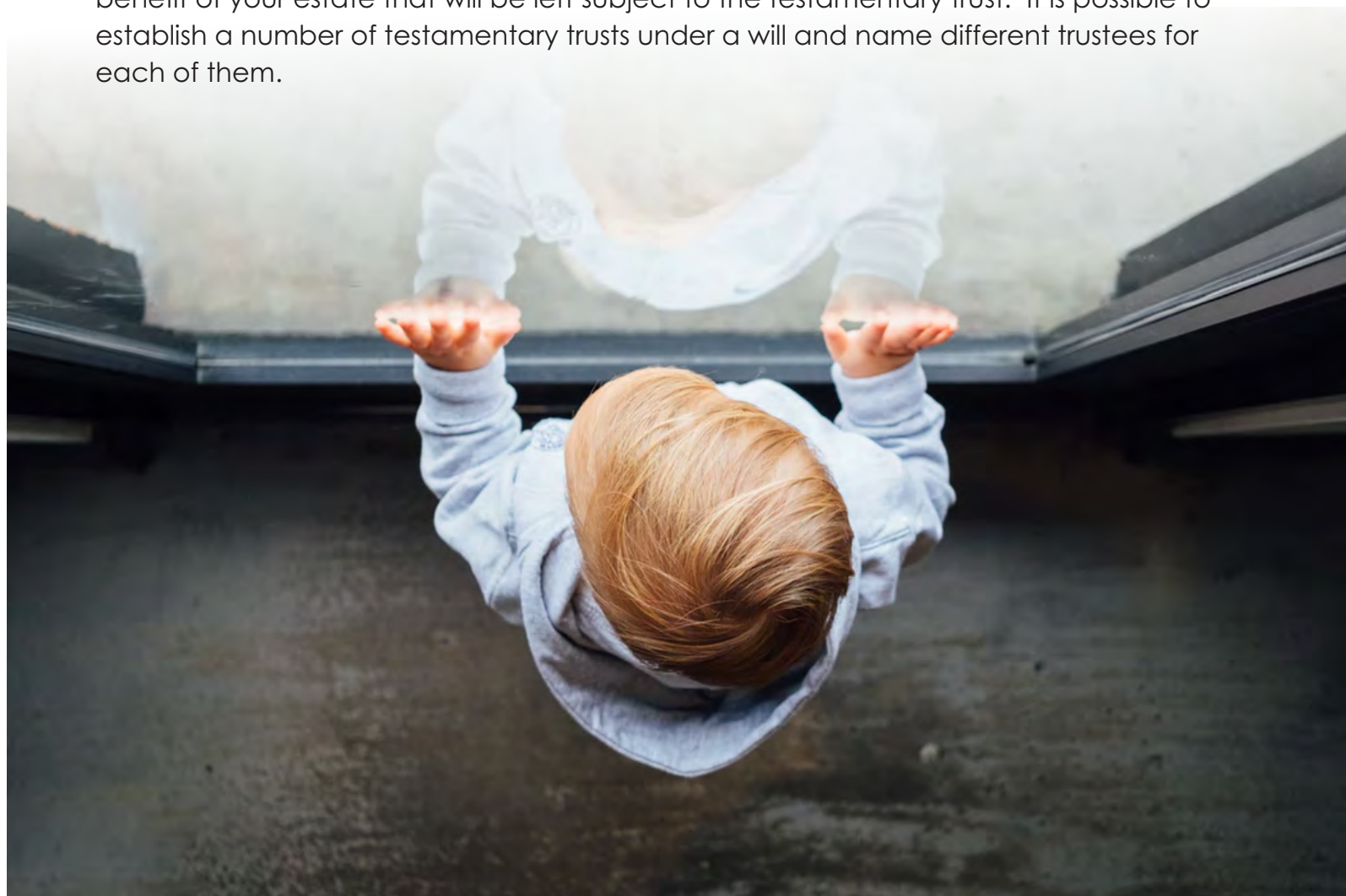
When the Beneficiaries become trustees they can exercise all of the powers given to your Trustee and can wind up the trust or give trust property and income to themselves, other named beneficiaries (if any) or pass control of the trust to someone else should they wish to do so.

## **WHAT ABOUT YOUNGER CHILDREN?**

You decide when the younger children gain control of their trust, up until then your Trustee is in control. Naturally, until the child reaches the required age, your executor can make funds available from the trust to meet the child's needs.

## **WHO CAN BE TRUSTEE OF A TESTAMENTARY TRUST?**

You can nominate anyone, including the executors of your will, your spouse or partner, or your children. The trustee has effective control of the trust, so the trustee should be a person who you trust to act in the best interests of those who are to receive the main benefit of your estate that will be left subject to the testamentary trust. It is possible to establish a number of testamentary trusts under a will and name different trustees for each of them.



## **I LEFT MY ESTATE TO A TESTAMENTARY TRUST AND MY SPOUSE NEEDED THE MONEY, WOULD MY SPOUSE BE ABLE TO GAIN ACCESS TO IT?**

If your spouse is a beneficiary of the testamentary trust, the trustee could pay all or part of the capital and/or income to your spouse. It is often the case that your spouse is the Trustee or at least one of them and in that case a determination of this sort is within his or her control.

## **ARE THERE ANY OTHER ADVANTAGES OF A TESTAMENTARY TRUST APART FROM TAXATION?**

Yes. There are several. A testamentary trust could also protect beneficiaries from creditors, or litigants in professional negligence claims and can also protect spendthrift or intellectually impaired beneficiaries by keeping control of the assets in responsible hands for the benefit of the at risk beneficiary.

## **WHAT SHOULD I CONSIDER BEFORE ESTABLISHING A TESTAMENTARY TRUST UNDER MY WILL?**

There will be ongoing maintenance costs such as accountancy fees for preparation of trust taxation returns. Factors that you should take into account, include a consideration of whether the income generated by your estate would be sufficient to warrant a testamentary trust, or whether there are special needs such as a beneficiary with an intellectual or other impairment.



*Make an appointment  
today to create your  
Testamentary Trust*

**connollysuthers**  
LAWYERS

**TOWNSVILLE | AYR**  
(07) 4771 5664  
law@connollysuthers.com.au  
www.connollysuthers.com.au