



## Testamentary discretionary trusts

*Too often we think about **who** we would like to leave our assets to when we die but not **how** we should dispose of them. A testamentary trust is one option to consider.*

### What is a trust?

A trust is an entity created to hold assets for the benefit of certain persons or entities (**beneficial owner**), with a trustee managing the assets of the trust (**legal owner**). Most trusts are founded by the person who executes a written deed of trust (**settlor**). The deed establishes the trust and sets out the terms and conditions upon which it will be administered.

### Types of trusts

There is no one form of a trust. The most common forms include:

- > discretionary trusts (also known as family trusts)
- > unit trusts (also known as fixed trusts)
- > hybrid trusts (combination of both fixed and discretionary entitlements)

Trusts can be established either during a person's life time (**inter vivos**) or on a person's death, established in accordance with the terms of their Will (**testamentary**).

### Types of testamentary trusts

There are many different types of testamentary trusts that can be included in your Will. These include:

- > **Right to reside:** gives a beneficiary the right to live in a property for their lifetime or for a specified period of time.

### Wills & Estates areas of expertise

- > Business transfer and succession
- > Charitable foundations
- > Estate administration
- > Estate disputes & litigation
- > Estate planning
- > Letters of administration
- > Powers of attorney
- > Probate
- > Reseals & probate of overseas Wills
- > Structuring of entities
- > Superannuation
- > Taxation
- > Trusts
- > Wills

### RIGBY COOKE LAWYERS

Level 11, 360 Elizabeth Street  
Melbourne Victoria 3000  
T +61 3 9321 7888  
[www.rigbycooke.com.au](http://www.rigbycooke.com.au)

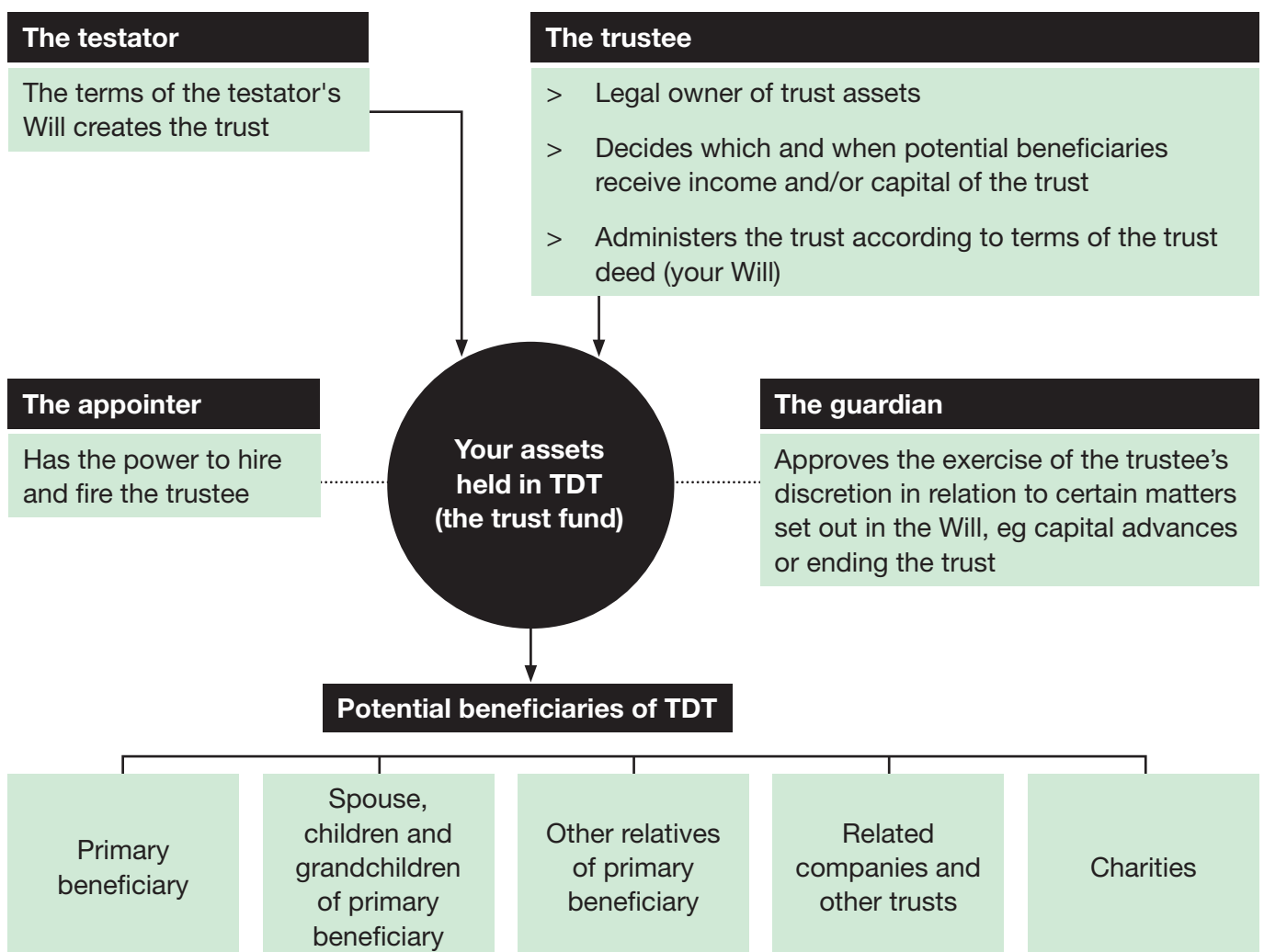
- > **Life interest:** gives a beneficiary the right to receive income from the trust for their lifetime, and in some cases may also be able to access the capital.
- > **Protective trust:** provides protection of an asset for the benefit of a vulnerable beneficiary (eg with a disability). The trustee would apply the income and capital for the benefit of the beneficiary for his or her lifetime.
- > **Testamentary discretionary trust:** similar to a family trust but established in a Will.

## What is a testamentary discretionary trust?

A testamentary discretionary trust (**TDT**) is created by the terms of a person's Will. It has a trustee, a range of potential discretionary beneficiaries (such as spouse, children and grandchildren) who are entitled to receive income and/or capital of the trust at the trustee's discretion and, in many cases, an appointor who holds the power to appoint and remove the trustee.

If your accountant or financial adviser recommends testamentary trusts to you, they are usually referring to testamentary discretionary trusts.

## Testamentary trust structure



## **Benefits of a testamentary discretionary trust**

Many of the benefits of a TDT arise from the fact that while the assets of the trust may be controlled by the intended beneficiary, the assets held in the trust do not form part of the beneficiary's personal estate.

### **Asset protection**

A TDT can protect the assets a beneficiary inherits under a Will if they:

- > find themselves in financial difficulties (bankrupt)
- > run their own business
- > are going through a relationship breakdown and involved in a property settlement (the level of protection is determined by the terms of the trust)

The separation between the legal owner and beneficial owner of the trust assets allows for this protection to exist.

### **Income splitting**

The ability to split income makes this structure attractive to many testators leaving behind young children or grandchildren.

TDT's provide a favourable tax position when paying income distributions to a minor (child under 18). This is because a minor beneficiary of a testamentary trust is taxed as an adult. It means that a minor beneficiary is entitled to receive an \$18,200 tax free threshold (2018/2019 financial year) and the standard adult tax rates thereafter.

In comparison, a minor beneficiary of an inter-vivos discretionary trust (a trust created during one's lifetime) is only entitled to a \$416 tax free threshold and any income above this amount is taxed at penalty tax rates. Figures do not include low income rebates.

## **Income streaming**

Income streaming is the ability to pay different classes of income to different beneficiaries.

For example, paying the fully franked dividend received on BHP shares to Beneficiary A and paying rental income to Beneficiary B. This gives the trustee the greatest flexibility when it comes to distributing income to the beneficiaries and it also allows for a more tax effective trust.

Some other benefits may include:

- > as testamentary trusts are established by a Will, the testator has absolute control over the terms of the trust
- > during the testator's lifetime, he or she can vary the terms of the testamentary trust at any time until his or her death or incapacity
- > the testamentary trust comes into existence on the testator's death so they can retain control and ownership of the assets up until their death
- > the testamentary trust can continue for up to 80 years (if required) to cover the life of the main beneficiary, and it is also possible for the trust to vest at any earlier date if authorised by the Will or if the trustee has the power to elect an earlier date
- > it is possible to establish more than one testamentary trust in a Will, for example, one for each child

Finally, if you are uncertain about the future need for a testamentary trust, an option is to prepare your Will in such a way as to give your beneficiaries the option to establish the testamentary trust at the time of your death.

## Generational wealth management

Sometimes people want to ensure that certain assets, such as family heirlooms or a family holiday house, remain 'in the family' for years to come. Generational wealth management can be achieved by establishing a TDT in your Will.

This type of trust can ensure future generations have the use and benefit of the assets for years to come. The class of beneficiaries of a TDT can be wide or restricted to include only bloodline relatives. This is sometimes referred to as a 'bloodline trust'.

### Peter and Susan's story

Peter is 60 years old and Susan is 62. They are both semi-retired and are now concerned that they have neglected their estate planning for the past 10 years.

Peter and Susan have three adult children, two are now married with young children of their own and the third is single. One child is currently experiencing marriage difficulties. They have a combined wealth of \$3,000,000 (family home, superannuation, investment property and life insurance).

Peter and Susan would like to ensure their children get the most out of their inheritance and this includes protecting it from falling into the hands of creditors or losing half of it through a relationship breakdown.

Peter and Susan were advised to include TDT's in their Wills for the benefit of each of their children. This type of trust can provide tax minimisation opportunities as well as assist in protecting their children's inheritance from both relationship breakdown and bankruptcy.

Peter and Susan died in an accident before they signed their updated Wills. At the time of their death, their daughter was in the process of separating from her husband and their single son was in financial difficulties after his business failed.

Unfortunately because Peter and Susan left their

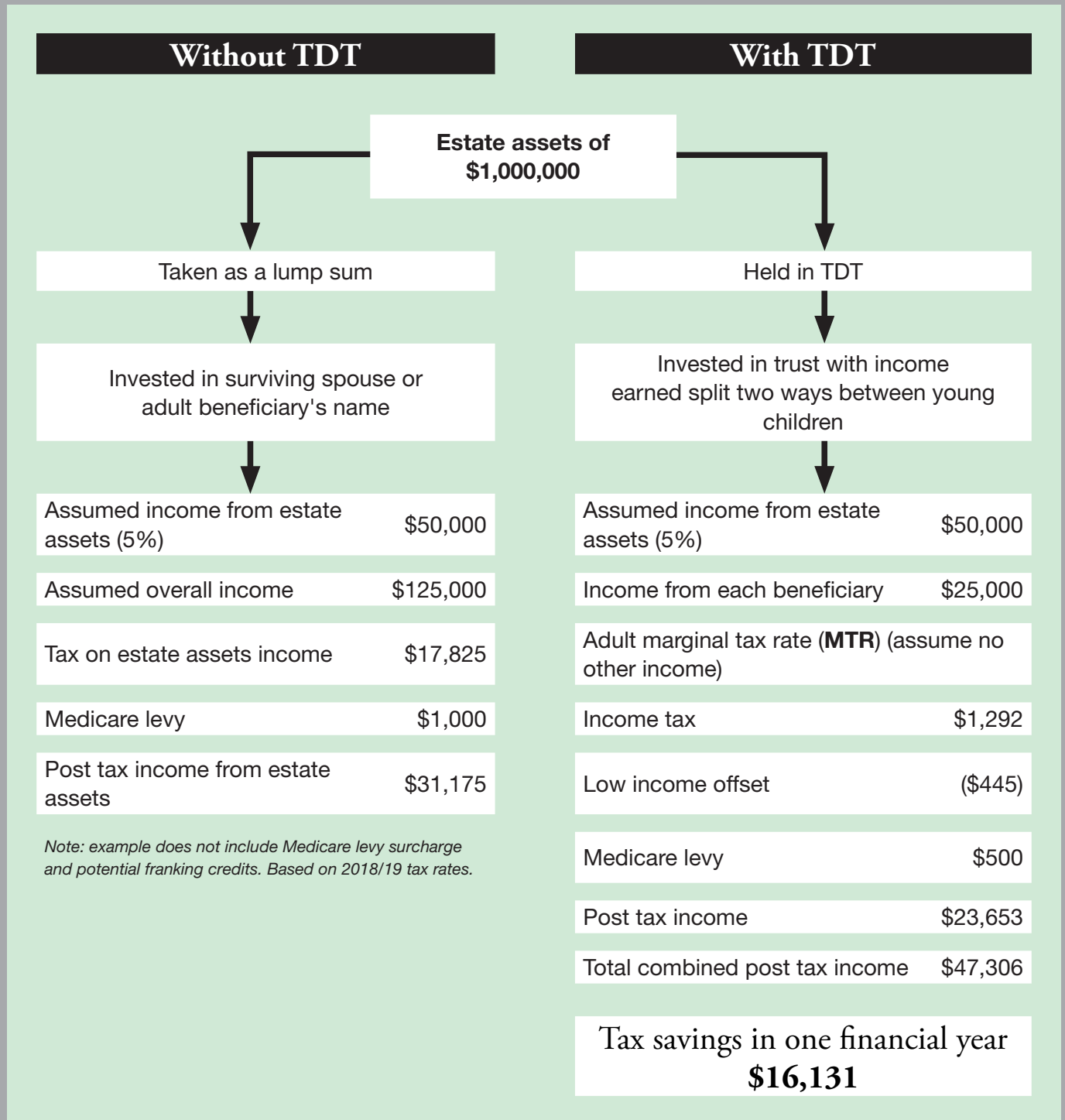


estate to their children in their personal names, their son's inheritance fell into the hands of his creditors and their daughter's inheritance formed part of the matrimonial assets when she and her estranged husband divorced.

Had Peter and Susan incorporated TDT's in their Wills, their daughter would most likely have retained her inheritance, their son's creditors would still be seeking repayment and their third son could have utilised the potential tax savings available to him and his young family.

## Lost tax savings

An example of the potential tax savings Peter and Susan's son could have taken advantage of is demonstrated below:



The potential tax savings lost by not using the testamentary discretionary trust and distributing the income earned to the two children is \$16,131 in just one year.

**Note:** there are limitations to the effectiveness of a testamentary discretionary trust. Please contact us to discuss your personal circumstances.



## Our team



Rachael Grabovic  
*Partner*  
T +61 3 9321 7826  
RGrabovic@rigbycooke.com.au



Rosa Bazzanella  
*Senior Associate*  
T +61 3 9321 7881  
RBazzanella@rigbycooke.com.au



Marcus Schivo  
*Lawyer*  
T +61 3 9321 7892  
MSchivo@rigbycooke.com.au

## About Rigby Cooke Lawyers

Rigby Cooke Lawyers is a full service law firm providing commercial expertise and industry knowledge to private and public sector clients across Australia.

With origins that can be traced back to the 1840s, we have earned our reputation of achieving success for – and with – our clients, by remaining adaptive to change. We do this by understanding each of our clients' businesses and industry, and by staying at the forefront of changes in technology and legislation.

This is because, above all else, we remain true to our mission, *Our people: Your success.*

## Full-service offering

Our team of more than 80 staff in Melbourne covers:

- > Banking & Finance
- > Construction & Projects
- > Corporate & Commercial
- > Customs & Trade
- > Insolvency & Reconstruction
- > Intellectual Property
- > Litigation & Dispute Resolution
- > Mergers & Acquisitions
- > Migration
- > Notary Public
- > Planning & Environment
- > Property
- > Tax & Wealth
- > Wills & Estates
- > Workplace Relations

## Further information

We provide a comprehensive Wills & Estates service to professionals, executives, business owners, investors, mums and dads and retirees. Contact our Wills and Estates team on **+61 3 9321 7857** or **willsandestates@rigbycooke.com.au**

### Disclaimer

This publication contains comments of a general nature only and is provided as an information service. It is not intended to be relied upon as, nor is it a substitute for specific professional advice. No responsibility can be accepted by Rigby Cooke Lawyers or the authors for loss occasioned to any person doing anything as a result of any material in this publication.

©2018 - 2019 Rigby Cooke Lawyers

Liability limited by a scheme approved under Professional Standards Legislation