

Estate planning for modern families

4 September 2018



A faded background image of a mountain peak with a person climbing. The text is overlaid on the image.

**Everything we do
embodies the passion
and entrepreneurial
spirit of our clients.**


Introduction

4 September 2018




Cyberlaw

Sladen Legal's multi-disciplinary approach to cyberlaw assists clients to achieve regulatory compliance, manage risk and optimise business operations. We inspire action through knowledge by advising on legal and regulatory issues, translating often complex legal theory into operational practice.



Cyberlaw



Cybersecurity



Information
Law




Information
Security




Privacy



Surveillance



Governance



Policy



Frameworks

- **Cyberlaw**
 - <https://sladen.com.au/cyberlaw>
- **Helaine Leggat**
 - In addition to her law credentials Helaine has earned some of the world's most esteemed certifications in cybersecurity, privacy and information security. Helaine has specialised at the leading edge of these disciplines since 2000 and has provided services to public and private sector organisations globally across all sectors.
- **Certifications:**
 - CISSP - Certified Information Systems Security Professional
 - CSIM - Certified Information Systems Security Manager
 - CIPP - Certified Information Privacy Professional
 - CIPP/IT - Certified Information Privacy Professional, IT



Associations and memberships:

- Australian Information Security Association (AISA)
- International Association of Cryptographic Research (IACR)
- Australian Institute of Company Directors (AICD)
- International Information Systems Security Certification Consortium Inc. ((ISC)2)
- Information Systems Audit and Control Association (ISACA)
- International Association of Privacy Professionals (US, ANZ) (IAPP)
- Australian Women Security Network (AWSN)
- Ducere Global Faculty on Thought Leadership
- Member of the Expert Network, Department of Industry, Innovation and Science
- Prime Minister's Advisory Council on Cyber Security - industry working group

Personal Succession Planning & Deceased Estates

- Wills
- Structuring of simple or complex or special purpose testamentary trusts
- Special disability trusts
- Mutual Will agreements
- Powers of Attorney
- Superannuation including binding death benefit nominations (BDBN) and pensions (link to super page)
- Early withdrawal of super benefits to maximise capital available to pay gifts under will
- Use of life insurance
- Estate planning with succession of control of trusts and companies
- Business succession planning
- Statements of wishes to trustees and appointors
- Minimising risk of family provision claims
- Family agreements
- Deceased estates and estate administration
- Deceased estate litigation including family provision claims

- New resources available at our “**Personal Succession Planning & Deceased Estates**” webpage

- News items
- Brochures
- Client Fact Finder
- Key Contacts

**Sladen
Legal**

INFORMATION FOR WILLS / POWERS OF ATTORNEY

PART A – PERSONAL DETAILS

QUESTION 1

YOUR DETAILS

Full Name <input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Miss		Address	D.O.B
Home phone number		Mobile phone number	Work phone number
Email:			
Occupation:			
Address for correspondence:			

(IF NO PARTNER PROCEED TO QUESTION 2)

DETAILS OF YOUR PARTNER

Full Name <input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Miss		Address	D.O.B
Home phone number		Mobile phone number	Work phone number
Email:			
Occupation:			
Address for correspondence:			

FINAL AMENDED Estate Planning Fact Finder.docx#F 1 - 5.1P.3008/18 8.25 Rev

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Key Contacts



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Recent and topical developments - blended families, digital assets and medical treatment decision makers

Presented by Magdalena Njokos

4 September 2018





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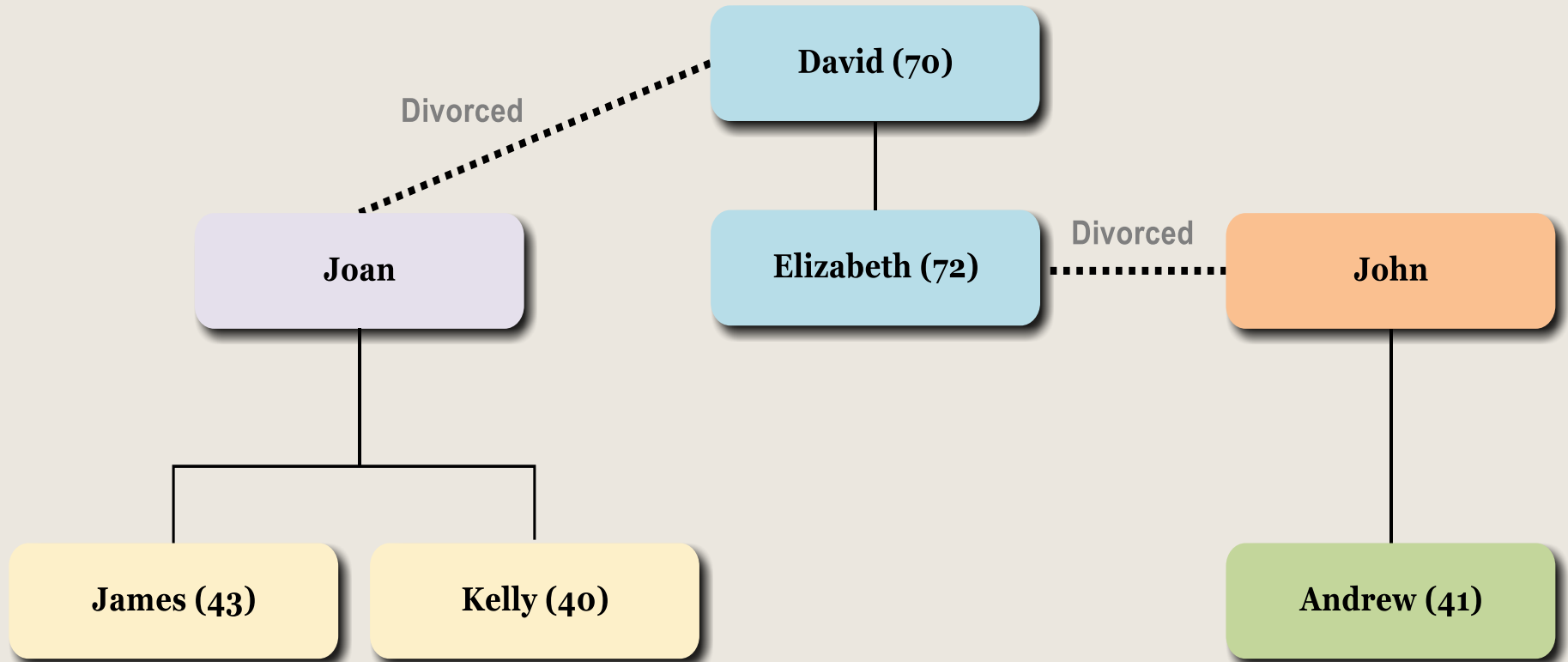
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Complex estate planning - a case study



Scenario – Family structure



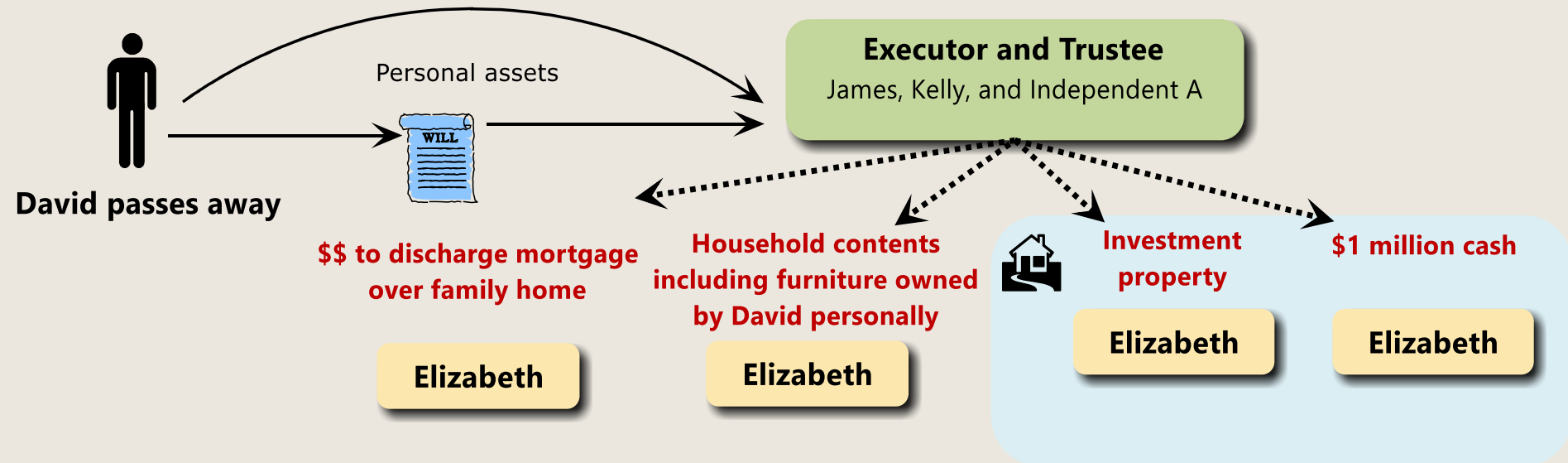
David's objectives

- To balance the interests of his biological children and Elizabeth.
- To ensure that control of the business and the wealth accumulated in the various trust and company structures passes to James and Kelly.
- To provide Elizabeth with a home to live in and income to maintain her lifestyle however to not necessarily leave her with substantial wealth which would be passed outside of David's bloodline.
- To protect the inheritance (as far as possible) against a marital breakdown in respect of James and Kelly.
- Uphold the provisions of the Binding Financial Agreement (BFA) with Elizabeth to the extent possible.

Issues identified

- The source of wealth?
 - Who and what character
- The financial status and the financial needs of Elizabeth, James, Kelly (and Andrew)?
 - Age, health, support available
- Pre-existing agreements in place?
 - Binding Financial Agreement
- Other?
 - Keeping the wealth in the bloodline
 - Family law risks of James and Kelly

Implementation of succession plan – provision for Elizabeth



Specific Wishes



Wish that any furniture contained within the principal residence but not owned personally to remain in the property whilst Elizabeth resides there

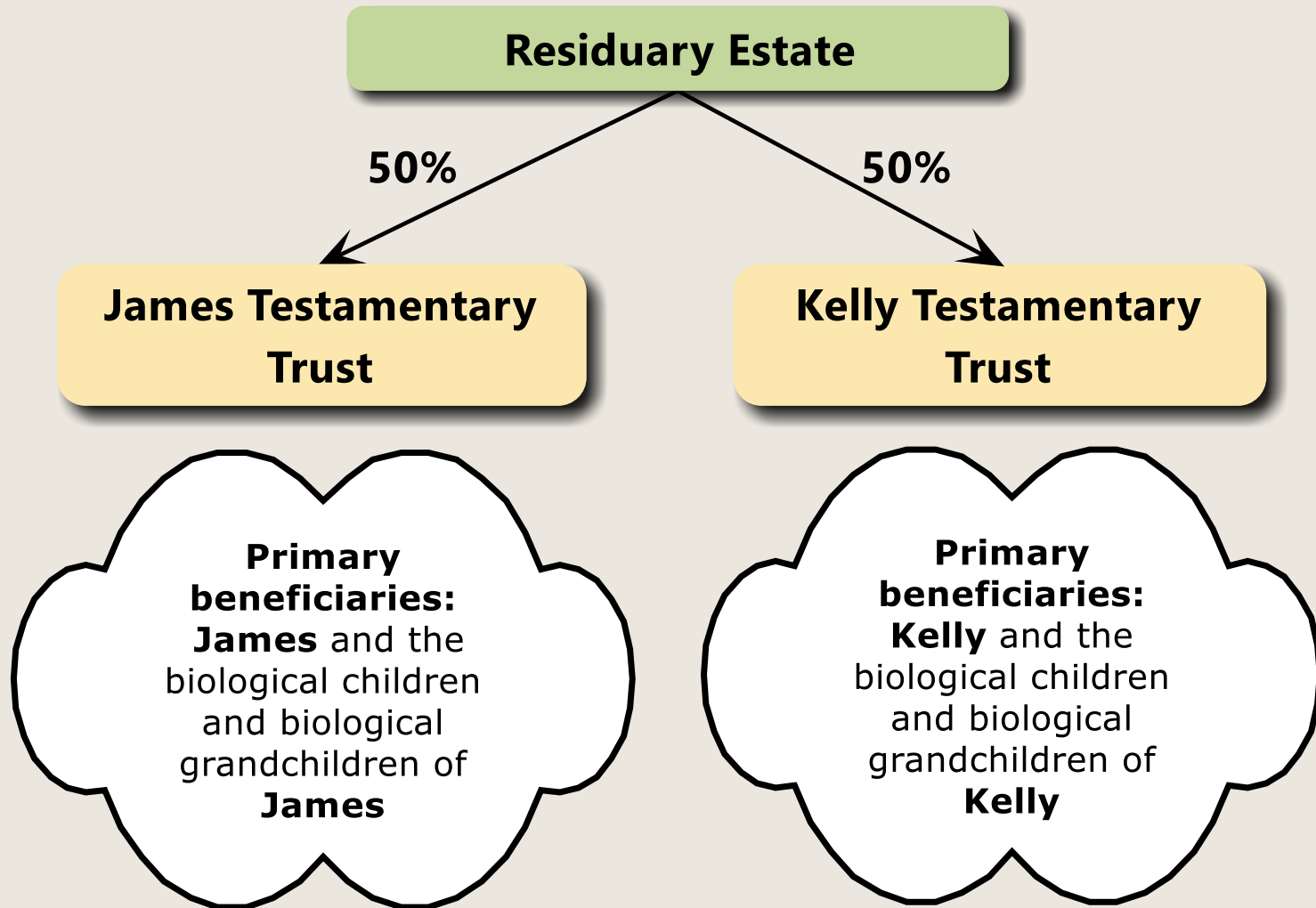


Wish that trustees and appointors of existing trust permit Elizabeth to have unrestricted use and enjoyment of holiday homes



Direction that trustees of the existing trusts do all such things to cause the transfer (free of all mortgages and charges) of an income generating motel to Elizabeth

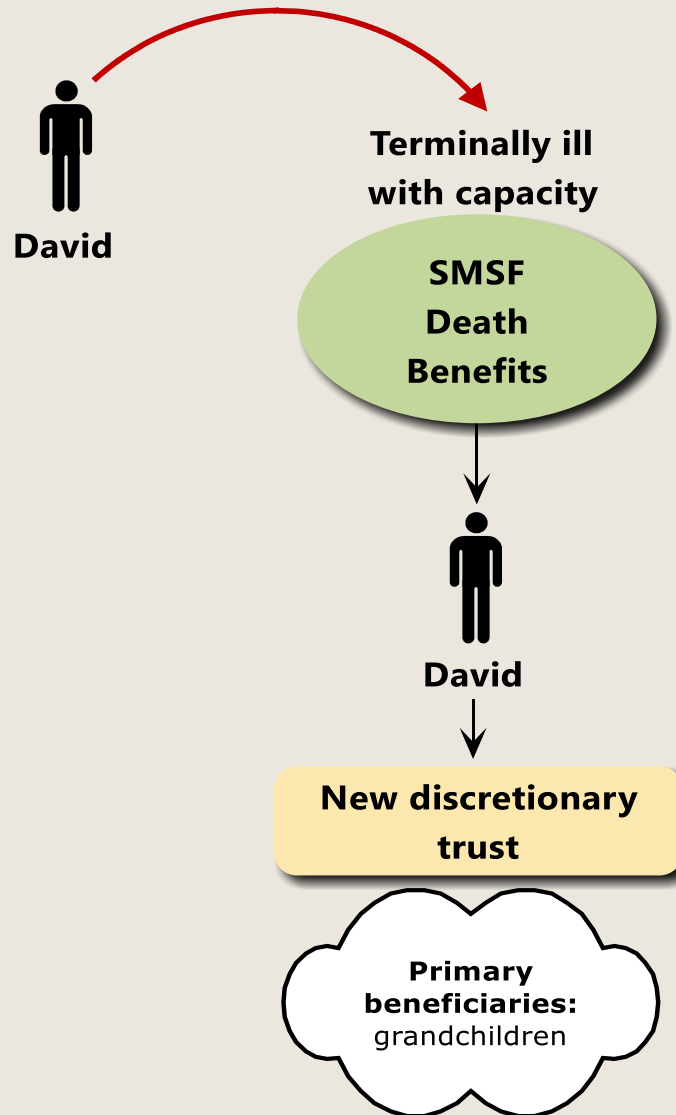
Implementation of succession plan – residuary estate



Benefits of testamentary trusts

- Beneficiaries at commercial risk
- Spendthrifts and gamblers
- Beneficiaries in an unstable relationship
- Taxation issues

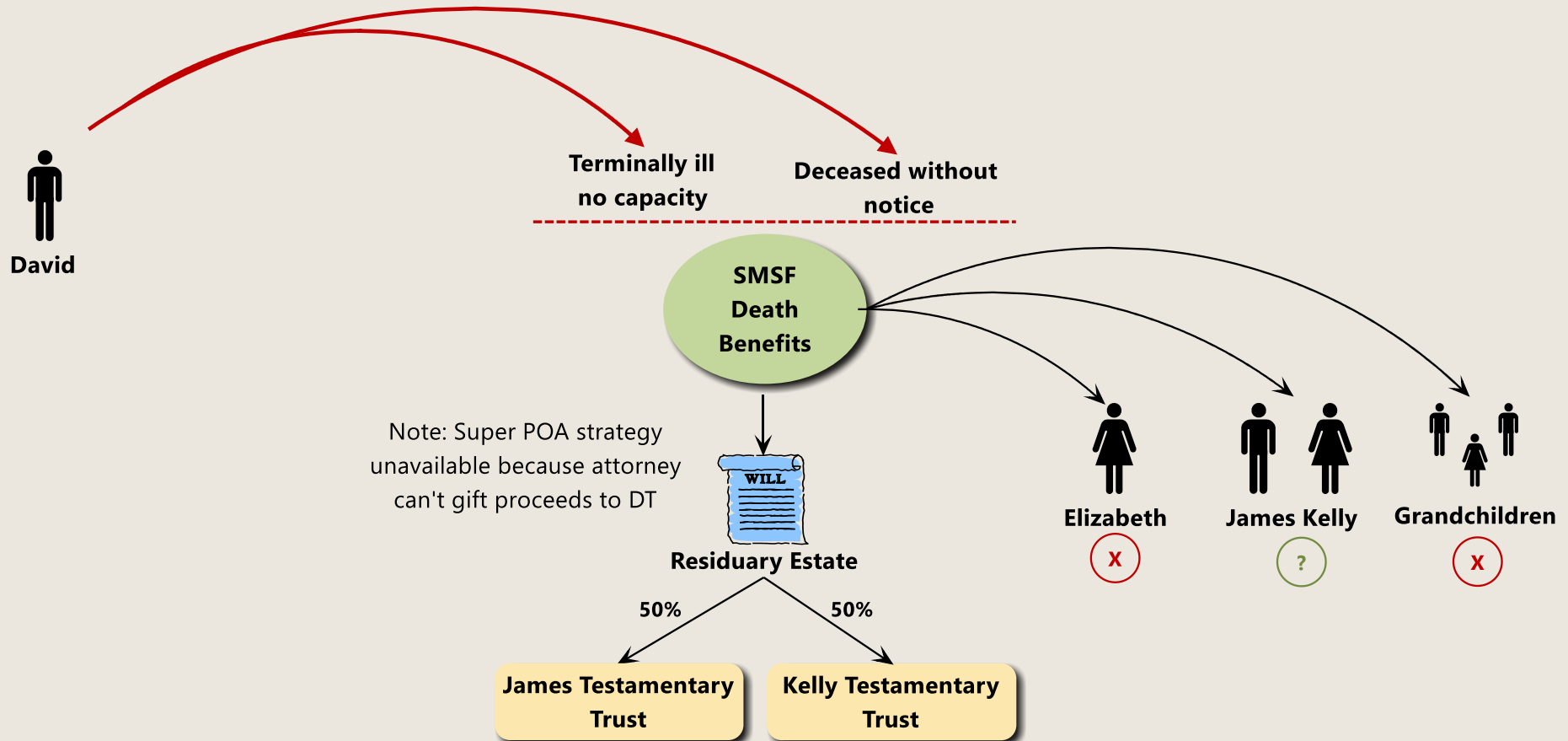
Superannuation benefits – terminally ill with capacity



Payment of superannuation benefits

- **Terminally ill with capacity**
Superannuation benefits withdrawn during David's life and distributed directly to David. So as to not have the superannuation benefits in David's personal name, they are then gifted to a new discretionary trust for the benefit of his children and/or grandchildren.

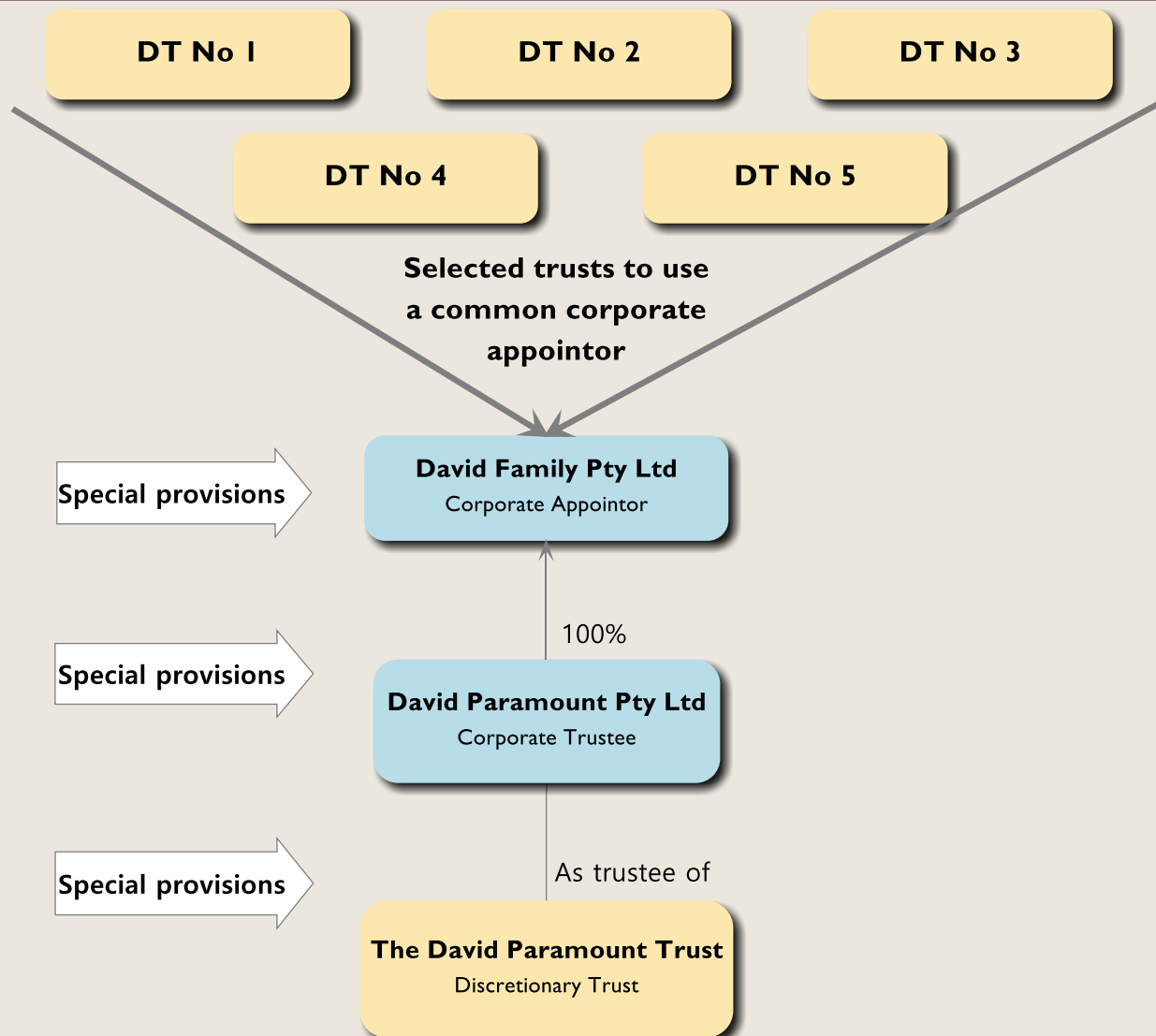
Superannuation benefits – terminally ill no capacity or deceased



Payment of superannuation benefits

- **Terminally ill without capacity or deceased**
Superannuation benefits paid to children pursuant to a BDBN (exposed to family law and creditor risk but kept outside of the estate) or paid to estate and distributed in accordance with David's will (utilise benefits of testamentary trusts but exposed to estate litigation risk).

Existing discretionary trusts - corporate appointor structure



Existing discretionary trusts - corporate appointor control provisions



What about Andrew?

The law allows a person to make a claim against an estate if:

- They are an eligible person as defined under the *Administration and Probate Act 1958* (Act); and
- The deceased, at the time of death, had a moral duty to provide for the eligible person's proper maintenance and support; and
- The distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person whether by will or intestacy provisions.

Under the Act step-children do have the right to make a family provision claim on the estate of their step-parents.

In determining the amount that a Court may award to an adult step-child, the Court will usually take into account the degree to which the adult step-child is not capable by reasonable means, of providing adequately for their own maintenance and support.

No quick fix






- There is no quick and easy fix
- Consideration to be given to wide range of matters including existing agreements
- Key is to ensure that the right persons are in the roles of executor, trustee, appointor and director of testamentary trusts, discretionary trusts and companies
- Ensure that the estate planning documents are regularly reviewed

Digital assets and estate planning

Digital assets




- ***“Digital assets” is a broad term used to describe social media accounts, email accounts, digital music libraries, blogs, games that have monetary value and other online financial accounts.***
- Legislation in Australia regarding digital assets and their transferability on death is currently non-existent although there are some jurisdictions beginning to shine a spotlight on the issue.
- Failure to plan for digital assets could see such assets (both with monetary value and sentimental value) drift off into the “netherworld”.

The current position of the major social networks and online services - examples

Facebook		<p>The profile of a deceased person may be deleted or “memorialised” at the request of the executor of their estate. A “memorialised” profile allows friends and family to post on the wall of the Facebook profile in remembrance, but does not allow anyone to access the account. Alternatively, an immediate family member may request that the account be deleted.</p> <p>It should be noted that photos and videos previously added by the deceased may no longer be available.</p>
Hotmail		<p>Access to a deceased person’s Hotmail account is at the discretion of Microsoft. (Note: Even if the deceased’s account is closed, a copy of the deceased’s emails can be requested by the deceased’s legal personal representative.)</p>
Twitter		<p>Twitter will not provide login information for a deceased person’s account to anyone; however the executor of their estate can apply to have the account deleted.</p>
Paypal		<p>A deceased person’s PayPal account can be closed by providing documentary evidence of death and identity. The balance of any funds in the account will be payable to the estate of the deceased.</p>
Instagram		<p>The profile of the deceased person may be deleted or “memorialised” at the request of an immediate family member. Proof of death will be required to memorialise the account and proof of authority of the appointed legal personal representative of the deceased is required to close the account.</p>

Gaining access to digitally stored assets

There are several options that a person can consider to ensure digitally stored information such as account details and passwords is accessible upon their death including:

True Key		<p>True Key is a password manager that allows you to securely store a list of usernames and passwords in a virtual vault that is locked with a master password.</p> <p>The True Key data is kept on your trusted device and does rely on you providing login details to the executors of your estate.</p>
1Password and		<p>1Password and LastPass are also comprehensive password managers. Similar to True Key they provide a place for users to store passwords, software licenses and other sensitive information in a virtual vault that is locked with a master password.</p>
Last Pass		<p>As with True Key, data is kept on your own devices, and it does rely on you providing the login details to the executor of your estate.</p>



Tips on how to protect digital assets

1. Consider providing digital and online account information to executors including passwords and login details or give instructions on where such details can be found.
2. Consider providing executors with a list of hardware or special programs used including the location of important digital files and online memberships.
3. Give instructions in relation to how online accounts and information should be managed after death (i.e. what should be destroyed, cancelled or changed to “in memorium”).
4. Consider the terms and conditions of the digital assets to ensure wishes are able to be exercised and that access by an executor is not in breach of terms of conditions.

Appointment of a medical treatment decision maker



Changes to medical decision making laws

- Medical treatment decision making laws changed on 12 March 2018 with the commencement of the *Medical Treatment Planning and Decisions Act (Vic) 2016* (Act).
- The Act repeals the previous *Medical Treatment Act 1988*.
- The focus of the Act was to simplify the laws on medical treatment aiming to provide persons with the ability to decide and document what treatment they want and ensure people receive medical treatment that is consistent with their preferences and values.
- An Enduring Power of Attorney (Medical Treatment) that was validly prepared and executed prior to 12 March 2018 still remains valid unless replaced by a new appointment pursuant to the Act.

What is a medical treatment decision maker (MTDM)?

- The Act allows a person to plan ahead and take control of who has legal authority to make medical treatment decisions for them if they are unable to make those decisions for themselves.
- A MTDM can consent to, or refuse the commencement or continuation of, medical treatment or a medical research procedure on your behalf.
- The MTDM is required to make the decision that he or she reasonably believes the person would have made had they had decision making capacity.

What decisions can a MTDM make?

- Medical treatment decisions include:
 - treatment with physical or surgical therapy;
 - treatment for mental illness;
 - treatment with prescription pharmaceuticals or an approved medicinal cannabis product;
 - dental treatment; and
 - palliative care.

Advance care directive

- In addition to preparing a form of appointment of a medical treatment decision maker, a person may also prepare an advance care directive.
- An advance care directive sets out binding instructions, preferences and values in relation to medical treatment.
- An advance care directive may contain either or both of the following:
 - An **instructional directive**, which is an express statement about medical treatment that the person consents to or refuses the commencement or continuation of; **and/or**
 - A **values directive**, which is a statement about the persons preferences and values to be used as the basic upon which the person would like any medical treatment decisions to be made on their behalf.

What is the process for making medical treatment decisions?

If a person has lost decision making capacity and has made an instructional advance care directive that includes directions about the proposed medical treatment then the person health care practitioner must follow the directive as far as is reasonably practical.

If a person has made an advance care directive but it does not include a relevant instructional directive then the MTDM will be asked to make the decision.

- The MTDM must:
- Consider any valid values directive;
- Consider any relevant preferences the person has expressed;
- Consider the persons values whether expressed or inferred during their life;
- Consider the likely effects of the medical treatment and whether they are in line with the persons preferences and values;
- If preferences and values cannot be ascertained then the MTDM must make a decision that promotes the persons personal and social wellbeing; and
- Consult with any person the MTDM reasonably believes would have been consulted by the person in the circumstances.

Overlap with other enduring powers of attorney

- If a person appoints an attorney in respect of personal matters as well as a MTDM there is some overlap in the powers given to both the attorney and the MTDM.
- In relation to medical treatment, the MTDM can override the personal attorney.
- A MTDM can also elect to withdraw medical treatment whereas a personal attorney cannot.

Resolving succession disputes pre and post death

Presented by Edward Skilton

4 September 2018





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Resolving succession disputes pre and post death

Will Validity



Will Validity

3 main areas of contention:

- Cognitive capacity to make a Will.
- Knowledge and approval of the contents of the Will.
- Freedom from undue influence in making the Will.

Testamentary Capacity

4 part *Banks v Goodfellow* test:

- Understand the nature and effect of a Will.
- Understand the nature and extent of their property.
- Comprehend and appreciate the claims to which they ought to give effect.
- Be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition.

Testamentary Capacity

Understand the nature and effect of a Will:

- The simplicity of or complexity of a particular Will and/or family situation may have a bearing on whether the willmaker retained the requisite level of capacity.
- *Ryan v Dalton*; Estate of Ryan [2017] NSWSC 1007 at para 6:
“... *Even taking into account the relative simplicity of the 2013 Will, the Court is not left with just a residual doubt.*”

Testamentary Capacity

Understand the nature and extent of their property:

- Handing over the management of share portfolios and real estate to advisers is not necessarily a bar to a finding of capacity.
- Consider the level of understanding a willmaker has of the distinction between ownership of assets and control of separate structures.
- Does the willmaker have at least a general understanding even if they cannot confirm the exact shares owned / address of investment properties / values of assets and liabilities.

Testamentary Capacity

Comprehend and appreciate the claims to which they ought to give effect:

- An unfair Will is not necessarily evidence of a lack of capacity. Consider an application for further provision pursuant to *Part IV* of the *Administration and Probate Act 1958*.
- Was the willmaker incapable of weighing competing moral claims, for example the reasonable needs of children and grandchildren?

Testamentary Capacity

Be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition:

- Disputes around this element of the test often involve an exploration of the severity and type of dementia suffered by a willmaker.
- The Court may require expert evidence as to how the disorder of the mind impacted upon the first three elements of the test.

Testamentary Capacity

Key evidence may be provided by:

- Lawyers who took instructions, prepared the Will, witnessed the execution of the Will.
- Family / friends of the willmaker.
- Accountant(s).
- Aged care staff.
- Contemporaneous notes and affidavit / oral evidence of the treating GP and/or specialist medical practitioner(s).
- Retrospective expert medical analysis using contemporaneous medical notes, lawyer and other witness affidavits.

Knowledge & Approval

The person seeking to have the Will admitted to probate (usually an executor) is required to prove that the willmaker understood what s/he was doing and its effect, that is to say, that the Will truly represented the willmaker's testamentary intentions. Generally, it is presumed that if a Will has been executed correctly, the willmaker knew and approved of the contents of the Will. That presumption can be displaced however if there are suspicious circumstances surrounding the making of the Will.

Knowledge & Approval

Suspicious circumstances may include:

- The declining health of the willmaker.
- The involvement of family in the making of the Will.
- The willmaker's difficulties with language, eyesight and/or hearing.

Knowledge & Approval

Testamentary capacity is concerned with the willmaker's ability to understand.

Knowledge and approval is concerned with whether the willmaker actually did understand.

Undue Influence

Probate undue influence (coercion) is notoriously difficult to prove. The burden is on those objecting to the Will being admitted to probate to prove that the willmaker signed the Will not by a deliberate act but due to the pressure placed upon the willmaker by another person.

Undue Influence

It is observed that children may request that a parent make a Will in their favour and may seek to influence a parent, without that influence reaching such a level as to overbear the free will of the willmaker.

Where a lawyer is involved in the making of a Will, that is to say the lawyer stands between the influencer and the willmaker, it may be so hard to prove undue influence, particularly where the influencer is required by the lawyer to remain outside of the room while the Will is discussed and executed.

Case Study 1

Key facts:

- Deceased died leaving 3 adult children.
- Personally owned assets, control of various very valuable inter vivos trusts (control of which defaulted to the LPR).
- Family disharmony due to a spouse of a child asserting himself as a decision maker for the family.
- 2 of the children desire to wrestle control away from their sibling's spouse.

Case Study 1

The Wills:

- Penultimate Will (lawyer prepared, 2 years prior to death):
 - Independent executor
 - Direction to administer the inter vivos trusts for the equal benefit of the 3 children and their descendants.
 - 3 discretionary testamentary trusts to receive 1/3rd each of residue.
- Last Will (family member prepared, 2 weeks prior to death):
 - Family member executor (spouse of a child of deceased).
 - No direction in respect of the administration of inter vivos trusts.
 - Specific assets to each of the 3 discretionary testamentary trusts (favouring the trust in respect of which the executor's spouse is the primary beneficiary).

Case Study 1

Strategic focus:

- Capacity:
 - Contemporaneous medical notes reveal evidence of early vascular dementia but GP says “no problem making a Will”.
 - A retrospective expert medical report however raises doubt as to testamentary capacity.

- Undue influence:
 - No evidence that willmaker was particularly frail or vulnerable and no evidence that executor forced the willmaker to sign.

Case Study 1

Strategic focus:

- Knowledge and approval:
 - Executor claims to have read over the Will and clearly recollects discussion with the willmaker.
 - But the willmaker did not speak very good English and the Will is complex.
 - Solicitor who prepared penultimate Will ensured a qualified interpreter and translator was used.
 - Alleged witnesses don't remember signing the Will or witnessing the willmaker sign.

Case Study 1

- Division 128 of the ITAA 1997 (rollover) operates when a CGT asset owned by a person just before death passes to the deceased's LPR or to a beneficiary in the deceased's estate (section 128-15 of the ITAA 1997).

- Subsection 128-20(1)(d) of the ITAA 1997 provides that:

A CGT asset passes to a beneficiary in your estate if the beneficiary becomes the owner of the asset: ...

(d) under a deed of arrangement if:

(i) the beneficiary entered into the deed to settle a claim to participate in the distribution of your estate; and

(ii) any consideration given by the beneficiary for the asset consisted only of the variation or waiver of a claim to one or more other CGT assets that formed part of your estate.

Case Study 1

Stamp Duty

- S42 of the *Duties Act 2000* exempts transactions from Duty where:
 - The transfer is not made for valuable consideration by the LPR of the deceased to a beneficiary under and in conformity with the trusts contained in a Will or arising on an intestacy, or the transfer relates to a property that is the subject of a trust for sale contained in the Will of the deceased.
 - The transfer is not made for valuable consideration by the LPR of the deceased to a beneficiary to the extent that the transfer is made in satisfaction of the beneficiary's entitlement arising under the Will of the deceased or arising on an intestacy.

Case Study 1

Stamp Duty

- Revenue Ruling DA.051:
 - It is the excess in the benefit that the transferee receives as compared with the benefit under the Will or intestacy that is dutiable.
 - An Order following a successful family provision claim varies the Will or intestacy and therefore the exemption is obtained.

[Note: An Order dismissing a family provision claim (for example because it has settled at mediation) does not vary the will or intestacy and therefore the exemption may not be obtained.]

Case Study 1

Outcomes:

- We picked our preferred assets, which was better than our best case under the Wills because the executor was concerned about losing control of inter vivos trusts.
- We assumed the (calculated) risk on Duty as although we received a greater value of dutiable property than we would in conformity with the Will, other dutiable property remained in inter vivos trusts, presenting us with a possible argument that we did not receive more dutiable property. Our client obtained a full exemption.
- The executor assumed the risk on CGT. Has not yet lodged a return.

Resolving succession disputes pre and post death

Control of Trusts



Key Roles

- Discretionary objects (beneficiaries) – right to due administration, to be considered.
- Trustee – legal title to the assets, to administer the trust in the best interests of the beneficiaries as a whole.
- Guardian – consent required to certain actions e.g. distributions of capital.
- Appointor – power to remove and appoint trustees (fiduciary?).

Replacing Trustees

- Pursuant to trust instrument – generally in the discretion of the Appointor. Key considerations:
 - *Mercanti v Mercanti* – suggests that Appointor could replace trustee and appoint himself/his own company in order to restore the status quo of the management of the trust's business.

Replacing Trustees

- Contrast with *Ying No.6* in which it was held that the Appointor, in removing the trustee and appointing his own company as trustee of the relevant trusts, owed a fiduciary duty to the beneficiaries of the trusts to act in their best interest interests and not for a collateral purpose, for his own benefit or with any ulterior purpose. The Appointor breached those duties. It is appropriate to grant a declaration that the appointment of the new trustee was and remains invalid, and consequently should be ordered to be aside.

Replacing Trustees

Statutory power under s 41 *Trustee Act 1958* – note it is permitted for a person (beneficiary) to apply to have him/herself appointed as trustee (unlike in some other States/Territories):

“ (1) Where a trustee is dead, or remains out of Victoria for more than one year without having properly delegated the execution of the trust, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him or refuses or is unfit to act therein, or is incapable of acting therein, or is a minor, then, subject to the restrictions imposed by this Act on the number of trustees—

Replacing Trustees

*“ . . . (a) the person or persons nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust; or (b) if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee—
may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of Victoria, desiring to be discharged, refusing, or being unfit, or being incapable, or being a minor as aforesaid.”*

Replacing Trustees

Removal by Court under s 48 *Trustee Act 1958*: “*whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the Court,*”.

Case Study 2

Key facts:

- Trust deed provided that Appointor could:
 - Remove and appoint trustees in the discretion of the Appointor.
 - Nominate successor Appointor by Will or deed.
- Last Will purported to nominate the executor as Appointor.
- When the validity of the last Will was questioned, the executor produced a copy of a deed dated almost 2 years earlier, nominating the executor (by name) as from the date of that deed of nomination.
- Beneficiaries snookered?

Case Study 2

Strategic focus:

- Test the waters with an application under Order 54 of the *Supreme Court (General Civil Procedure) Rules 2015* – seeking a proper accounting by the trustee.
- If/when the accounting is not sufficient, seek trustee removal and appointment of independent trustee pursuant to ss 41 and/or 48 of the *Trustee Act 1958*.
- Executor asserts he is Appointor by Will and/or Deed. But the Will has not yet been admitted to probate. We thought the Deed was suspicious and so arranged for a handwriting expert to inspect the original . . .

Case Study 2

Outcomes:

- Trustee promptly agreed to transfer assets out to the beneficiaries as a discretionary distribution.
- Assets were pre CGT.
- Duty exemption obtained under *s 36A Duties Act 2000* as the beneficiaries were beneficiaries of the trust when the property was acquired by the trust and the trust paid Duty at the time.

Note the client's own trust could have qualified as a beneficiary exempt from Duty but there was a concern as to a possible foreign trust Duty surcharge as the client's trust had foreign beneficiaries and the client had a very low appetite for the slim risk of resettlement, given their own trust had less flexibility than most discretionary trusts.

Resolving succession disputes pre and post death

Inter Vivos Transfers



Inter Vivos Transfers

- Capacity – similar considerations to testamentary capacity.
- Equitable principles:
 - Unconscionable conduct (inequality of bargaining power).
 - Presumption of undue influence.
- Nature of the transaction – was it a gift, loan or some trust arrangement?

Case Study 3

Key facts:

- Family disharmony. Eldest child moves in with patriarch and keeping two younger children at arm's length from patriarch.
- Eldest child needs to go out to work so nurses attend upon the patriarch at the home.
- Patriarch tells nurse in earshot of eldest child, that patriarch will leave a significant gift to the nurse in his Will and if the nurse were minded to marry him, she could have his home.

Case Study 3

Key facts:

- Eldest child arranges for the home (farm) to be transferred into her name (pre CGT asset and family farm exemption from Duty claimed).
- Patriarch dies, Will leaves assets equally between the children (including our client the youngest child) but the home has already been registered in the name of the eldest child.

Case Study 3

Strategic focus:

- Some obvious capacity concerns but nothing overtly pointing to such cognitive decline as to invalidate the transfer.
- May be unconscionable for child to retain the property given the patriarch depended upon her for care and was at a special disadvantage in relation to her.
- The transfer may have been the result of undue influence?
- Was there more to this transfer than an intention for the child to retain beneficial ownership?

Case Study 3

The child was in a position of ascendancy and will not be able to rebut the presumption of undue influence?

- *Thorne v Kennedy* at [30]-[36]:

“In Allcard v Skinner, Lindley LJ said that “no Court has ever attempted to define undue influence”. One reason for the difficulty of defining undue influence is that the label “undue influence” has been used to mean different things. It has been used to include abuse of confidence, misrepresentation, and the pressure which amounts to common law duress. Each of those concepts is better seen as distinct. Nevertheless, the boundaries, particularly between undue influence and duress, are blurred. . .”

Case Study 3

“ . . . One reason why there is no clear distinction is that undue influence can arise from widely different sources, one of which is excessive pressure. Importantly, however, since pressure is only one of the many sources for the influence that one person can have over another, it is not necessary that the pressure which contributes to a conclusion of undue influence be characterised as illegitimate or improper.”

Case Study 3

- An independent witness spoke to us regarding the transfer. He says:
 - The child was concerned that her father would transfer the home to “any nice lady who looked after him”
 - The home was “transferred to the daughter to make sure he couldn’t transfer it to anyone else”.
- Although undocumented and despite the statutory declaration the child made in respect of the Duty exemption, our client alleged the property was held upon trust for the deceased transferor.

Case Study 3

Outcomes:

- Without admissions the transferee child agreed to mortgage the property and transfer a sum equal to the value of our client's entitlement under the Will if the property remained in the estate (1/3rd).
- A good result for our client as no CGT or Duty factored in, sum paid included growth in value since the transfer.
- The transferee child may have had a potential claim against the estate for further provision (more than the 1/3rd provided in the Will) pursuant to Part IV of the *Administration and Probate Act 1958*.

Conclusion



Super and death – mistakes and how to avoid them

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Overview

- Control cases
- BDBN cases
- Conflict cases

Super and death – mistakes and how to avoid them

Control cases



Control Cases

- Katz v Grossman
- Ioppolo v Conti
- Wooster v Morris

Control Cases

- Problem
 - Leaving one person in control of the fund when another is to benefit
 - Even if binding nominations are made
 - In particular for blended families

Control Cases

- Solutions
 - Second super funds – especially for second spouses
 - Control of the shareholding in the SMSF corporate trustee
 - Guardian role in the SMSF
 - Binding death benefit nominations

Super and death – mistakes and how to avoid them

BDBN cases



BDBN Cases

- Donovan v Donovan
- Munro v Munro
- Re Narumon Pty Ltd

Control Cases

- Problem
 - BDBN is lapsing
- Solution
 - Update the SMSF trust deed to remove lapsing provisions

Control Cases

- Problem
 - Avoiding defective BDBNs
- Solutions
 - Follow procedures in the SMSF deed including
 - Form
 - Witness requirements
 - Service
 - Less requirements the better

Control Cases

- Problem
 - Attorneys making BDBNs
- Solution
 - Provide in the SMSF deed that attorneys can make BDBNs
 - Provide in the power of attorney that attorneys can or can't make BDBNs

Super and death – mistakes and how to avoid them

Conflict cases



Conflict cases

- McIntosh v McIntosh
- Brine v Carter

Control Cases

- Problem
 - Beneficiary has a conflict in role of executor and beneficiary
- Solution
 - Have a will and name an executor
 - In the will expressly allow for executor to act in conflict and seek super benefits for themselves
 - In intestacy situations don't seek administrator role



Thank You

Drinks and canapés are served until 8.00pm, so if you have further questions, please come and chat.