What is a Testamentary Trust?

A closer look at the testamentary trust. By **Debi Godwin**, Director - Independent Executor & Trust.

A testamentary trust (sometimes referred to as a **will trust**) is a trust which arises upon the death of the testator, and which is specified in his will (testamentary trust literally means *a trust in a will*). A will may contain more than one testamentary trust, and may address all or any portion of the estate. In simple terms, testamentary trusts are most often formed for young adult children or minor children to help administer funds should the parents die. These funds may come from the sale of the estate, life insurance policies, or the sale of other valuable assets.

Is this the same as a Family Trust?

No; testamentary trusts are very different from inter vivos or family trusts, which are created during one's lifetime. A testamentary trust is a legal entity created as specified in a person's will. In practical terms, testamentary trusts tend to be driven more by the needs of the beneficiaries (particularly minor beneficiaries) rather than by tax considerations, which is often the case with inter vivos trusts.

What four parties are involved in a testamentary trust?

- The Testator i.e. the person who specifies that the trust be created, in his/her will;
- the trustee, whose duty is to carry out the terms of the trust;
- the *beneficiary(ies)*, who will receive the benefits of the trust;
- although not a party to the trust itself, the *Master of the High Court* is a necessary component of the trust's activity. It oversees the trustee's handling of the trust.

What is a Trustee?

A trustee's duty is to look after the trust for a certain period of time. As the name implies you need to be able to trust your trustees. Normally, the trustee relationship is in effect until the minor reaches a certain age or has finalised his/her tertiary education. These terms, however, can be flexible and customized to meet the parent's wishes. In addition to providing for minors, a testamentary trust can also be used to provide for those who have disabilities or are unable to provide for themselves.

It should be noted that with a testamentary trust the trustee administers the assets until the conditions for disbursement are met. Until that time, the trustee has a great amount of control and power over the assets and how they are disbursed. The court will only oversee the administration of the process, which means it is important to make sure the person appointed as the trustee is someone who can be trusted for the long term.

The Trustee must act with all the care, diligence and skill that can reasonably be expected of a person who manages the affairs of another. He must avoid conflict between his interests and those of the trust beneficiaries and must keep the trusts assets separate from his own.

What are the advantages of a testamentary trust?

- A testamentary trust provides a way for assets devolving to minor children to be protected until the children are capable of fending for themselves.
- A testamentary trust has low upfront costs, usually only the cost of preparing the will.
- A testamentary trust not only protects assets it also protects beneficiaries. A beneficiary with say, for example, a gambling or addiction problem would not have direct access to the capital of the Trust, and the Trustees are then in a position to monitor the income paid to the beneficiary.