

Estate Planning & Super

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Agenda

- What is estate planning?
- Factors to consider
- What is a testamentary trust?
- Estate and non-estate assets
- Superannuation Death Benefits and Important Cases

Statistics

“\$46m has been transferred to the NSW Trustee & Guardian over the past 5 years due to unclaimed estates or individuals who died intestate.”

NSW Trustee & Guardian NSW

What is estate planning?


- To ensure your wealth passes to the right beneficiary, at the right time, in a tax effective manner
- Wealth is held in a variety of ownership forms and each person's estate planning objective is different
- Failure to plan well may result in...
 - A reduction in the wealth passed onto intended beneficiaries
 - Unnecessary tax liabilities
 - Benefits passing to the wrong beneficiaries






Jim Morrison



What happens if you don't have a will?

- Different intestacy rules apply in each state:
- Here is an example of what can happen:

- If  passes away, leaving only...

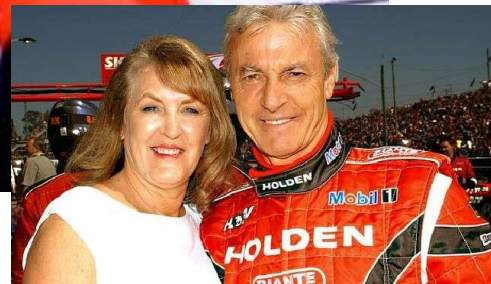
1.	 → Spouse	Spouse gets entire estate.
2.	 → Spouse & children	Spouse gets first \$350K and; 1. Interstate's personal effects, and 2. Half of the balance of the estate Children share the remainder of the estate between them.
3.	 → Children	Children share the estate equally.
4.	 → Parents	Parents share the estate equally.
5.	 → Siblings	Siblings share the estate equally.

Laws in every state are different.

Aretha Franklin



Peter Brock



First
ex-wife



Second
ex-wife



Bev



Bev's child
from a
previous
relationship

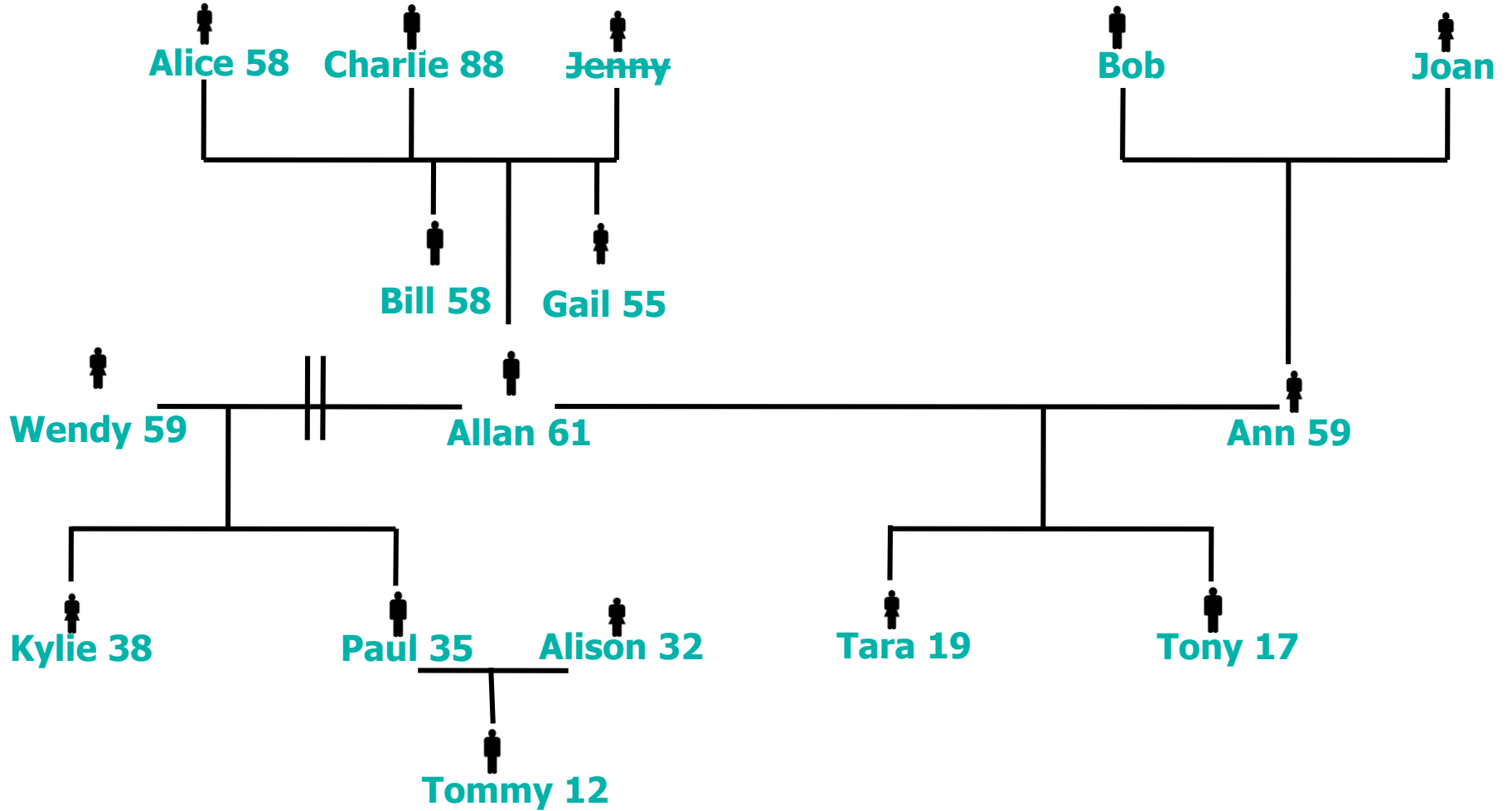


Bev's
children
with Peter

Julia



Family tree



Estate planning is not just about what happens when you pass away

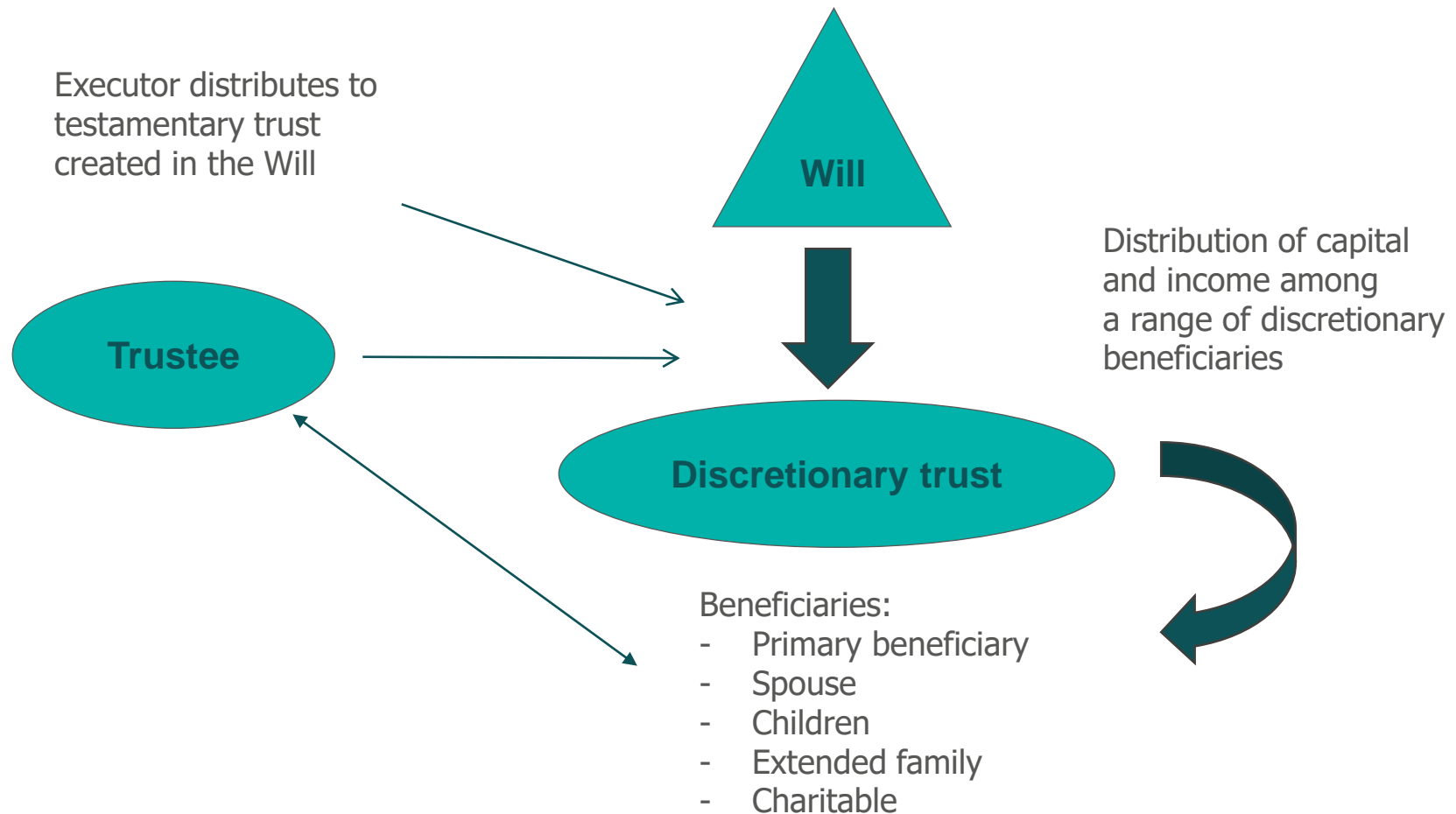
- By then it's too late to change things
- Estate planning is also about the right ownership of assets today
- Review your estate plan if there is change in circumstances e.g. marriage, child birth, divorce, death of beneficiary, change in property etc.
- Estate planning is the fundamental principal about financial planning
 - Achieving goals and objectives
 - Maximising wealth
 - Having the right level of control
 - Passing your wealth to the right people at the right time
 - Protecting your wealth

Factors to consider

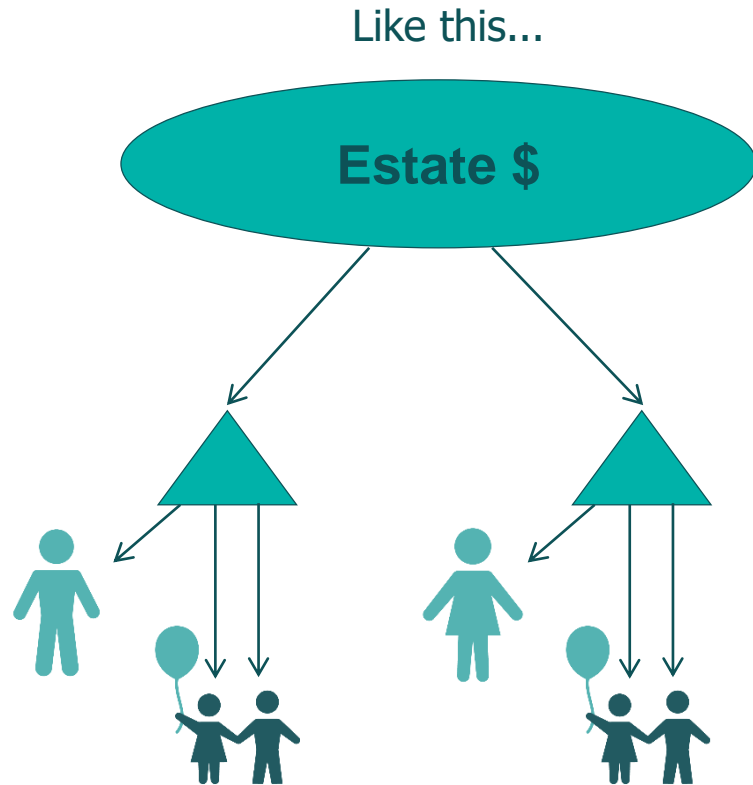
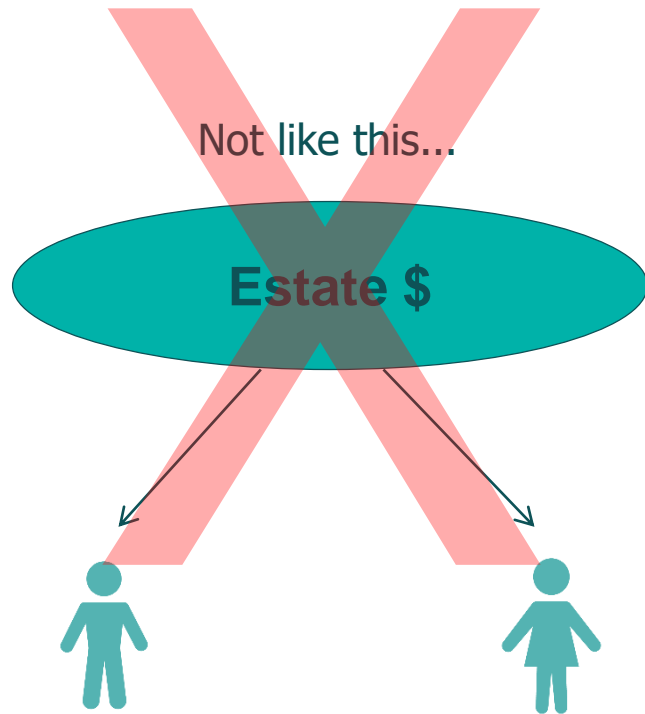
- Will
- Power of attorney
- Enduring guardianship
- Advance Health Directives
- Testamentary Trusts
- Mutual Will
- Life interests
- Equalisation clause
- Memorandum of wishes
- Charitable Trusts
- Special Disability Trusts
- Business Will
- Death Benefit nomination for your superannuation

What is a Testamentary Trust?

A testamentary trust is established by a Will that comes into effect upon the death of the will maker.



Testamentary Trust



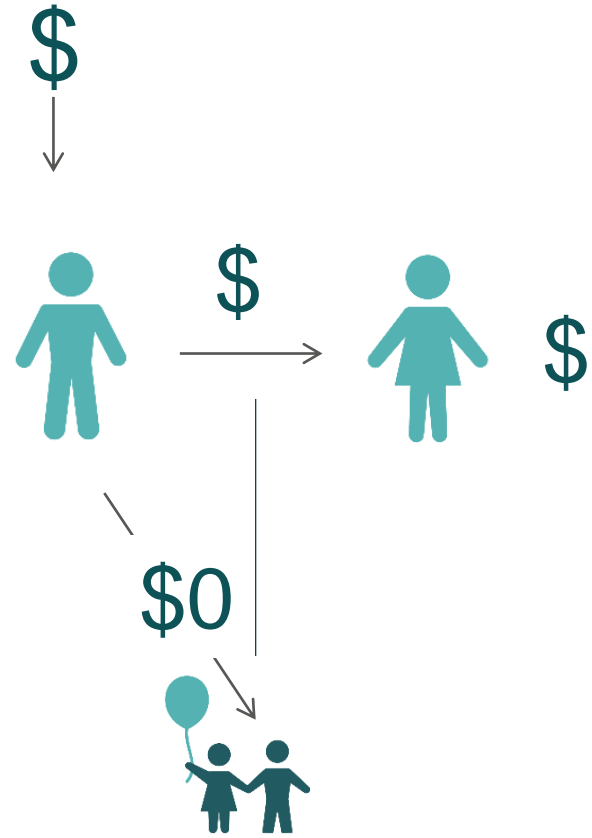
- \$ don't pass directly to beneficiaries
- \$ pass to a trust controlled by a trustee for your beneficiary's benefit

Divorce

Ideal Scenario

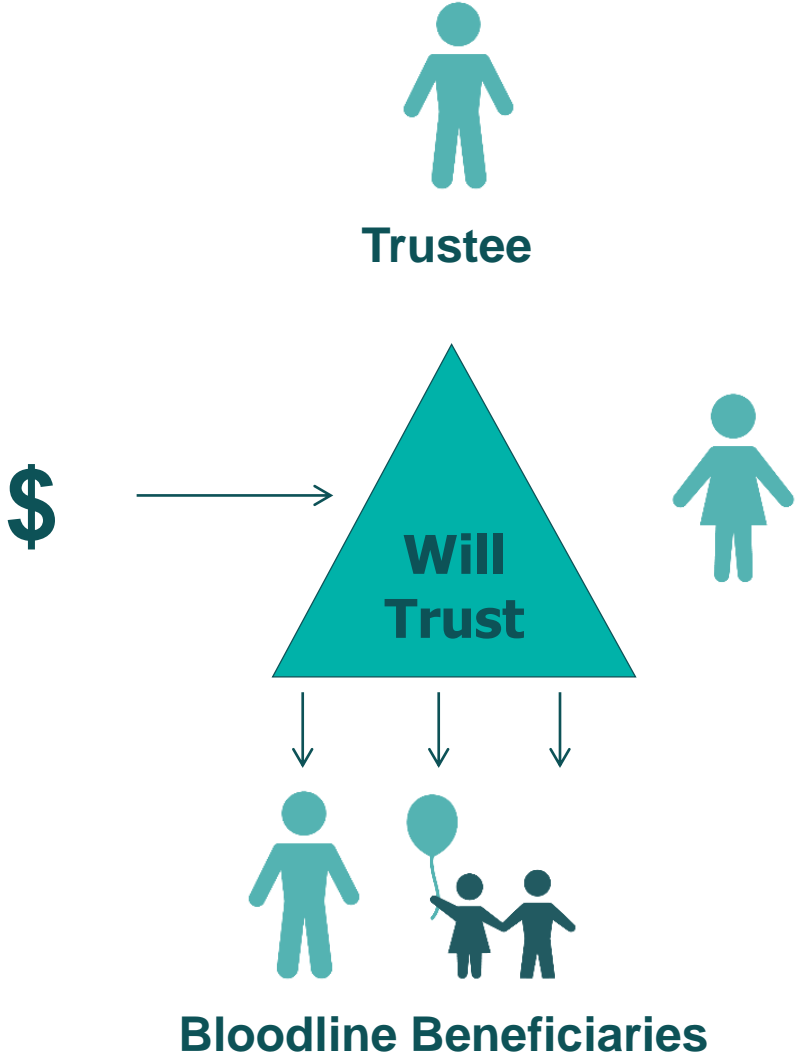


What They're Afraid Of



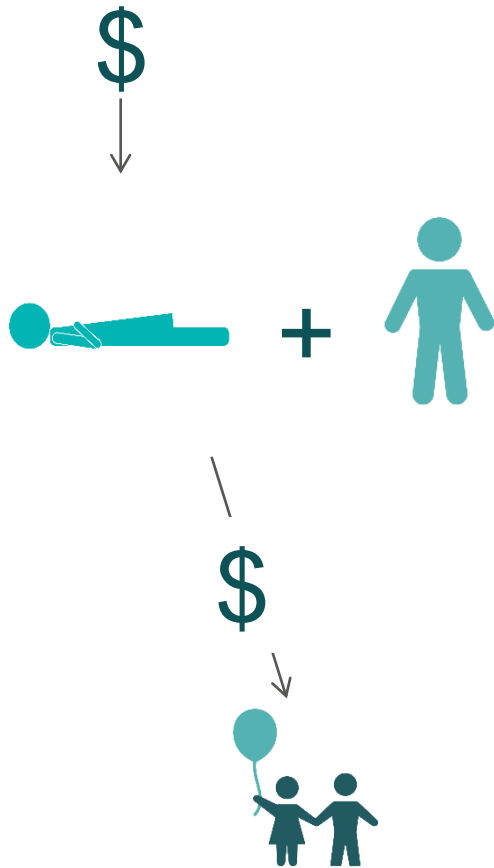
Divorce

A better solution

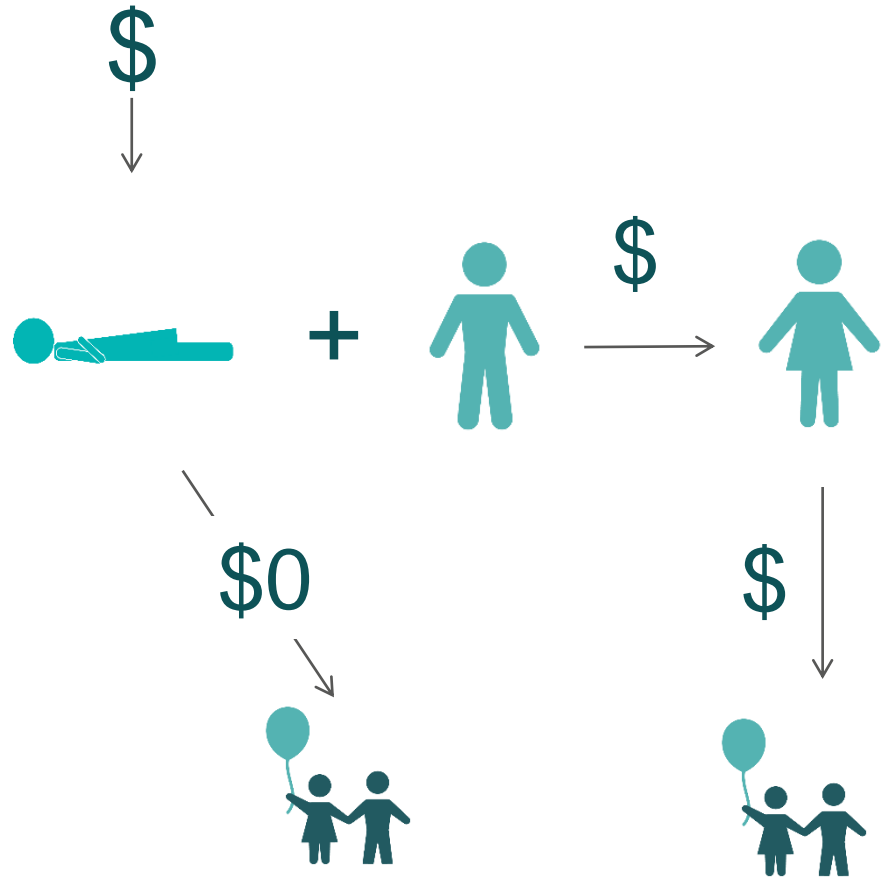


Re-partnering in the event of death

What Parents Want

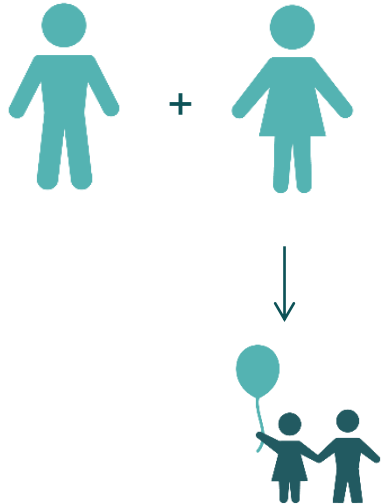
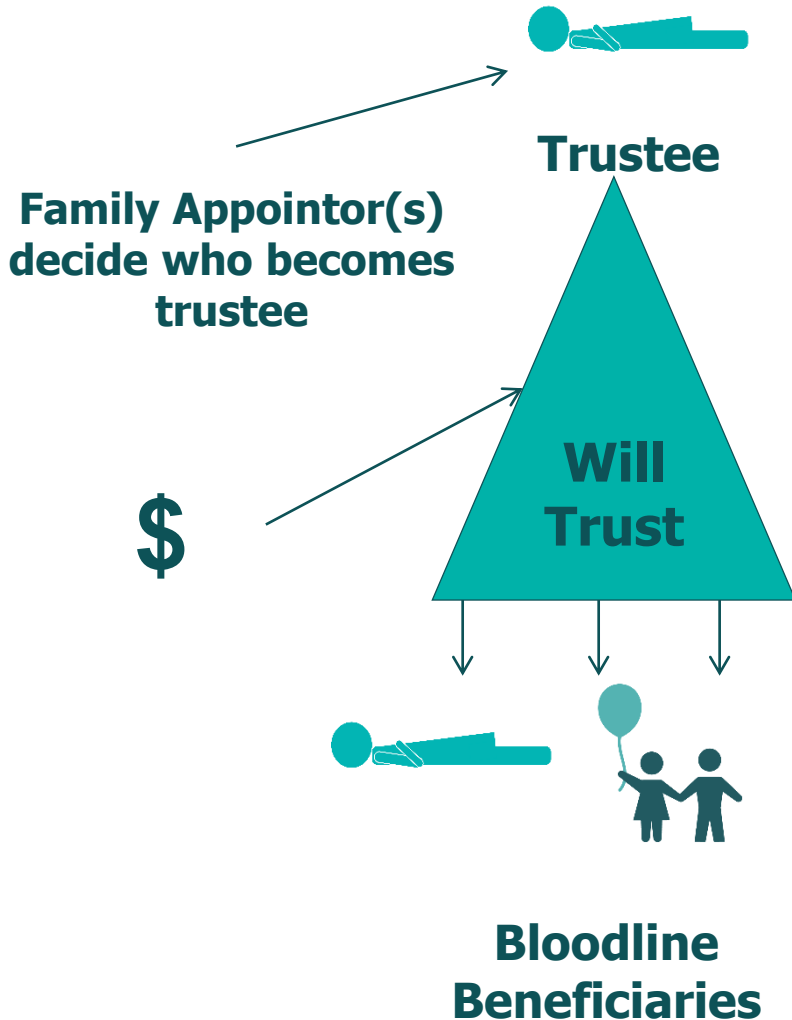


What Parents Are Afraid Of



Re-partnering in the event of death

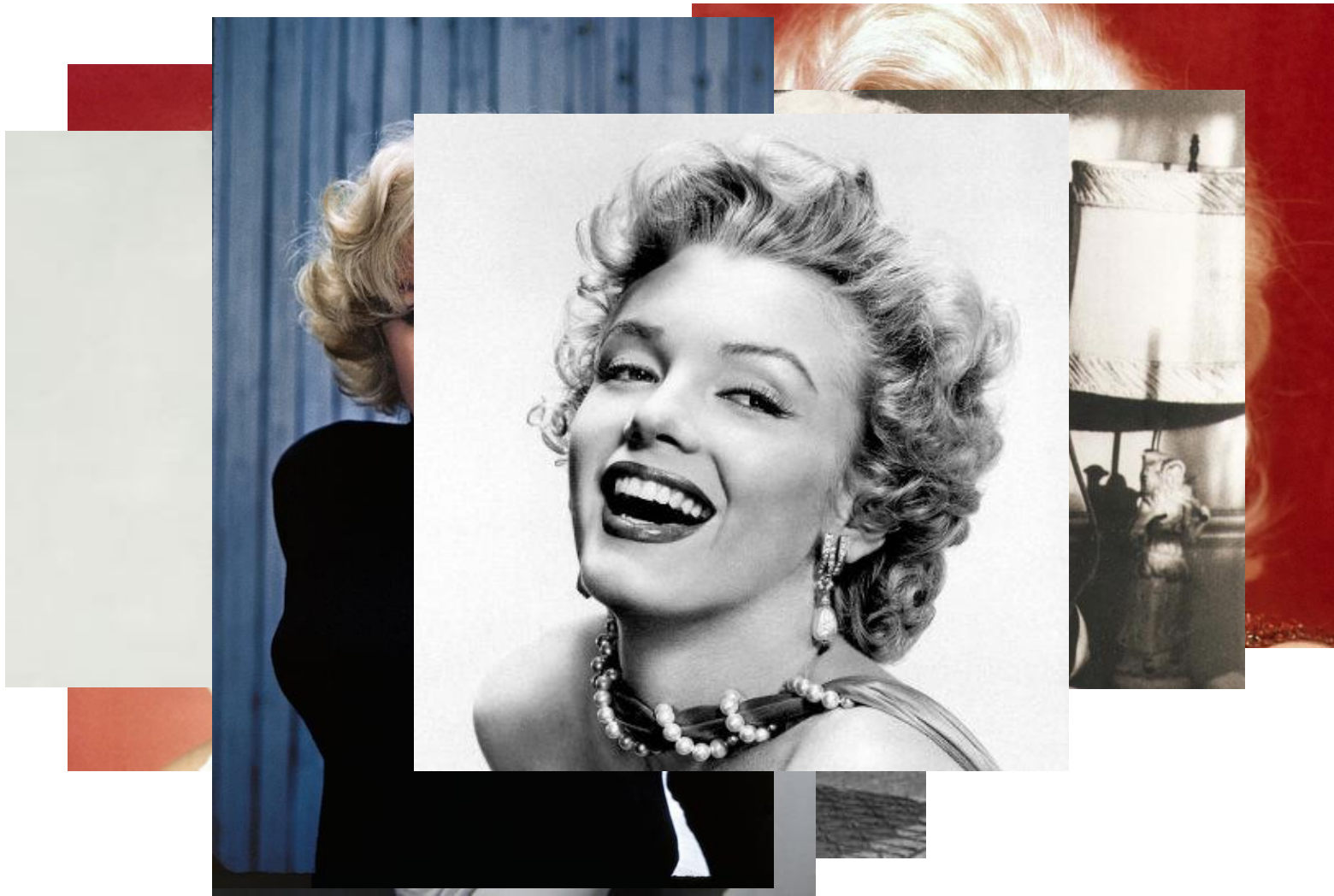
A better solution: What Parents Want



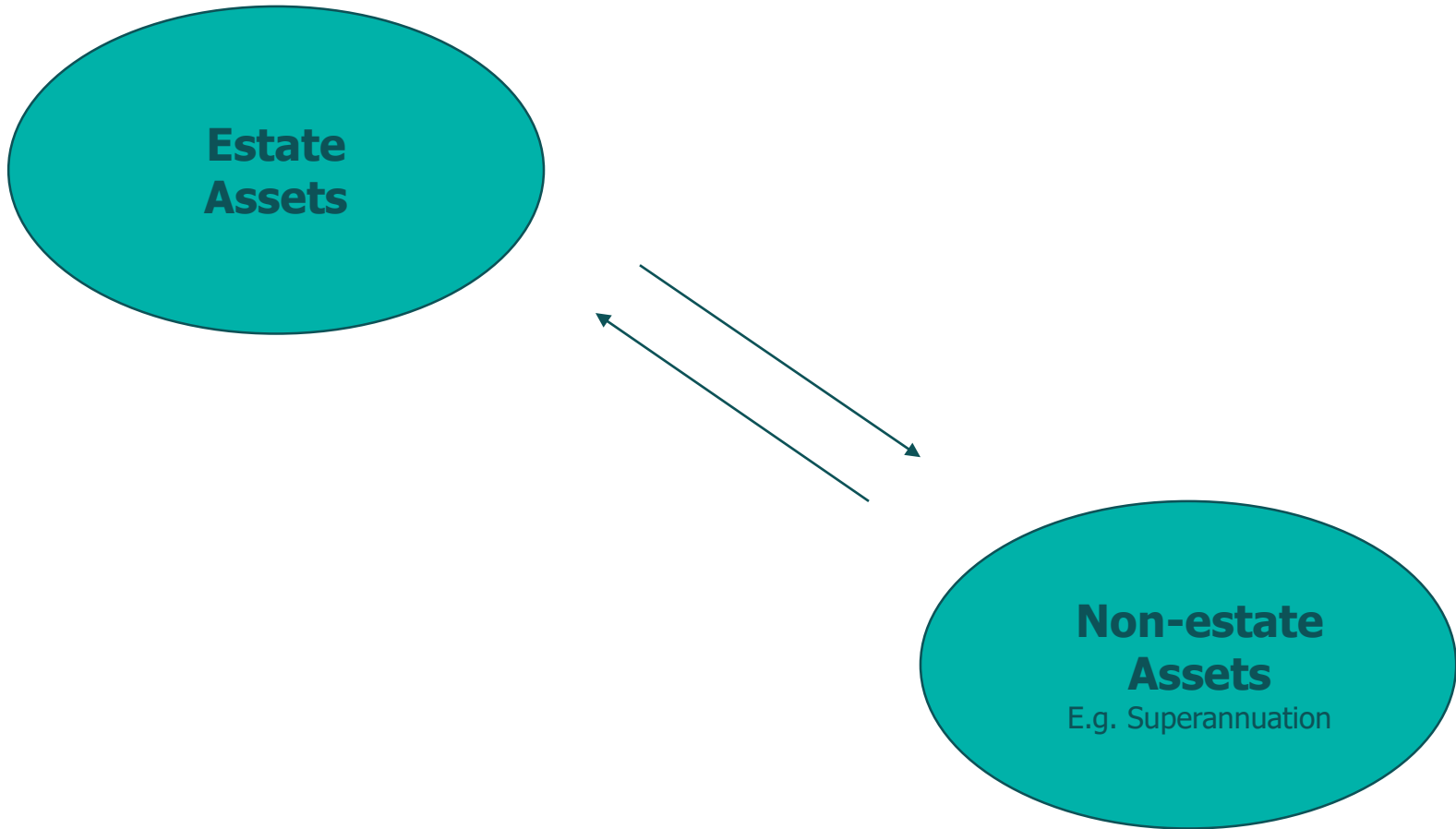
When should I consider using a testamentary trust?

- If you are concerned that one or more of your beneficiaries may be at risk from a family law claim, bankruptcy or other legal misadventure
- If one or more of your beneficiaries has a physical or mental disability, is a spendthrift, has poor judgement or has an addiction
- If one or more of your beneficiaries is a child under 18 years, or has children under 18 years themselves
- If you have assets that you would like to remain in the family
- If you wish to include any special rules, requirements, restrictions or conditions in your Will

Marilyn Monroe



Estate vs. non-estate assets



Estate assets

- Estate assets include:
 - Assets owned in your own name solely
 - Assets owned with another as tenants in common
 - Super death benefit paid to your estate
 - Self owned life insurance policies

Non-estate assets

- Non-estate assets include:
 - Jointly held assets (joint tenants)
 - Life interest in assets
 - Assets owned by a company
 - Assets owned by a trust
 - Life insurance policy paid direct to a nominated person
 - Superannuation

Jointly owned assets

- Jack owns the family home jointly with Sue. In the event of his death, the ownership passes to Sue (the survivor)
- Governed by the “Laws of Survivorship”



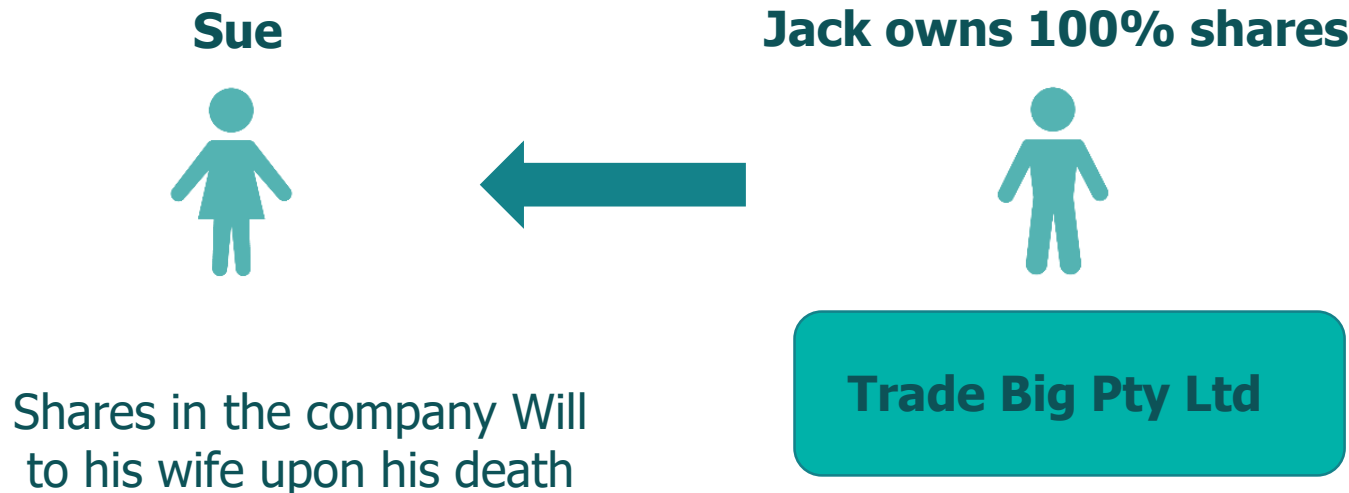
Life interest

- Jack owns the family home solely. In the event of his death, he has given his wife Sue life interest



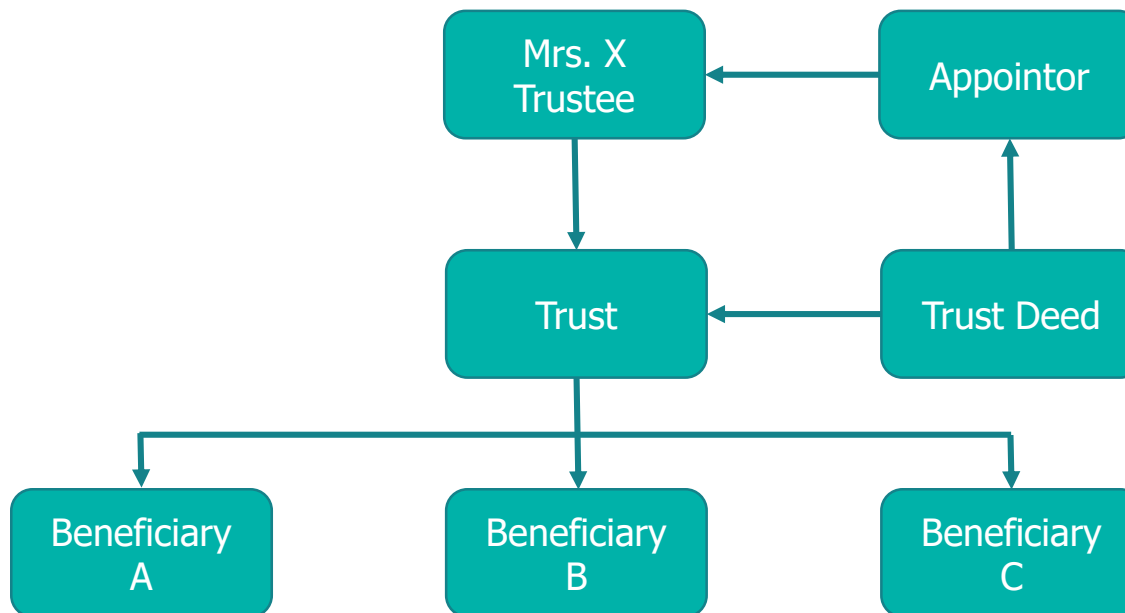
Assets owned by a company

- Jack owns 100% of the shares in Trade Pty Ltd
- He is the sole director of the company
- Upon his death, his Will transfers the shares to his wife Sue
- Sue, as the sole shareholder, can appoint herself as the sole director of the company. She will assume control of the company.



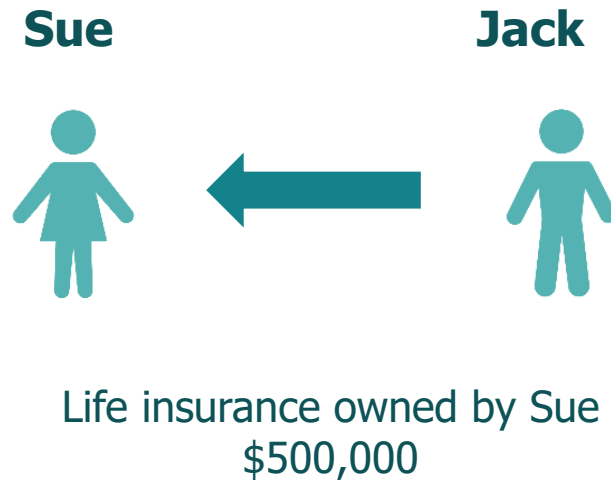
Assets held in trust

- Mrs X is Trustee of the Trust. Mrs X dies. Her Will cannot direct who will become the new trustee
- Trust Deed specify who will be the appointor - who will choose a new trustee
- Trust Deed states who will succeed Mrs X as appointor on her death
- This person will assume control of the trust and the trust assets








Life insurance proceeds

- Jack has a life insurance policy of \$500,000 on his life. He has nominated his wife Sue as the owner of the policy
- In the event of his death, proceeds of the policy will be paid to Sue



Non-resident estate beneficiaries

- Father has \$9m estate and wants equal division for 3 sons (i.e. \$3m each)
- Because of tax attributes, net effect is not the same for each beneficiary
 - CGT event K3 to consider

Asset	Beneficiary	Tax consequences
\$2m main residence (post CGT)	Son A 	<ul style="list-style-type: none"> • Cost base for Son A = market value at date of death • Son A = main resident exemption if sell house within 2 years of father's death (without having to use it as MR) • If sell after 2 years, have to use it as main resident
\$2m investment property (pre CGT)	Son B 	<ul style="list-style-type: none"> • Cost base for Son B = market value at date of death • Son B = subject to CGT on subsequent sale of property
\$2m cash	\$1m to Son A; \$1m to Son B 	No CGT consequences as cash ≠ CGT asset
\$1m investment property (post CGT TAP)	Son C 	<ul style="list-style-type: none"> • No K3 (since property is taxable Australian property) • Cost base for Son C = cost base at date of death • Son C = subject to CGT on subsequent sale of property
\$2m shares (post CGT non-TAP)	Son C 	<ul style="list-style-type: none"> • K3 capital gain in deceased's return since shares are non-TAP and Son C is a non-resident • Reduce amount of residuary deceased estate available for distribution since deceased estate must pay for CGT on K3

Superannuation Death Benefits and Important Cases

Stock v N.M. Superannuation Pty Limited

Key Facts

- Mr Mandie died with his late spouse listed as the beneficiary of his Superannuation Policy and no binding death nominations in place
- The trust deed stated that the super benefits must be paid out to Mr Mandie's dependants or his legal personal representative in the absence of a binding death benefit nomination
- Mr Mandie's two sons and daughter were listed as his dependants and there was no stipulated legal personal representative
- The trustee paid the death benefits equally between Mr Mandie's three children despite the daughters claims that the sons had been removed from Mr Mandie's Will following a family business falling-out

Stock v N.M. Superannuation Pty Limited

Outcomes

- Superannuation is not an estate asset and therefore the trustee of a Super Fund does not need to follow the directions of the Will
- The trustee has the discretion on how distribute benefits in the absence of a binding death benefit nomination

Estate Planning

is more than just a will



Katz v Grossman

Key Facts

- Mr and Mrs Katz were the members and individual trustees of an SMSF
- Mr Katz appointed his daughter Linda Grossman as a trustee of the SMSF upon the passing of Mrs Katz
- Linda appointed her husband as a second trustee of the SMSF upon the passing of Mr Katz
- Mr Katz had a non-binding death benefit nomination for his super to be paid equally between his children, Linda and Daniel.
- Linda and her husband paid the entire death benefit solely to Linda
- Daniel was unsuccessful in his challenge of the appointment of Linda and her husband as trustees of the SMSF

Katz v Grossman

Outcomes

- Careful consideration needs to be given to control of the SMSF after death of members
- Non-binding death benefit nominations are mere considerations that do not have to be followed by the trustees so a binding nomination should be considered for certainty



Donavan v Donovan

Key Facts

- Mr Donovan was the sole member of an SMSF with a corporate trustee
- The SMSF's deed allowed for both binding and non-binding death benefit nominations
- Mr Donovan had made a death benefit nomination for his super benefits to be paid to his legal personal representative upon his death
- The death benefit payment was made to the Mr Donovan's second wife upon his death
- Mr Donovan's nomination was determined to be non-binding as it did not state that it was binding

Donavan v Donovan

Outcomes

- A binding death benefit nomination must clearly state that it is binding on the trustee
- SISR 6.17A does not apply to SMSFs, however an SMSF trust deed may specifically incorporate the requirement of SISR 6.17A into its binding death benefit nomination requirements



Munro v Munro

Key Facts

- Mr Munro and his second wife Patricia were the members and individual trustees of an SMSF
- Mr Munro signed a binding death benefit nomination form to pay his Super to the 'Trustee of Deceased Estate' upon his death
- Patricia's daughter was appointed as a trustee of the SMSF upon Mr Munro's passing
- Patricia and her daughter announced their intention to pay the death benefit at their discretion as trustees on the basis that the binding death nomination was invalid
- The Court found that the binding death benefit nomination was invalid as the term 'Trustee of Deceased Estate' was not another way of referring to the legal personal representative

Munro v Munro

Outcomes

- Using the term 'Legal Personal Representative' where the intention is for payment of benefits to the member's estate will avoid unintended consequences
- Trustees should ensure that the binding death benefit nomination forms are consistent with the trust deed provisions and legislation

Superannuation Death Benefits

Dependents

LPR

Spouse

Child

Interdependent

Wooster v Morris

Key Facts

- Mr Morris and his second wife Patricia were the members and individual trustees of an SMSF
- Mr Morris had a binding death benefit nomination in favour of his two daughters from his first marriage
- Following the death of Mr Morris, Patricia announced her intention to pay all of the deceased's benefits to herself upon receiving legal advice that the binding death benefit nomination was ineffective
- The daughters were successful on their challenge to the Supreme Court that the binding death benefit nomination was valid and binding on the trustee
- The court ordered for the benefits and all cost to be paid by the SMSF trustee and Patricia personally on a joint and several liability basis however Patricia had passed away prior to the date of judgement and majority of the SMSF's assets had been diminished by then

Wooster v Morris

Outcomes

- The costs associated with protracted litigation are high and can significantly diminish the death benefits eventually paid
- Control of the SMSF after death of a member is as important as having a valid death benefit nomination in place

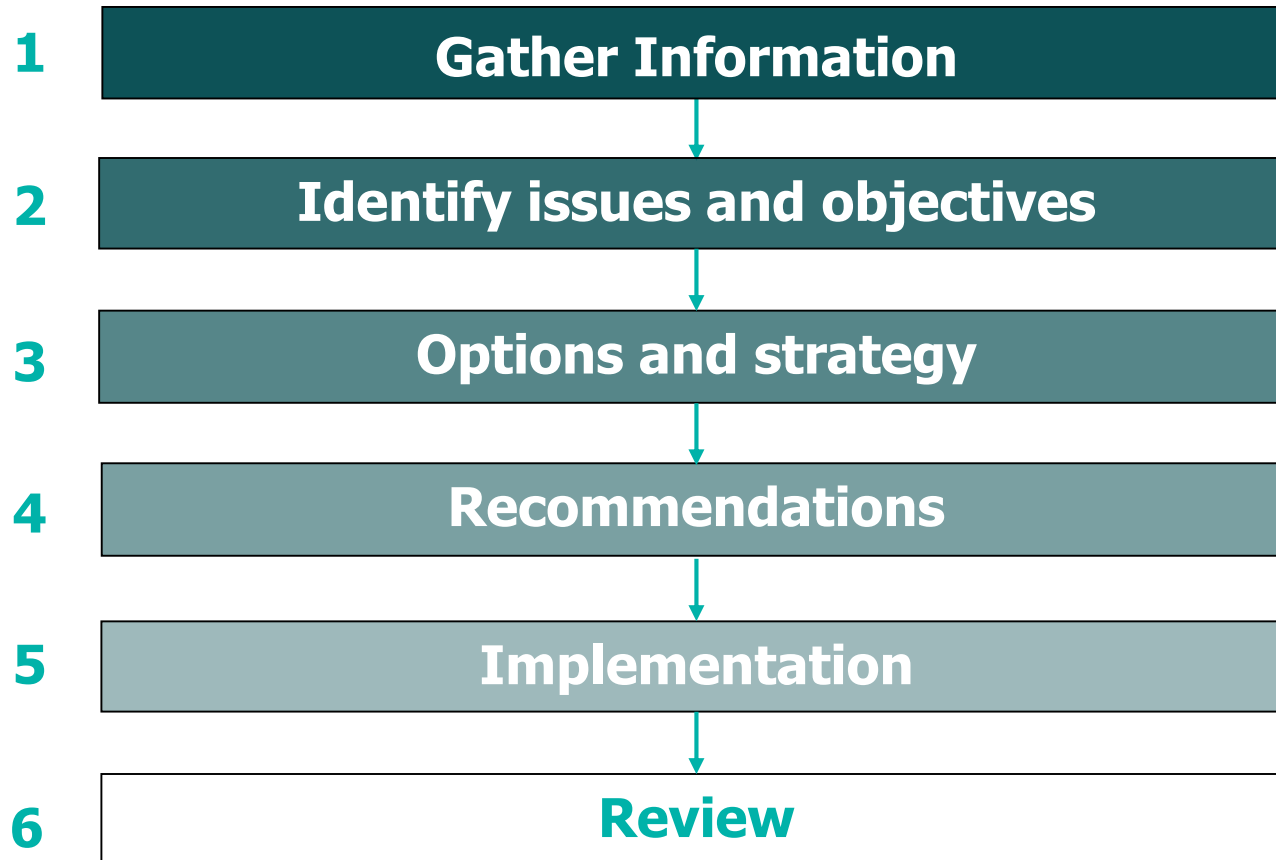


How can we help?

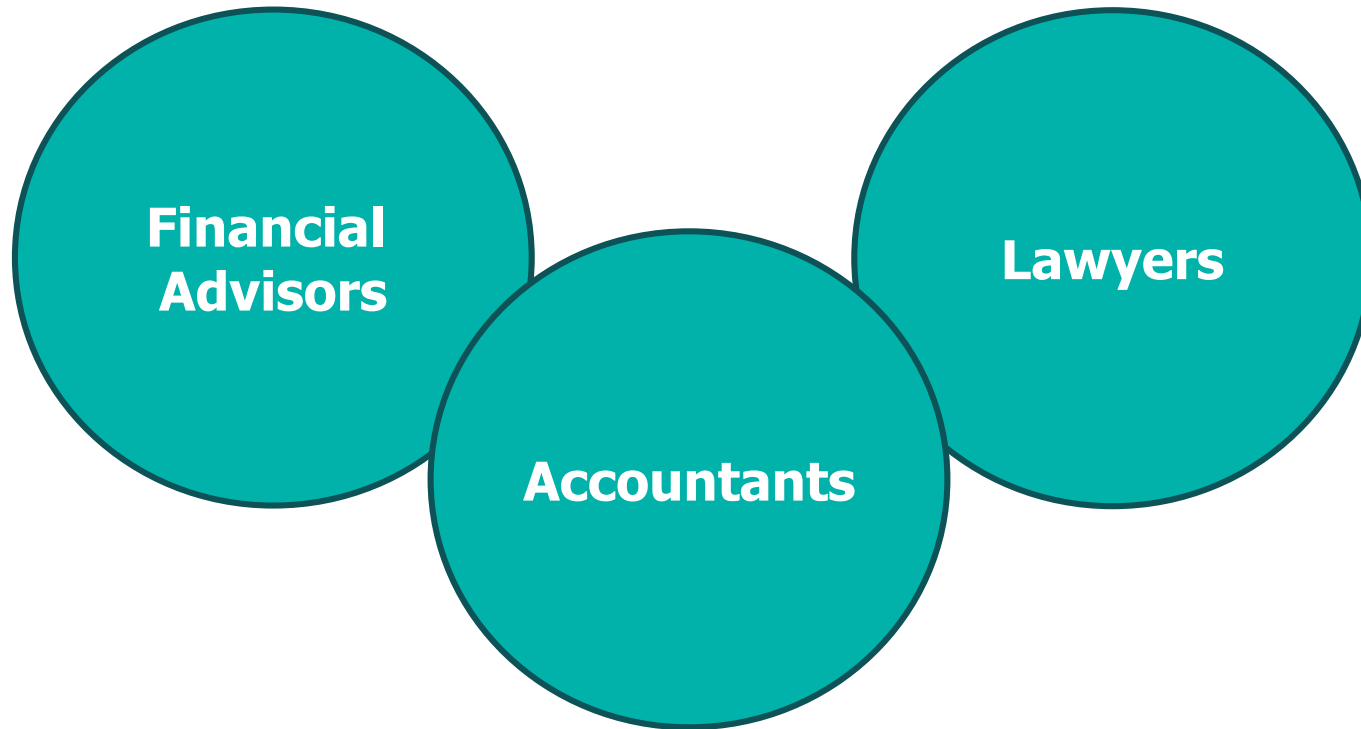
NCFS Financial Planning Design



Estate planning process



A team approach



Your Estate Plan and Financial Plan should be a coordinated approach

How we operate

Complimentary meeting

No cost to you

Fee for service

Complete objectivity

Hourly rate

Varies depending on the complexity of your situation

No commission

Our advice is in your best interest

“Life is pleasant. Death is peaceful. It's the transition that's troublesome”

Isaac Asimov (1920-1992)

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Thank you