



## Family Court ignores the legal fiction of many testamentary trusts.

It is common nowadays for asset protection and taxation reasons, to draft your Will to leave bequests by way of a testamentary trust, rather than directly to an intended beneficiary.

A testamentary trust works by creating a trust in the Will, and upon the Will-maker's death the asset is transferred to a person (such as the executor of the Will) to hold on trust for a group of intended beneficiaries. Usually the terms of the trust allow the trustee to decide how the asset or income is distributed within the group of potential beneficiaries.

Legally, the individuals in the group of intended beneficiaries have a right to have the trust administered, or managed, but nothing more; that is, none of the individuals have a right to any particular portion of the assets or the income until the trustee election to pay them. Similarly, the trustee does not have any legal beneficial entitlement in the trust property, but only holds it on behalf of the group of intended beneficiaries.

The Family Court has stated in a number of cases that if a person is a potential beneficiary under a testamentary (and indeed other forms of) trust, and if they have demonstrated a willingness and ability to control the trust, then despite any apparent limitations on their role in the legal structure of the trust, the Court will deem the assets or part of them to be property of a party to a marriage or de facto relationship, and so available for division in a property settlement.

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