

Webinar: Intergenerational wealth transfer strategies using different structures and how debt can be created or debt/assets separated within these

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**TOWNSENDS BUSINESS
& CORPORATE LAWYERS**

AUDIENCE QUESTIONS

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Question 1

I've been doing some thinking and debating around section 102AG and recent changes 2020 I think they came in. A strategy was to let the 2nd to die's assets fall into the 1st to die's testamentary trust to make for simplification. It is complex it seems but trying to work out is this still okay to do with the changes that came in or do we need several trusts in place to retain tax effectiveness.

Answer 1

The section describes 'excepted trust income' as including:

"an amount included in the assessable income of a trust estate is excepted trust income in relation to a beneficiary of the trust estate to the extent to which the amount:

- (a) is assessable income, of a kind covered by subsection (2AA), of a trust estate that resulted from:
 - (i) a will, codicil or an order of a court that varied or modified the provisions of a will or codicil"

Subsection 2AA includes

“property ... transferred to the trustee of the trust estate to benefit the beneficiary from the estate of the deceased person concerned, as a result of the will, codicil, intestacy or order of a court mentioned in paragraph (2)(a)”

It seems to us that the transfer of the 2nds assets to the trust set up for the 1st is still a transfer to the trustee of that trust to benefit the beneficiary from the estate of the deceased person (2nd) as a result of the will of the 2nd that directed it be so.

Therefore s.102AG(2)(a) applies.

Question 2

Peter, is it best practise to have multiple trustees or appointors for the Testamentary to reduce risk?

Answer 2

It will reduce risk, yes, by making the trust appear more independent and stand-alone and less like simply a tool of the key person.

Question 3

Does a Testamentary discretionary trust always require a minimum of two Trustees?

Answer 3

As long as the trustee and the beneficiary are not the same (ie the beneficiaries can include the trustee but cannot be only the trustee in which event no trust exists) there is no legal requirement for more than one trustee.

As noted in Answer 2 having more than one trustee may reduce risk.

Question 4

Hi Peter, we are particularly interested to know if it is possible to replace one of the trustees of a discretionary testamentary trust with another trustee, where the Will has not specifically stated the ability to do so?

Answer 4

Once the testamentary discretionary trust is established on the death of the Willmaker, the terms of the trust are set out in the Will and, to the extent that they are not so, then in the local State legislation dealing with trustees.

You would need to check the trustee legislation in your State. In NSW the situation may be covered in s.6 of the Trustee Act 1925 (NSW):

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1925-014#sec.6>