

GIFT WRAPPING INHERITANCES?



How does the Family Court view testamentary trusts when a marriage breaks down?

In a nutshell, the Family Court is not applying the same principles to testamentary trusts as they apply to a family discretionary trust set up or controlled by either one of the parties to a divorce.

How come?

It is the Family Courts view that a testamentary trust is not established by the parties in divorce proceedings. The testamentary trust is normally established by a family member's Will for the benefit of his/her lineal descendants. The right to this capital is normally limited to the lineal descendants (children, grandchildren etc) of the testator, not solely the party in the divorce.

To further distance the inheritance held by a testamentary trust from the asset pool in a marriage breakdown, RetireLaw Wills include terms that prohibit a party to a Family Court proceeding from being a trustee (controller of the trust). These terms also install the executor as the independent trustee of the Will. This strategy assists in demonstrating that a particular party to a divorce is not the "alter ego" of the testamentary trust, and therefore the trust assets ought not to be included in the contested asset pool.

Despite the undoubted interest a party may have in a testamentary trust, the Family Court is not looking to incorporate the testamentary trust to work out a 50/50 split of assets. For example:

Testamentary trust = \$500,000

Couples combined assets = \$1,000,000

In the example above, the courts are not looking to award \$750,000 to each party by including the trust assets. Unlike family discretionary trusts set up by the parties to the divorce, testamentary trusts are not considered part of the couples combined assets.

While the Family Court may see a testamentary trust as a financial resource to one of the parties, its practice is currently to accept that it is a trust created by third parties. On occasion the Family Court has chosen to apply a small differential in the split of the couple's combined assets only. A commonly quoted example of such a split was

in the 2004 case *Ward v Ward*, where a split of 42.5 / 57.5 was awarded by the court in recognition of a testamentary trust being a financial resource to one of the parties. This uneven split did not incorporate the funds held in the testamentary trust.

Currently, testamentary trusts are secure against family court intervention. This security can be enhanced by a Will's trust terms which remove a trustee that is a party to a divorce. If you have any questions about testamentary trusts or any other estate planning issues please do not hesitate to get in touch. We are always happy to hear from you!

The following link is for our presentation ***The Convenient Truth*** which highlights the advantages of inheriting via testamentary trusts

To view please click here

www.modernestateplanning.com.au/retirelawpresentation



The advertisement features the 'modern estate planning' logo in red and black, with 'Proudly Presented By RetireLaw' below it. A yellow arrow-shaped button contains the text 'CLICK HERE' and 'To watch this *must see* presentation on Wills'. To the right, a white document titled 'THE CONVENIENT TRUTH' in yellow letters contains the text 'The true story about why the era of simple Wills is OVER!' in red and black. An illustration of a family of five is shown to the right of the text. At the bottom of the document, it says 'Duration 10 minutes / Sound required'.



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