

Crilly Lawyers Information Sheet

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The Testamentary Trust

There are three different ways that a person (Willmaker) can arrange for property to be handled after their death. These are compared in this table. The table shows differences between a Will, an inter vivos trust and a testamentary trust.

	WILL	INTER VIVOS TRUST	TESTAMENTARY TRUST
GENERAL DESCRIPTION	In a standard Will, the Willmaker leaves his estate in fixed shares for specific beneficiaries. For example, the Will may say: "I leave my residual estate to my children who survive me in equal shares". Sometimes the Will provides that if a Willmaker has a child and that child dies, the that child's share of the Willmaker's estate is to be distributed among the grandchildren.	The Latin expression "inter vivos" means "between living people". An inter vivos trust is a trust established during a person's lifetime. Most of the trusts discussed in this guide are inter vivos trusts.	A testament trust is a trust established under a Will when the Willmaker dies. It is this establishment on death that distinguishes a testamentary trust from an inter vivo trust. In other respects, a testamentary trust has much in common with an inter vivos trust. The beneficiaries and the discretion given to the trustee as to the distribution of income and capital can be the same in a testamentary trust and an inter vivos trust.
ASSUMPTIONS	All assets controlled by the Willmaker are owned beneficially by the Willmaker.	The Willmaker has control of a trust, say, a discretionary trust, and has transferred all (or a substantial part) of the Willmaker's assets to the trust before death. Upon death, the Willmaker has no interest in the assets transferred.	The Willmaker has written Will that provides for a testamentary trust to be established after his death and during the administration of his Will. Before his death, the Willmaker is the outright owner of his assets.
EFFECTIVE DOCUMENT	The Will.	The deed establishing the inter vivos trust.	The Will and then the terms of the testamentary trust contained in the Wil
EFFECT OF DEATH	Before death the Willmaker owns all assets beneficially. Upon death, the legal ownership of those assets passes to the Willmaker's executors. It is the executor's function to collect all assets and pay all debts of the Willmaker. During this time, the executors hold the assets on trust for the beneficiaries specified in the Will. Once the executors have completed the administration of the estate, the legal ownership of the Willmaker's estate is transferred to the beneficiaries.	The Willmaker's death has no effect on an inter vivos trust. The legal ownership of the assets remains vested in the trustee of the trust and the equitable ownership of those assets remains with the beneficiaries under the terms of the trust. If the Willmaker is a trustee or, in fact, the trustee of the trust, the Willmaker's death may require the appointment of a new trustee. However, the rights of the beneficiaries of the trust are not affected.	Before the Willmaker dies, the Willmaker owns the assets in the Willmaker's name beneficially. Upon the Willmaker's death, the legal interest in those assets passes to the Willmaker's executors. It is the executors' function to collect all the assets and pay all debts of the Willmaker. During this time, the executors hold the assets in trust for the Willmaker's beneficiaries as specified in the Will. Once the executors have completed administration of the estate (such as by passing a specific gift to a specific beneficiary in the Will) the legal ownership of

EFFECT OF DEATH CONTINUED			<p>the Willmaker's estate is transferred to the trustees of the testamentary trust, who then deal with the assets, not in accordance with the terms of the Will, but in accordance with the terms of the testamentary trust. The Willmaker's executor or executors may or may not be the same person or persons as the trustee or trustees of the testamentary trust. The trustee deals with the trust capital and income in accordance with the powers given to them under the testamentary trust.</p>
TAX CONSIDERATIONS	<p>Death duties: No.</p> <p>Stamp duties: No. There are no stamp duties payable on the transfer of property by Will.</p> <p>CGT: No. There is no CGT payable on the transfer of property by Will. The cost base and time of acquisition rules should be considered separately.</p>	<p>Death duties: No. Trusts can outlive persons who establish them and, in any event, only the property dealt with by the Will would be subject to any applicable death duties (and there are currently none in Victoria); the property in the trust is not dealt with by the Will.</p> <p>Stamp duties: Yes. Stamp duty would be payable on the transfer of real property from the transferor owner to the trust (this would be payable on the transfer occurring). No further stamp duty would be payable on death.</p> <p>CGT: Yes. The Willmaker would have to pay CGT on any gain realised on the "sale" of his property to the trust. Again, this would be payable only on transfer, not on death and consideration should be given to the availability of the various CGT concessions.</p>	<p>Death duties: No. There are currently no death duties in Australia.</p> <p>Stamp duties: No. There are no stamp duties payable on the transfer of property from the estate of the Willmaker to the testamentary trust.</p> <p>CGT: No. There is no CGT payable on the transfer of property from the estate of the Willmaker to the testamentary trust. The cost base and terms of acquisition rules should be considered separately.</p>