

# Complex estate planning in a complex world

RACV Club

6 September 2016



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

Presented by Rob Jeremiah

6 September 2016



# Effective estate planning for super

Presented by Phil Broderick

6 September 2016





# Phil Broderick Principal Sladen Legal

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## Outline

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- Tying super into estate planning
- BDBNs
- Reversionary pensions
- What takes precedence: BDBNs or reversionary pensions?
- Control of SMSF trustee
- Powers of attorney and SMSFs

## Introduction – tying super into estate planning

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- Super:
  - does not automatically form part of a member's estate
  - is not automatically governed by a member's will
- However, can still govern super:
  - If the super is directed to be paid to the estate
  - By appointing the legal personal representative who can be appointed as trustee/director
  - In dealing with the shares held in the corporate trustee
  - By expressing wishes as how to pay super death benefits
  - By creating a superannuation proceeds trust

## Introduction – tying super into estate planning

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- Super needs to be considered separately from personal assets governed by the will:
  - Who can receive death benefits is limited
  - Tax treatment to beneficiaries differs depending who the death benefits are paid to and the age of the member/beneficiary
  - The form of the death benefit (lump sum or pension) differs depending on the who the death benefits are paid to and their age
  - Tax treatment to the SMSF differs depending on who receives the death benefits and the form of the death benefits
- Most important considerations in super estate planning are:
  - Controlling how the super death benefit is paid
  - Controlling who controls the SMSF



## Binding death benefit nominations (BDBNs)

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- BDBNs can be thought of as wills for super funds
- It is not compulsory for super funds to offer BDBNs
- 2 BDBN regimes
  - Non-SMSFs; and
  - SMSFs

## Non-SMSF BDBNs

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- Non-SMSF BDBNs governed by the SIS Regs (reg 6.17A) must meet certain criteria; including that they must:
  - (a) be in writing;
  - (b) be signed, and dated, by the member in the presence of 2 witnesses, being persons:
    - (i) each of whom has turned 18; and
    - (ii) neither of whom is a person mentioned in the notice;
  - (c) contain a declaration signed, and dated, by the witnesses stating that the notice was signed by the member in their presence.
  
- Non-SMSF BDBNs lapse after 3 years

## SMSF BDBNs

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- SMSFs are not governed by reg 6.17A (confirmed in SMSFD 2008/3)
- Therefore, SMSF BDBNs will be governed by the SMSF's trust deed, including whether the SMSF offers one at all
- Requirements could potentially include:
  - a particular form (often a schedule to the SMSF trust deed);
  - particular wording in the BDBN (eg that it says it's binding)
  - delivery of the BDBN to the SMSF trustee;
  - witnessing requirements.
- Given that every SMSF trust deed has different requirements, it's important to review each SMSF and follow the specific requirements and procedures

## Tailoring SMSF BDBNs

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- Given that SMSF BDBNs are governed solely by the SMSF trust deed, is great flexibility to tailor BDBNs, including:
  - Cascading BDBNs (ie dealing with death of nominees)
  - Dealing with specific benefit interests
  - Dealing with specific SMSF assets
  - “Life interest” pensions

## Case examples of BDBNs – *Donovan v Donovan*

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- Facts
  - Member wrote a letter to himself as director of the corporate trustee of the SMSF expressing that it was his wish that his benefits be paid to his estate.
  - SMSF trust deed granted the members the power to make BDBNs "in the form required to satisfy the Statutory Requirements"
- Found
  - Member's "wish" was not expressed to be binding and therefore it was not a BDBN
  - Reference in the trust deed to BDBNs satisfying the "Statutory Requirements" meant that the BDBN was required to satisfy the requirements of reg 6.17A SIS Regs
  - Here those requirements not met and therefore nomination not binding

## Case examples of BDBNs – *Wooster v Morris*

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- Facts
  - Member prepared a BDBN in favour of 2 daughters from the first marriage
  - Second spouse was the surviving trustee
  - Second spouse relied on legal advice that BDBN was defective and not binding
  - Second spouse paid the death benefits to herself
- Found
  - BDBN was binding
  - Second spouse should have sought court advice re binding nature of BDBN and before defending proceedings
  - Costs of proceedings ordered against second spouse personally without a right of indemnity from the SMSF

- Facts
  - Member prepared 2 BDBNs in favour of her husband but both lapsed under SMSF trust deed as they were over 3 years old
  - Member's will provided that super benefits were to go to member's children and no super benefits were to go to the husband
  - Husband the surviving trustee and determined to pay the benefits to himself
- Found
  - Wish in the will not binding
  - Children (who were the executors of the member's estate) had no right to be appointed as trustees
  - Husband's decision stands

## Case examples of BDBNs – *Munro v Munro*

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- Facts
  - Mr Munro, a lawyer, had a second spouse and 2 children from a previous marriage
  - Mr Munro prepared a BDBN directing his benefits be paid to the “trustee of deceased estate”
  - This matched terminology in previous BDBNs prepared by his financial planner and accountant
- Found
  - BDBN was defective
  - Trustees of estate is not a SIS dependant
  - SIS Act only empowers to pay to a legal personal representative – defined as “executor of the will or administrator of the estate of a deceased person”
  - Executor and trustee roles are distinct roles
- Lesson – use the right terminology



## Reversionary pensions

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- Historically relate to defined benefit pensions
  - Members could elect that the pension will automatically revert to their spouse upon their death
  - In the absence of such nomination the pension would cease upon member's death
- Is akin to a jointly held asset, ie automatically transfers upon death to the reversionary pensioner

## Reversionary pensions

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- The structure of reversionary pensions is not regulated by the SIS Act or Regs
  - Like BDBNs, there is great flexibility in preparing them
  - Generally straightforward
  - Could include “life interest” or cascading reversionaries
- If there is no reversionary pensioner to receive the benefits, then generally falls back to the default position, which could be:
  - Trustee discretion; or
  - BDBN
- How will the new \$1.6 million cap affect reversionary pensions?

## Limitation of reversionary pensions

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- Reversionary pensions generally work well when they are paid to spouses
- But they have a number of limitations:
  - Cannot nominate an adult child (unless disabled) or the LPR
  - Can only nominate one reversionary at a time (ie its all or nothing)
  - Cannot do a holistic nomination to cover all super interests
  - Reversionary nominations will not cover accumulation interests
  - Reversionary nominations will be lost if the pension is commuted
  - Reversionary nominations will not automatically cover new pensions, need new nominations for each pension

## Advantages of reversionary pensions

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- The ability to deal with multiple pensions separately
- Was tax advantage:
  - Reversionary pensions continued after the death of the member – ie maintained pension phase
  - Whereas non-reversionary pensions ceased upon death – ie went into accumulation phase
- No longer an issue – fixed by legislation
- But still an advantage where member holds life insurance
  - If added to a reversionary pension has same tax components as the reversionary pension
  - If not, is added to the taxable component

## What takes precedence: BDBNs or reversionary pensions?

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- Depends on the SMSF documents as not regulated by the SIS Act or Regs
- Need to review
  - SMSF trust deed
  - Pension documentation
- SMSF documentation will either:
  - Expressly state that one takes precedence over the other;
  - Provide that the one signed later will take precedence over the earlier one; or
  - Be silent as to which takes precedence

## Which takes precedence BDBNs or reversionary pensions?

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- Where SMSF documentation silent as to precedence
  - Generally the reversionary pension will take precedence
  - Because the pension will automatically transfer to reversionary pension so there is no death benefit
  - Ie like a joint tenancy
  - But does depend on the drafting of the SMSF documentation
- This view cautiously endorsed by the ATO
  - See Minutes of the March 2010 NTLG Superannuation Technical Sub-group

## Control and succession of SMSF trustees – Corporate trustees

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- Review what will happen after the member's death
  - Who will be the surviving director(s)?
  - Who are the shareholders of the corporate trustee?
  - Constitution of the company – how are directors removed and appointed?
  - SMSF deed – appointment and removal of the trustee and how benefits are/must be paid
  - The Corporations Act

## Individual trustees

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- Review what will happen after the member's death
  - Who will be the surviving trustee(s)?
  - SMSF deed and how benefits are/must be paid
  - Relevant State Trustee Act



## Corporate trustees vs Individual trustees

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- Corporate trustee generally better:
  - Gives greater options for succession planning (ie. through shareholding)
  - Death does not result in assets being transferred into new trustees' names
  - But the control of the company is generally not governed by the provisions of the SMSF deed (ie., shareholders not parties to the deed)
  - Limitation of liability
  - Penalties issued only once

## Use of guardians

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- Guardian
  - When would you use a guardian?
    - Allows non-members and non-LPRs to have a role in the SMSF
    - Enables the passing of control to children or independent persons
    - Could use when children, children's spouses or second spouses are in the SMSF
    - Implication of succession – don't have to deal with shares or changes of trustee etc
  - What powers does a guardian have?
    - Active powers such as to remove trustees or members
    - Consent powers – preventing trustees from making certain decisions without consent
  - Appointment of successive guardians
    - Matching successive guardians with successive appointors in trusts and testamentary trusts - holistic control

## Decision making and deadlocks

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- Even if you have a succession plan for the control of the fund trustee, disputes between trustees/directors may still occur, especially where there are existing members still in the fund
- Consider how decision making deadlocks can be resolved – eg., through:
  - The fund deed
  - The constitution
  - A shareholders' agreement etc
- Voting rights
  - One vote per member v proportionate voting
  - Which option is more appropriate?

## Control through SMSF deed or trustee constitution

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- Provisions that could be considered in a SMSF deed/SMSF corporate trustee constitution:
  - Power to appoint LPR as trustee/director
  - Power of LPR to compel their appointment
  - Power to make binding death benefit nominations
  - Who can be paid death benefits, ie. how does the deed define dependants/beneficiaries?

## Examples of problems with trustee succession

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### *Katz v Grossman*

- Facts
  - Father was surviving individual trustee of SMSF
  - Father appoints daughter as co-trustee
  - Father dies leaving daughter as sole trustee
  - Father's wish that assets be divided equally between son and daughter
  - Son seeks removal of daughter as trustee
- Found:
  - daughter was the sole trustee and had the sole discretion to pay father's benefits

## Examples of problems with trustee succession, cont.

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### *Moss Super Pty Ltd v Hayne*

- Facts
  - Husband wanted his assets to be paid equally to his two daughters of his previous marriage, his second wife and her two children
  - Second wife was left as the sole director of the corporate trustee
  - Daughter of first marriage sought to remove corporate trustee
- Found:
  - corporate trustee was appointed effectively and the discretion to pay benefits was left to the second wife

- Two cases have considered this issue

### *McIntosh v McIntosh*

- Facts
  - Mother appointed as administrator of son's intestate estate
  - Mother claimed and was paid son's death benefits as an interdependent
  - Estranged father sought to have the death benefits paid to the estate on the basis of conflict of interest
- Found
  - Was in breach of fiduciary duties
  - Ordered to pay the death benefits to the estate (half went to the father)

*Brine v Carter*

- Facts
  - Deceased member had a second spouse and 3 children from a second marriage
  - All 4 were executors
  - Member had 2 pension accounts to which he gave the following non-binding BDBNs
    - Defined benefit pension – to his spouse
    - Account based pension – to his estate
  - The spouse failed to inform 3 children of the existence of the nominations
  - Once the children found out they claimed the death benefits for the estate
  - UniSuper paid both pensions to the spouse



## Conflict of roles LPR v SMSF trustee/director

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### *Brine v Carter*

- Found
  - Spouse had fiduciary duties towards the estate
  - A fiduciary will not be in breach of their duties and can act in a position of conflict if they are authorised either
    - expressly or
    - by implication from the circumstances or
    - by the informed consent of the beneficiaries
  - Once the sons were aware of the claim, allowed the spouse to claim and allowed her to continue as executor they consented to her conflict of interest – therefore no breach of fiduciary duty
  - If the sons had not been aware of the estate's claim and not made a claim the spouse would have been in breach of her fiduciary duties
- Deal with issue via an authorisation of conflict clause

## Enduring financial powers of attorney

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- Are a must for SMSF members of **any** age
- Primary reason is that an attorney under an EFPoA can act as director/trustee of the SMSF
  - Prevents the SMSF becoming non-compliant
  - Assists where members are incapacitated
  - Can be used where members move overseas
  - More generally used for members who no longer want to be trustees/directors
- In addition if the deed allows EFPoAs can be used
  - To withdraw benefits before death
  - To take the actions of the member under the SMSF deed
  - To make BDBNs

# Will challenges – how the new rules are being applied by the Courts

Presented by Edward Skilton

6 September 2016





# **Edward Skilton**

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## Introduction

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- Justice Legislation Amendment (Succession and Surrogacy) Act 2014 Applies to estates of all persons dying on or after 1 January 2015.
- Different classes of "eligible claimants", some with additional requirements but all require moral duty and failure to make adequate provision.
- Quantum test beefed up.

## Claimants – Lowest threshold

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- Spouse or domestic partner: s90(a)
  - Spouse is married at time of death;
  - Domestic partner requires 2 years of living together or a minor child - this is significant because if not a domestic partner, a harder test applies
- Children: s90(b)
  - Special needs;
  - Under 18;
  - Full time student and under 25 (not part time and paying their own way!)
- Step children: s90(c)
  - Same as per s90(b);
  - No definition of "step child" - can they cease to be a step-child?

## Claimants – Middle threshold

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- "In effect" children: s90(d)
  - Believed they were the deceased's child. Same as per s90(b)
- Former spouse / domestic partner without property settlement (or other settlement?): s90(e)
- Adult children/step-children: s90(f)  
&
- "In effect" adult children: s90(g)

The relevance of being in (f) or (g) goes to quantum not eligibility

## Claimants – High threshold

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- Registered caring partner: s90(h)
- Grandchildren: s90(i)
- Spouse / domestic partner of a child of the deceased s90(j)
- Member of household of the deceased: s90(k)

Again, the relevance of being in (h) to (k) goes to quantum



## Cost Consequences

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Sections 97 (6) and (7) of the current Act repealed.

So, normal costs rules will apply? What does that mean if someone "wins" a modest amount?

### Practice Note No. 7 of 2015

Prior to the first directions hearing the plaintiff must file and serve an affidavit of their solicitor estimating the costs and disbursements up to and including mediation calculated on a standard basis.

At the first directions hearing, the Court may make an order capping the costs that may be recovered by a party in circumstances including cases where the net distributable value of the estate (excluding the costs of the proceeding) is less than \$500,000.

- In determining the amount of provision to be made by a family provision order, if any, the Court must take into account:
  - s91(4)(a) the degree to which, at the time of death, the deceased had a moral duty to provide for the eligible person;
  - s91(4)(b) the degree to which the distribution of the deceased's estate fails to make adequate provision for the proper maintenance and support of the eligible person
- The amount of provision made by a family provision order must not provide for an amount:
  - s91(5)(a) greater than is necessary for the eligible person's proper maintenance and support

- In determining the amount of provision to be made by a family provision order, if any, the Court must also take into account:
  - s91(4)(c) in the case of an eligible person referred to in paragraph (f) or (g) of the definition of "eligible person", the degree to which the eligible person is not capable, by reasonable means, of providing adequately for the eligible person's proper maintenance and support

- In determining the amount of provision to be made by a family provision order, if any, the Court must also take into account:
  - s91(4)(d) in the case of an eligible person referred to in paragraphs (h) to (k) of the definition of "eligible person", the degree to which the eligible person was wholly or partly dependent on the deceased for the eligible person's proper maintenance and support at the time of the deceased's death and . . .

The amount of provision made by a family provision order . . . s91(5)(b) in the case of an eligible person referred to in paragraphs (h) to (k) of the definition of "eligible person", must be **proportionate** to the eligible person's **degree** of dependency on the deceased for the person's proper maintenance and support at the time of the deceased's death.

### BRIMELOW v ALAMPI [2016] VSC 135

- Where deceased made no provision for adult daughter, moral duty to the plaintiff conceded but quantum in dispute.
- The plaintiff aged 50 years, married and has a son aged five years with her husband. She has three other children aged 21, 19 and 15 from a previous marriage, two of whom live with her and her husband and are financially dependent on her.
- Plaintiff and the deceased shared a meaningful relationship throughout the years and there are no circumstances that indicate a derogation of the deceased's moral duty to the plaintiff.

- (a) *The nature of the relationship, including the length of the relationship, if relevant.* The plaintiff knew the deceased all her life until the deceased's death. The plaintiff and the defendant shared a close and loving relationship throughout the years, with some differences causing a distance between them for certain periods of time.
- (b) *Any obligations or responsibilities of the deceased to the eligible person, any other eligible person and the beneficiaries.* The defendant concedes the deceased had a moral responsibility to provide proper maintenance and support for the plaintiff. The deceased also had a moral responsibility to provide for the defendant and for Vincenzo Alampi.
- (c) *The size and nature of the estate.* The assets and liabilities of the estate have been set out and considered with the result that, effectively, the net asset position of the estate is approximately \$487,000.

- (d) *The current and future financial resources, earning capacity and financial needs of the eligible person and any beneficiary.* The financial resources of the plaintiff are limited. She has no substantial assets, limited income and negligible superannuation. She has significant financial need for the future. The plaintiff's husband also has limited income. The income of the plaintiff would be used for day to day living expenses and she is unable to save for their future.
- (e) *Any physical, mental or intellectual disability of any eligible person or any beneficiary.* There was no evidence of any physical, mental or intellectual disability of the plaintiff or the defendant, save that the defendant said that he received a sum of money to compensate him for a work related injury.
- (f) *The age of the eligible person.* The plaintiff is aged 50 years.



- (g) *Any contributions (not for adequate consideration) of the eligible person to building up the estate or to the welfare of the deceased or the deceased's family.* The plaintiff does not assert any contributions to building up the estate of the deceased or to her welfare.
- (h) *Any previous benefits to the eligible person or any beneficiary.* The plaintiff has had the benefit of living with her parents for some periods of time where she was able to live either rent free or by paying a nominal amount of rent/board to her parents.
- (i) *Whether the eligible person was being wholly or partly maintained by the deceased, and if so, the extent and basis of such maintenance.* The plaintiff was not being wholly or partly maintained by the deceased, other than by the deceased's assistance to the plaintiff when the plaintiff lived with her parents for some periods of time.

- (j) *The liability of any other person to maintain the eligible person.* The plaintiff's husband maintains the plaintiff with his income paying for day to day living expenses, although his income is not significant.
- (k) *The character and conduct of the eligible person or any other person.* The plaintiff is of good character and conduct.
- (l) *The effect that a family provision order would have on the amounts received from the deceased's estate by other beneficiaries.* The defendant conceded at trial that he did not have a competing financial need although he is the residuary beneficiary.
- (m) *Any other relevant matter.* The defendant is not a credible witness and his evidence cannot be believed unless it is corroborated by reference to admissible contemporaneous documentary evidence.

Orders:

- Provision be made for the plaintiff out of the estate of the deceased by the payment to her of the sum of \$170,000.
- The plaintiff's costs of the proceeding assessed on a standard basis, to be taxed in default of agreement, be paid out of the estate of the deceased.
- The evidence indicates that the defendant has not complied with his income tax reporting obligations or with his disclosure obligations in respect of Centrelink payments for his minor children. Accordingly, these reasons for judgment are to be referred to the Deputy Commissioner of Taxation at the Australian Tax Office as well as the Minister of the Department of Human Services to take such action as they wish in reviewing the affairs of the defendant.

# Intricate trust structures and private groups

Presented by Daniel Smedley

6 September 2016





# Daniel Smedley

## Principal

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# Underlying control of trusts and the role of the appointor

Identify any “interest” and the unique structure elements

Individual

Company



Hybrid Trust



Discretionary Trust



Partnership



Class Trust



Fixed Trust



Unit Trust



## Limits on trustee's discretion

- Is the trustee's discretion subject to obtaining appointor/guardian consent to:
  - determination of income.
  - appointments or distributions of income/capital.
  - variation of the trust deed.
  - bringing forward the vesting date.
  - appointment of new trustee.



- Who owns the **shares** in the corporate trustee?
- What does the **constitution** provide for concerning governance of the trust deed and decision making?
- What is the effect of the **combination** of:
  - shareholding in the corporate trustee;
  - constitution of the corporate trustee;
  - the role of appointor/guardian in the trust deed; and
  - decision making where there are multiple persons in the role of appointor/guardian.
- Can any decisions be made?
  - **minoritarianism** - tyranny of the minority!

## The independent appointor

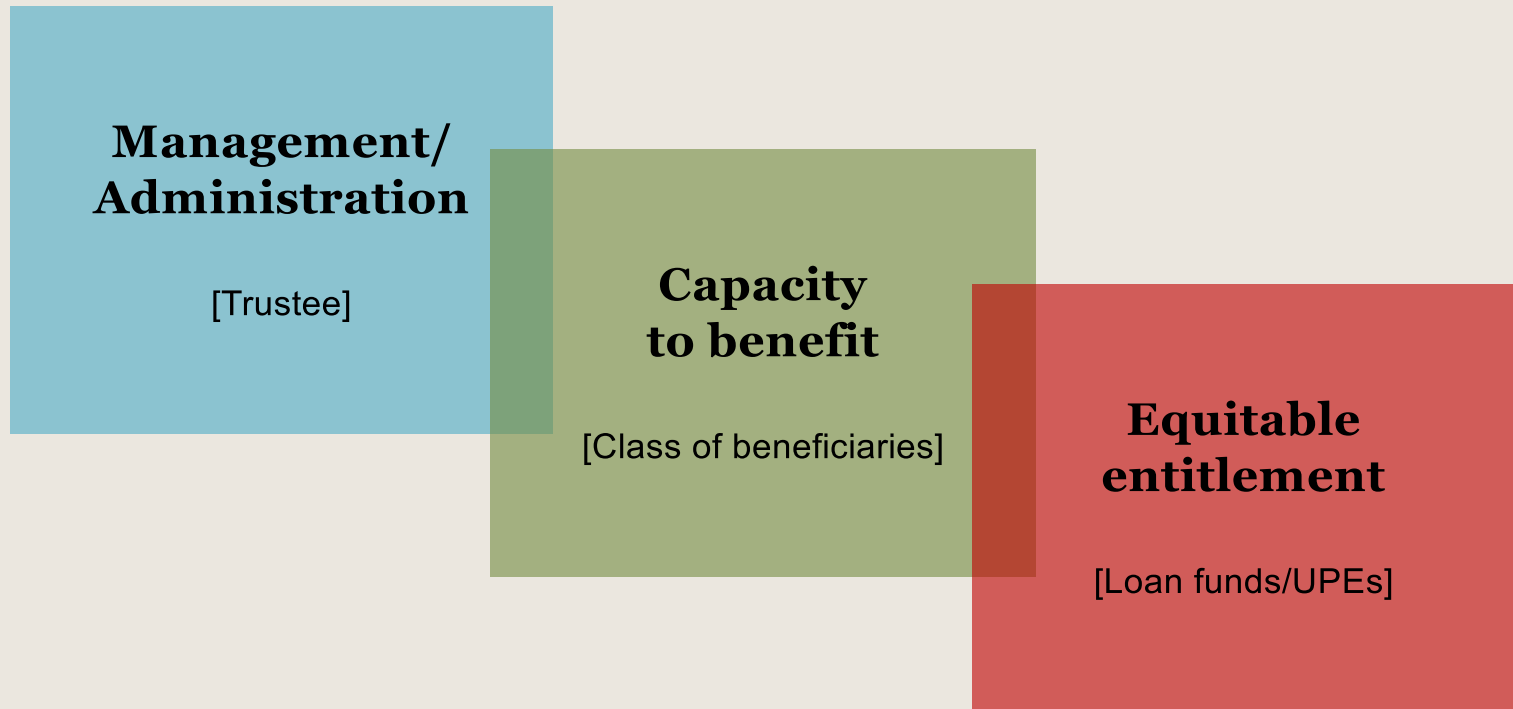
- Must be independent of the relationship and business risks of the key individual.
- Must be able to turn their own mind to any matters to be determined by the appointor and make decision free from influence.
- Should be someone in whom the family has absolute faith and confidence.
  - may be a relative;
  - may be a trusted friend;
  - may be a professional adviser.

## Review the documentation/structure

- Look for provisions concerning:
  - Changing the **appointor provisions**.
  - Including an **independent appointor**.
  - Requiring unanimous/majority or other form of **decision making**.
  - Providing a mechanism for **resolving disputes**.
  - Providing for the **succession of the appointors**.

# Appropriateness and structuring of corporate appointors

## Segmenting capital



## Structuring corporate appointors

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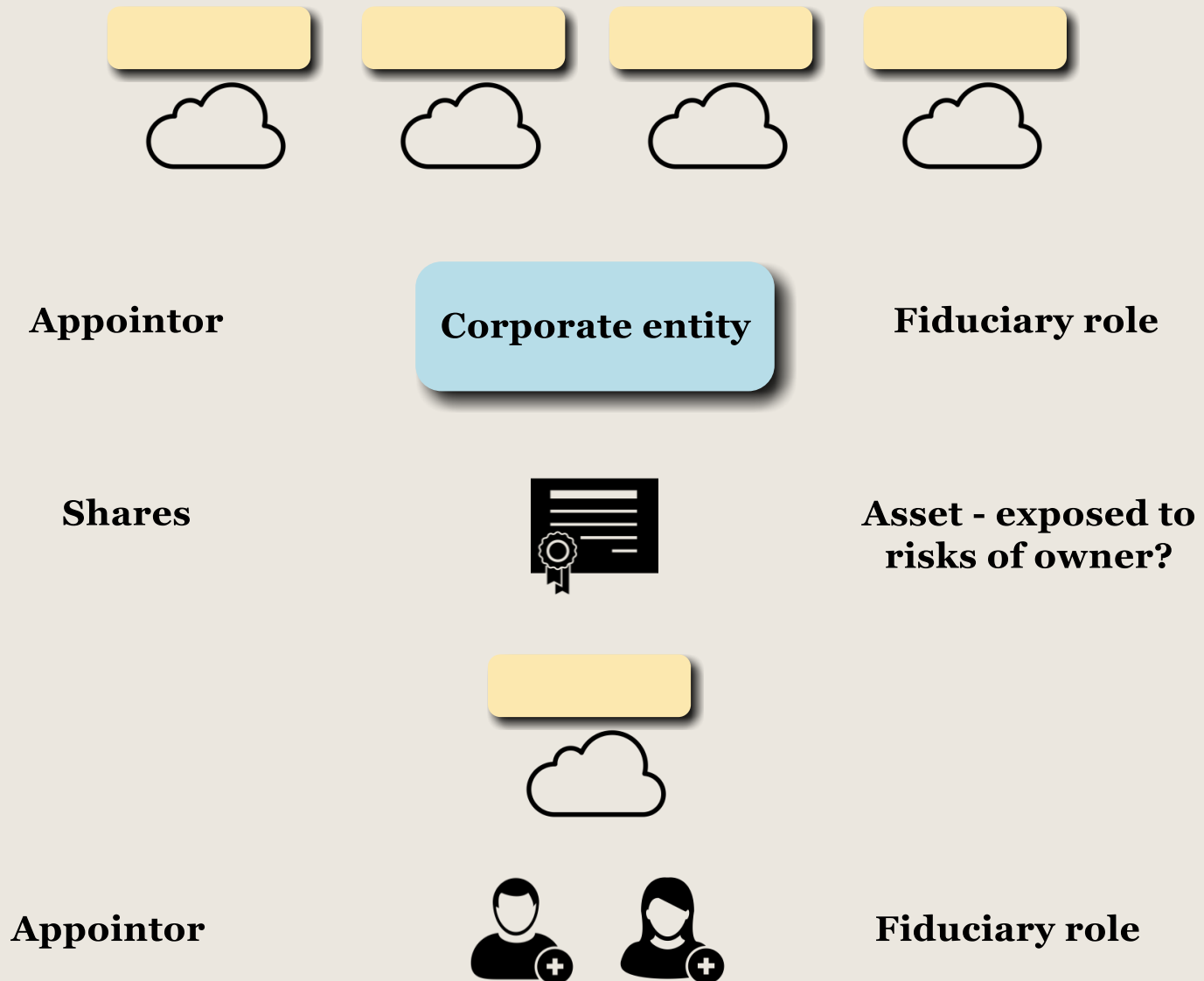
**Appointor**



**Fiduciary role**

# Structuring corporate appointors

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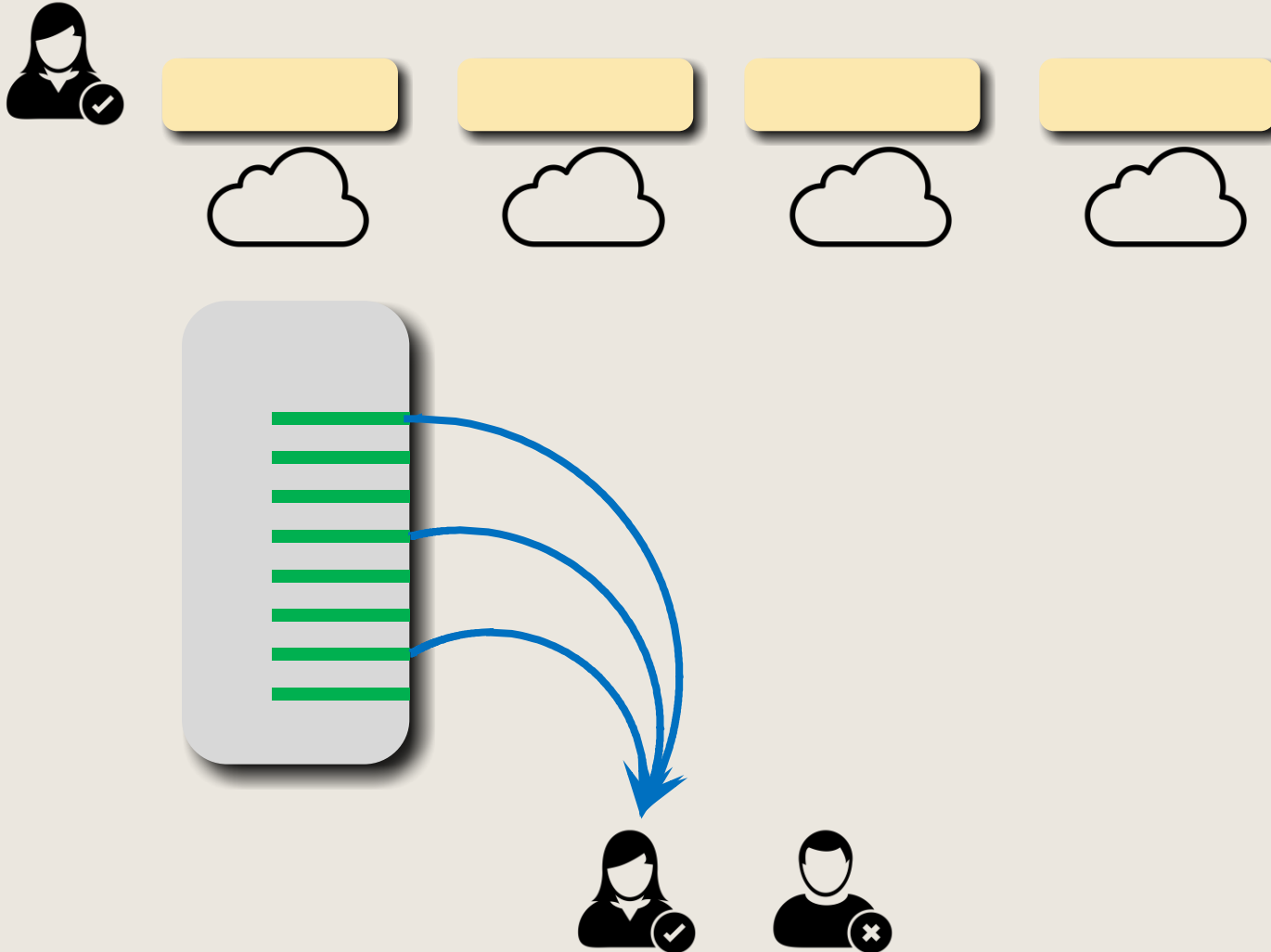


# Restrictions on related party benefit provisions in trust deeds



# Related party benefit provisions in trust deeds

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## Related party benefit provisions

- Power to grant to any beneficiary **a right of custody or use of trust assets** other than on arm's length terms.
- Power to **let property to any beneficiary** other than on arm's length terms.
- Power to **make a loan to any beneficiary** other than on arm's length terms.
- Power to **employ any person** related to the trustee other than on arm's length terms.
- Power to **employ any beneficiary** other than on arm's length terms.
- Power to **allow the trustee to deal with itself** (whether in its own capacity or in its capacity as trustee of another trust fund or to deal with any company or partnership notwithstanding that the trustee is a shareholder or director or member or partner of that company or partnership or to deal with the spouse or child of the trustee).
- Power to **act despite personal interest.**
- Etc.

Consider **placing limitations on the trustee's discretion** such as requiring the prior written consent of the appointor/corporate appointor.

## Structuring control

- Choose your **trustees** carefully.
- Choose your **directors** carefully.
- Choose your **appointors** carefully.
- Ownership of **corporate appointors**.
- Ownership of **corporate trustees**.
- **Width of classes** of beneficiaries.

## What is required?

- **Careful structuring** of the **role of the appointor/guardian** both in terms of identity of persons undertaking the role, succession should any one of those persons die or be incapable of acting and decision making/dispute resolution and the use of a corporate appointor for complex private groups.
- **Careful structuring** of the **shareholding in the corporate trustee** to ensure shares and voting rights are appropriately controlled including possibility of share split, use of legal vs remainder interest to bypass estate challenges.
- **Careful drafting** of the **constitution of the corporate trustee and corporate appointor** including limiting the trustee's discretion in relation to related party benefit provisions and using default management/distribution obligations should the next generation fail to agree on management.
- **Careful drafting** of a **family constitution to govern the relationship** between the parties, how the various family entities are to be managed and administered and the ability of those involved in the business to “buy out” any interest of the others including agreed valuation methodologies.

# Thank You

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