



ASA DIX LEGAL BRIEF

A PREVENTIVE LAW SERVICE OF THE JOINT READINESS CENTER LEGAL SECTION
UNITED STATES ARMY SUPPORT ACTIVITY DIX
KEEPING YOU INFORMED ON YOUR PERSONAL LEGAL NEEDS

TESTAMENTARY TRUSTS

Q: WHAT IS A TESTAMENTARY TRUST? A Testamentary Trust is a trust created in a Will, which means the trust only becomes effective upon your death. The terms of the trust are detailed in the actual Will. The topic of Wills is discussed in another ASA Dix Legal Brief. The individual who creates a trust is referred to as a grantor, trustor, or settlor and the individual(s) who receives the benefit from the trust (i.e. money or property) is referred to as a beneficiary. The person who holds legal title to the assets for the benefit of one or more trust beneficiaries and is responsible for managing the assets, according to the terms of the trust, is referred to as a trustee.

Q: WHY SHOULD I USE A TESTAMENTARY TRUST IN MY ESTATE PLAN? Testamentary Trusts are primarily used to prevent large sums of money (such as insurance proceeds) or real property from being distributed directly to children or young adults. For example, a Testamentary Trust may provide that if there is no surviving spouse, then all of the assets will be held and managed by a designated trustee until the children or young adults reach certain ages. A “separate” trust sets up an account for each of your children. A “unitary” trust creates an account that all of your children share. A trustee must be selected with care (“trust” is in the title). The trustee should be a person you have confidence in; someone who knows your children and understands their needs.

Q. WHAT ARE THE PROS AND CONS OF A TESTAMENTARY TRUST VERSUS FUNDED LIVING TRUSTS? Testamentary Trusts, which are created upon the death of the grantor, tend to be driven more by the needs of the beneficiaries (i.e. minors) than by tax considerations. In contrast, living trusts (also referred to as inter vivos trusts), which are created during the grantor’s lifetime, tend to be driven more by tax considerations. A living trust may be more expensive (costs and fees) to create than a Testamentary Trust, but it is not subjected to the probate court process as may be the case with a Testamentary Trust. If a beneficiary has not reached the specified age, the property must then pass into the Testamentary Trust under the will, thereby subjecting the trust property to probate. A funded living trust avoids probate costs and delays since the grantor must transfer assets into the trust during his or her lifetime. However, this means the trust must be managed by a trustee, which could result in substantial management fees and costs. If you are considering creating a trust, it would be advisable to discuss your options with a Legal Assistance Attorney.

Q: WHO ARE TRUST BENEFICIARIES? You can nominate anybody to be trust beneficiaries. The beneficiaries receive the benefit from the trust; they enjoy the principal of the trust property and any income generated from such property. If you name alternate or contingent beneficiaries, the trust establishes the conditions under which the beneficiaries must receive trust proceeds. When the beneficiaries are young (minors or even young adults), the trust may also provide for the continued management of the trust assets until the beneficiaries reach a certain age.

Q: WHAT IS THE NORMAL DURATION OF A TESTAMENTARY TRUST? Testamentary Trusts have definite beginning and ending dates. Testamentary Trusts begin on the date of death of the trust creator. In many trusts, the ending date is when the youngest beneficiary reaches an age specified in the trust.

Q: WHO SHOULD I CONSIDER NAMING AS A TRUSTEE? The responsibility of managing a trust can be accomplished by appointing any trusted adult person (i.e. a family member or friend) with or without investment knowledge, or an institution with investment experience. Since trustees have certain fiduciary duties, consider someone who, understandably, you “trust.” Consider that person’s age, expertise, ability to serve, and knowledge of the beneficiary’s needs. Depending on the state and the complexity of the issues, the trustee may be subject to supervision by the probate court for the duration of the Testamentary Trust

Q: IS THERE AN ALTERNATIVE TO A TESTAMENTARY TRUST? Yes. Specifically, the Uniform Gifts to Minors Act (UGMA) or the Uniform Transfer to Minors Act (UTMA) creates custodianships which are generally recognized in state law and may be preferable to creation of a trust in your will. Under the annual federal gift-tax exclusion, each child may be given gifts up to a certain amount without incurring any tax consequences. UGMA/UTMA accounts can be established during your life or through your Will, at death, for the benefit of your child(ren), and then fed with proceeds of your insurance policies like Servicemembers’ Group Life Insurance (SGLI), or with property from your estate, on death. Like the trustee, the UGMA/UTMA custodian will be charged with administering funds for the benefit of your children. Unlike a trustee, the custodian’s duties and responsibilities are defined in the Uniform Statutory Acts rather than a trust instrument. Also, when a custodian is a life insurance beneficiary, payment to the custodian should be made immediately after death without any court intervention. However, the same life insurance company may not pay immediately on a trust designation.

Q: WHO SHOULD I CONTACT IF I WANT MORE INFORMATION OR WANT TO ESTABLISH A TESTAMENTARY TRUST? Contact the Joint Base Legal Assistance Office to arrange a consultation with a Legal Assistance Attorney to discuss a Testamentary Trust or other types of trusts.