



# Death & Taxes

## Part 2: Superannuation Death Benefit Payments

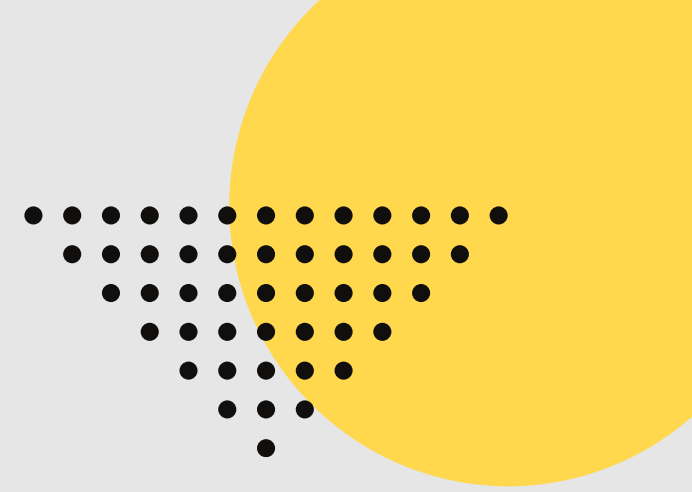
15 September 2022

**Nathan Yii**

Principal, Nathan Yii Lawyers



# Housekeeping



This is an interactive workshop!

01

Ask questions via Q&A

02

There'll be lots of quizzes and polls etc

03

Participate!

This session is being recorded. Replays available for VIP subscribers.

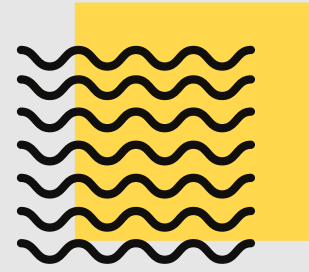


# WELCOME

Nathan Yii

Principal, Nathan Yii Lawyers

# Agenda



## **Introduction and Case Study**

### **Binding Death Benefit Nominations**

Hill v Zuda

### **Trustees & Exercising Discretion**

Katz v Grossman

Wareham v Marsella

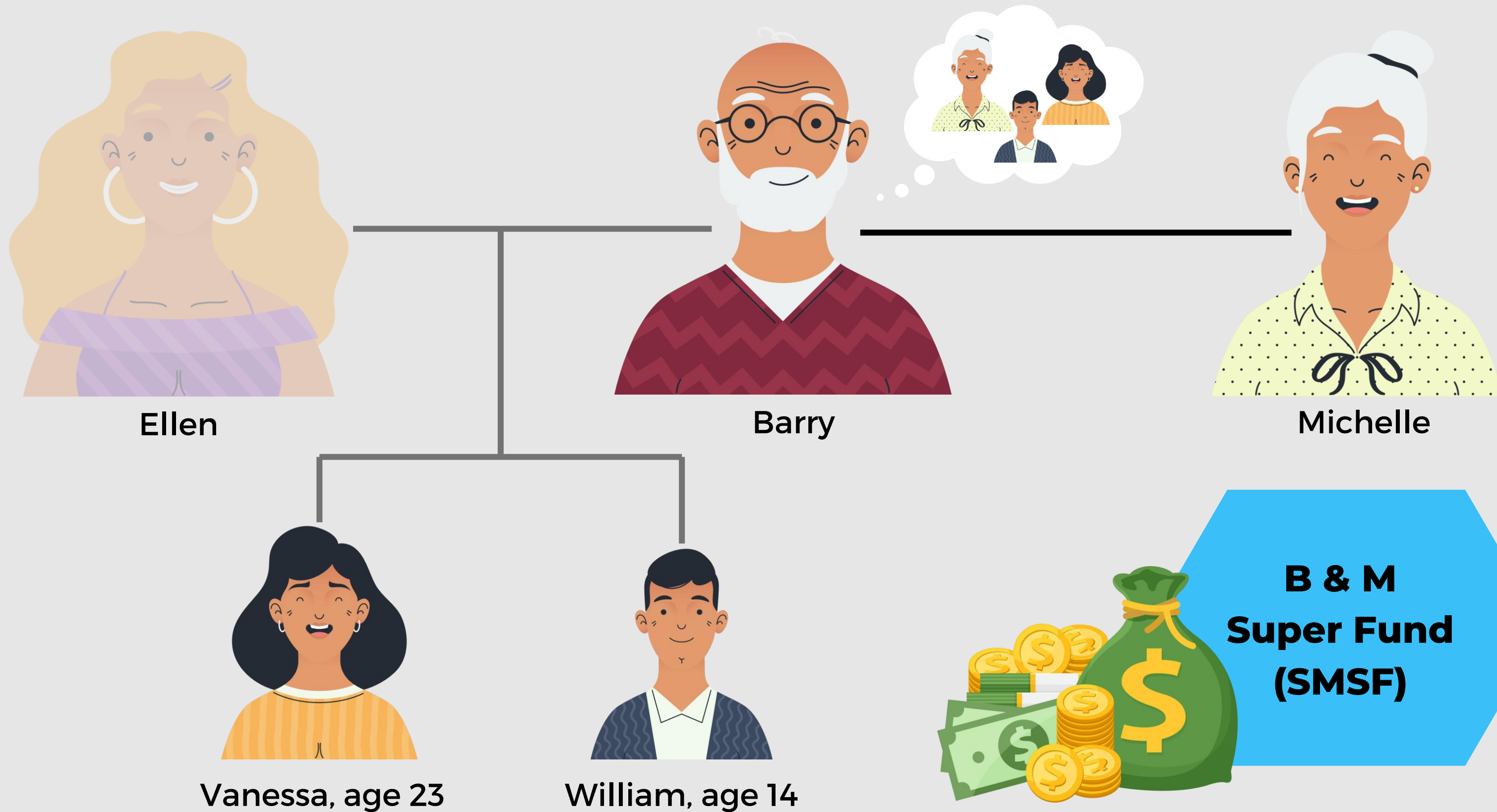
### **Questions & Answers**

will be taken throughout the session!



# Case Study

## Common Scenario





**Assuming  
Barry now has  
passed away...**



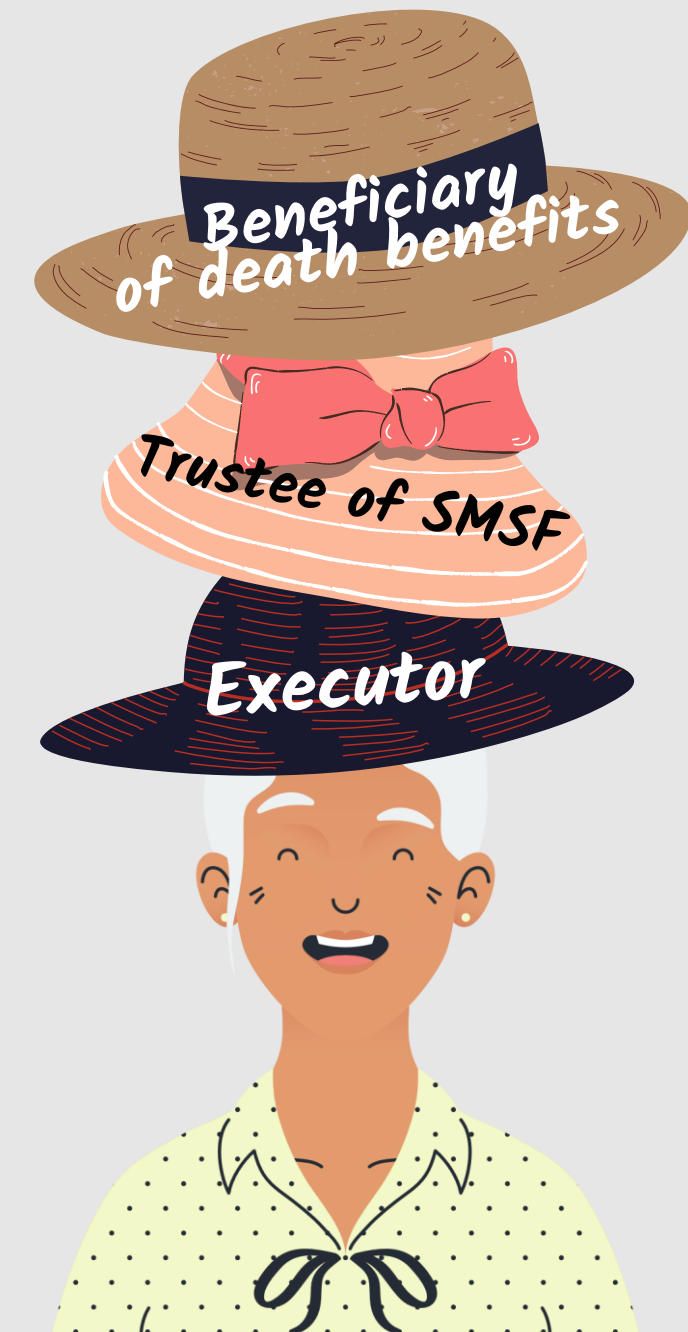
# Case Study

## What Happens Now?



Michelle is the sole executor.

The estate is divided equally between Vanessa and William.



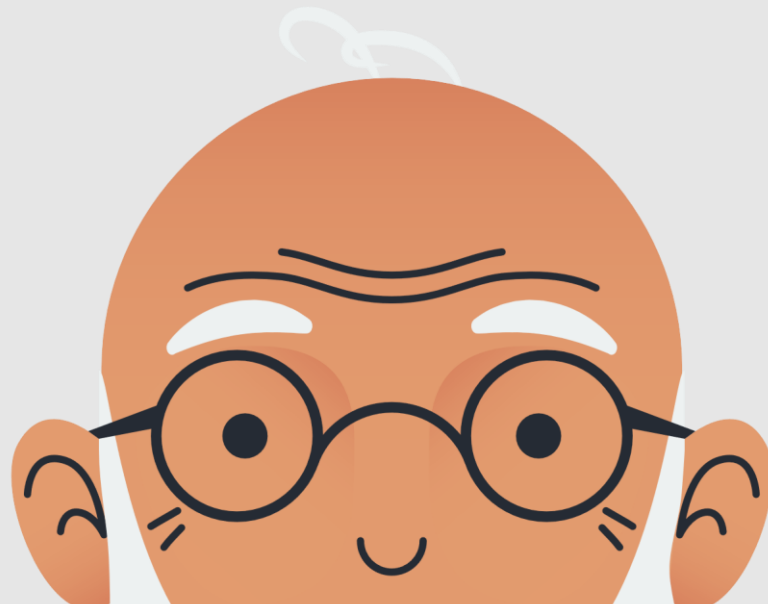
Can  
superannuation be  
paid to Michelle?

How can Barry make  
sure that superannuation  
passes to Michelle?

# Questions...

What are the tax  
consequences of paying  
superannuation to  
Michelle?

Can Michelle pay  
superannuation to  
herself?





# Payment of Death Benefits Eligibility and Tax



## Compulsory cashing requirement

“as soon as  
practicable”  
rr 6.21(1) SIS Regs



## Who?

**Dependants**  
(s 10 SIS Act)  
includes spouse,  
children of any age,  
financial  
dependants, inter-  
dependants

**LPR (estate)**



## Form and manner rr 6.21 & 6.22 SIS Regs

Lump sum and/or  
Pension\*\*,  
depending on  
recipient

**\*\* Note:** Children have  
compulsory conversion  
to lump sum at 25  
years, unless they have  
a severe disability



## Tax s 302-195 ITAA97

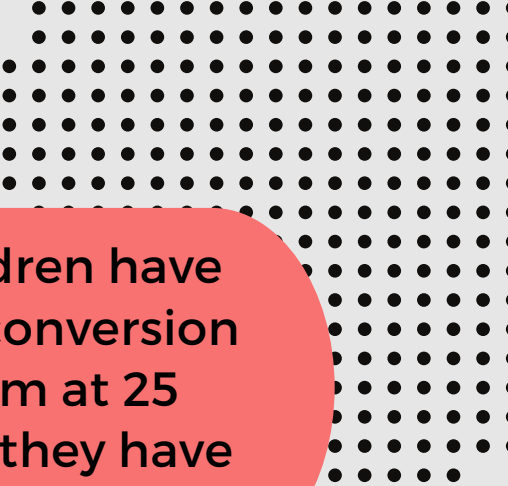
Death benefits  
dependant

vs

"Tax dependant"



# Payment of Death Benefits Recipients Summary



**\*\* Note:** Children have compulsory conversion to lump sum at 25 years, unless they have a severe disability

Who?	SIS Dependant	Tax Dependant	Form and Manner Available
Spouse / Domestic partner	YES	YES	Lump sum Pension
Minor children	YES	YES	Lump sum Pension
Adult children – financial dependants	YES	YES	Lump sum Pension**
Adult children – non-financial dependants	YES	NO	Lump sum
Financial dependants Inter-dependants	YES	YES	Lump sum Pension
Estate	YES r 6.22 SIS Regs	Look through	Lump sum

# **Binding Death Benefit Nominations**



# Binding Death Benefit Nominations Issues

A binding death benefit nomination is a legal document and a tool in the estate plan.

It uses include:

- Binding the trustee and removing discretion
- Removing assets from estate challenge risk
- Ensuring member's intentions are met



# Binding Death Benefit Nominations Issues

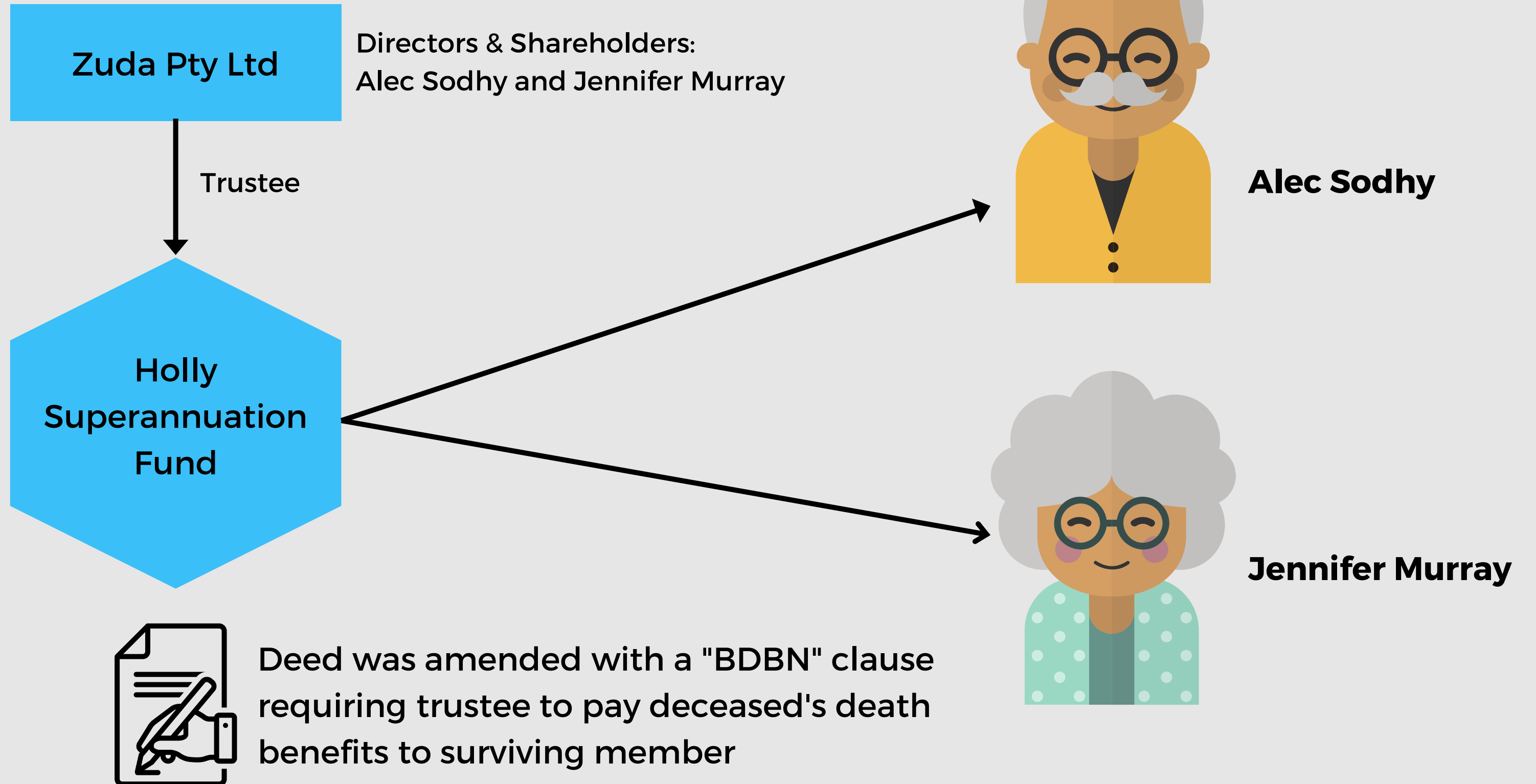
Other issues to consider:

- Do we need to follow r 6.17A SIS Regs and 3 year lapsing requirement? **Not necessarily!**
- Can we just nominate anyone under a BDBN? **No - they must be SIS dependants**
- Does the trust deed have a specific procedure to follow in making BDBNs?





# Hill v Zuda Facts



# Hill v Zuda Facts



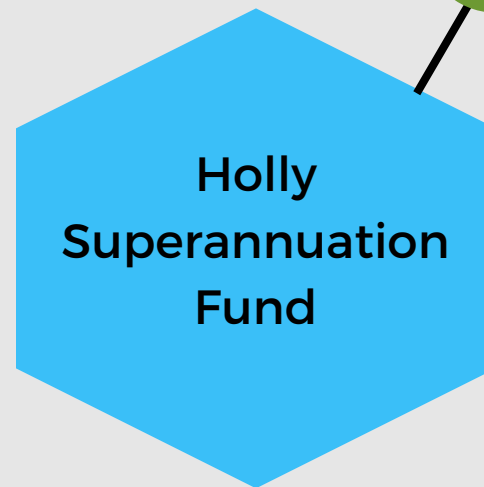
**Alec Sodhy**



**Jennifer Murray**

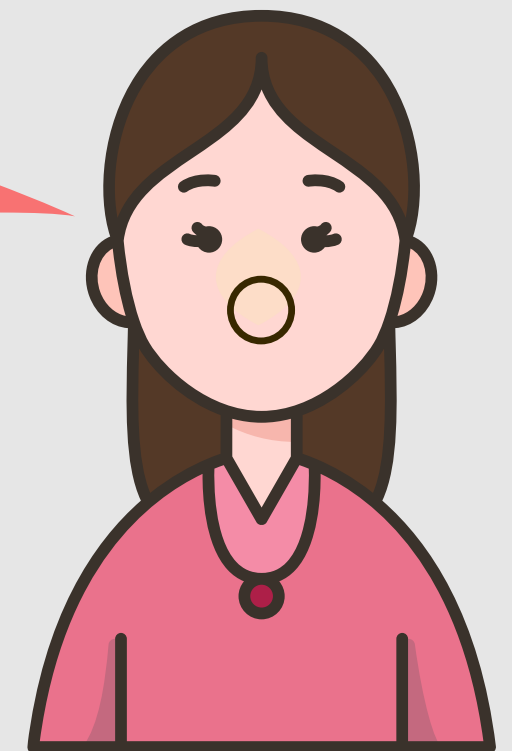


Death benefit  
payments



Holly  
Superannuation  
Fund

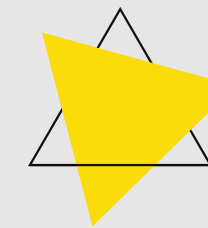
**Stop!**  
The BDBN doesn't  
comply with r 6.17A  
SIS Regs! I'm taking  
this to court.



**Claire Hill**

Alec's daughter from  
first marriage

# Binding Death Benefit Nominations Requirements under r 6.17A SIS Regs



Made in writing



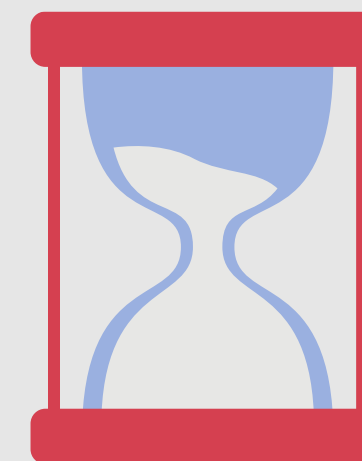
Signed and dated  
by member



Witnessed by 2 persons  
who are over 18 years  
and not beneficiaries



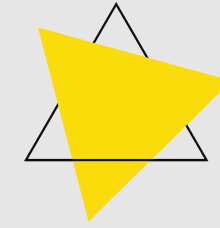
Declaration  
requirements



Lapses 3 years after signing,  
confirmed, or amended

# Hill v Zuda

## Outcome



Supreme Court of WA:

r 6.17A has no  
application to SMSFs



Court of Appeal: appeal dismissed

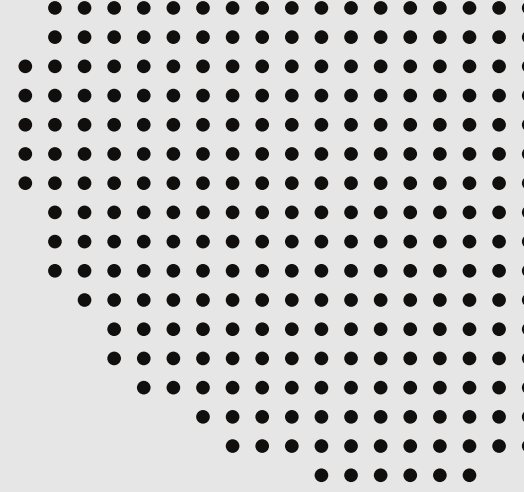
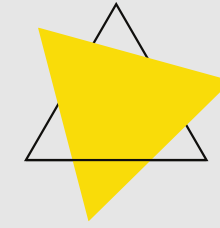


High Court: appeal dismissed



# Hill v Zuda

## Key Takeaways



- **R 6.17A SIS Regs does not automatically apply!**
  - 2 witnesses requirement
  - 3 year lapsing
- **Read the deed - are there other requirements?**
  - Acceptance?
  - Acknowledgement?
  - 'Given'?
  - Witnessing?
  - Lapsing?



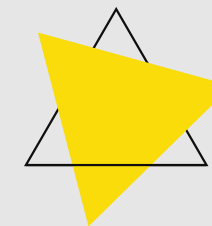


# Trustees & Exercising Discretion



# Katz v Grossman

## Facts

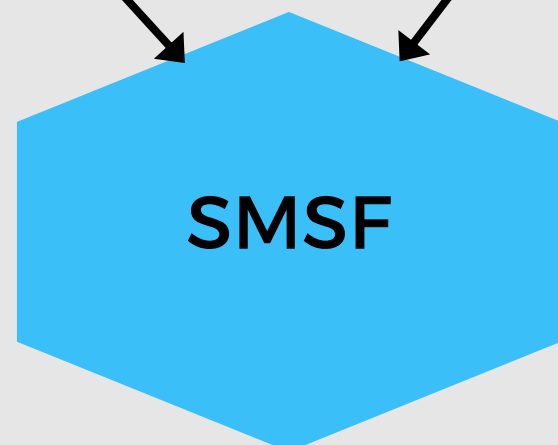


**Ervin Katz**



**Evelin Katz**

Members &  
Trustees



**Daniel Katz**  
the son



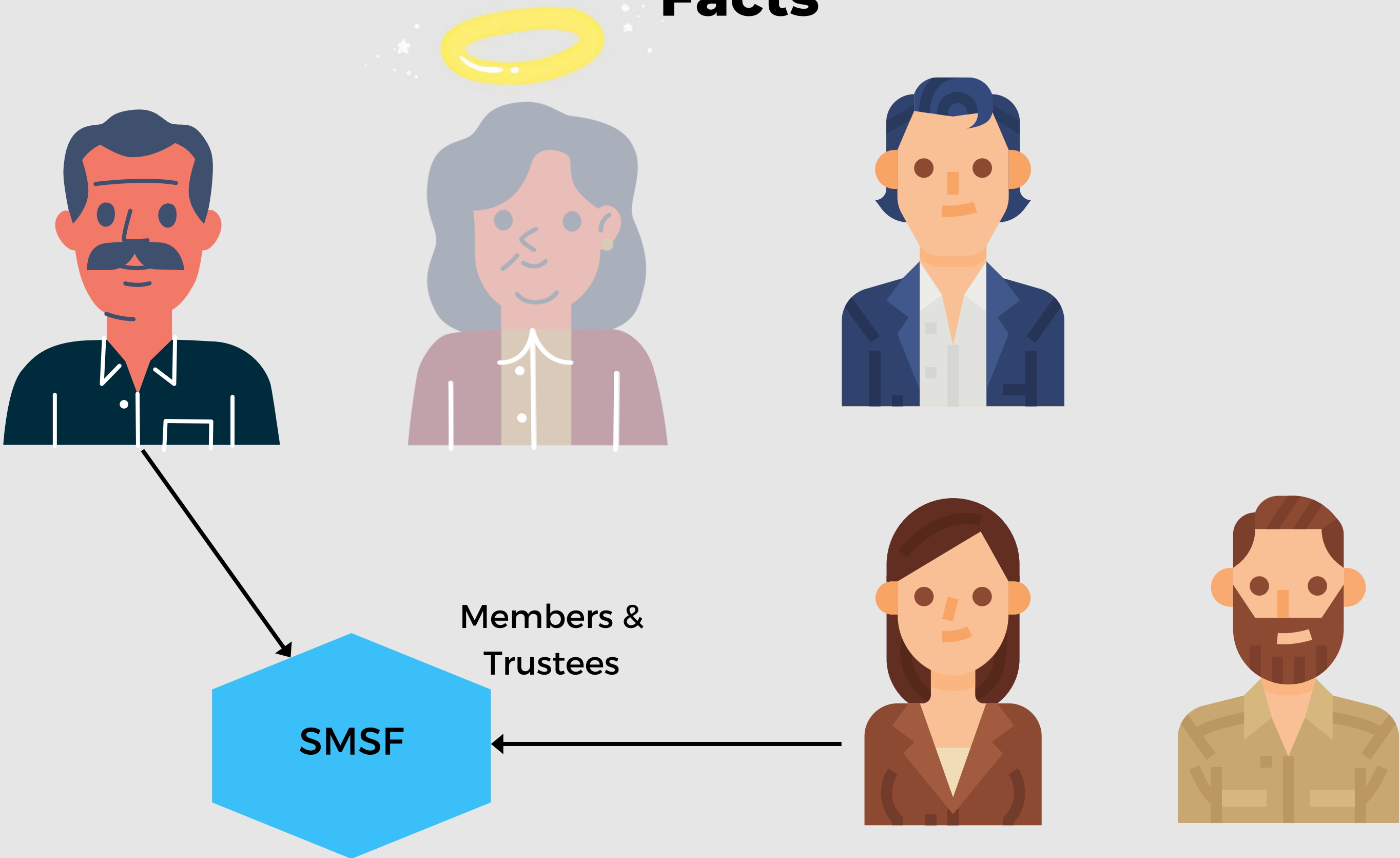
**Linda Grossman**  
the daughter



**Peter Grossman**  
Linda's husband

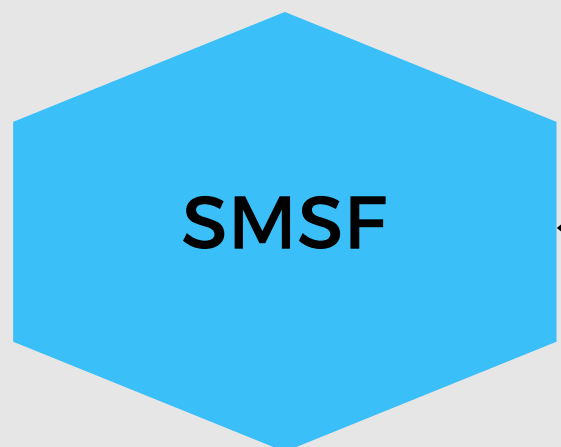
# Katz v Grossman

## Facts



# Katz v Grossman

## Facts

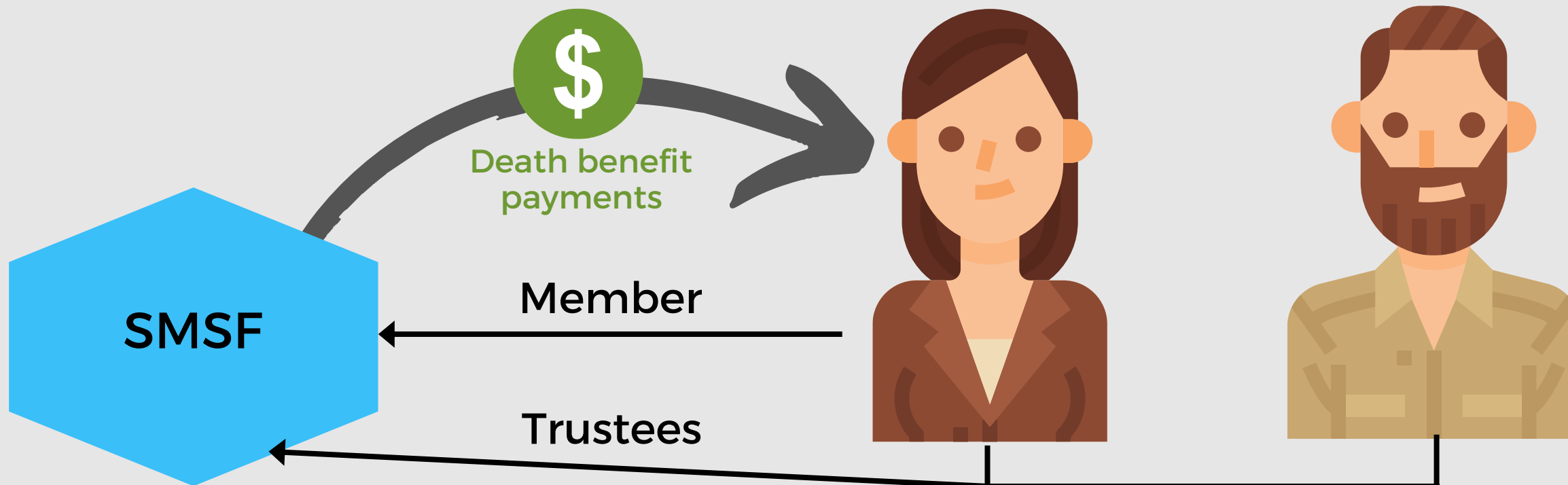


Member &  
Trustee



# Katz v Grossman

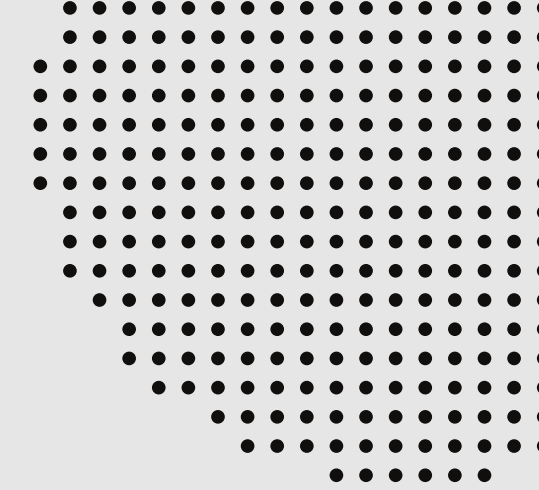
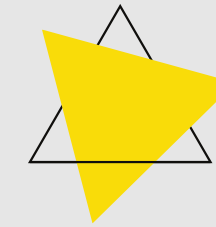
## Facts





# Katz v Grossman

## Facts



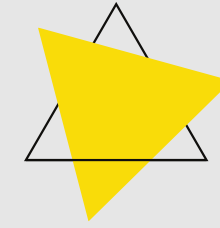
Probate  
granted  
to Linda  
and Daniel



Were Ervin's  
appointment of Linda  
and Linda's appointment  
of Peter valid?

# Katz v Grossman

## Outcome



Supreme Court of NSW held the appointments of trustees was valid (under the Trustee Act)

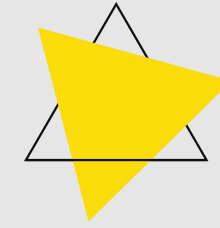


Result: Linda and Peter paid 100% of death benefits to Linda



# Katz v Grossman

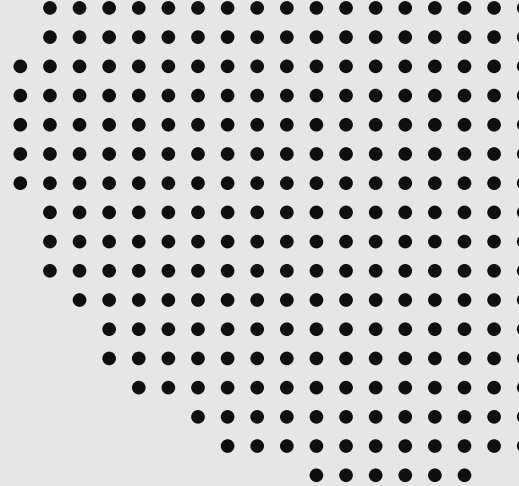
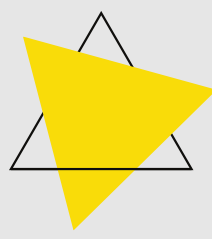
## Key Takeaways



- Binding death benefit nominations
- Corporate trustee for SMSFs
- Adjustment clauses in wills

# Wareham v Marsella

## Facts



**Helen Marsella**



**Riccardo Marsella**



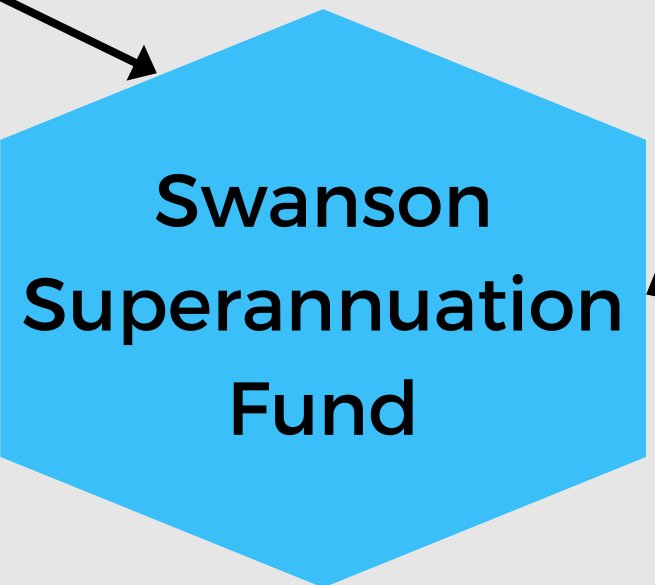
**Caroline Wareham**  
Helen's daughter  
from first marriage



**Martin Wareham**  
Caroline's  
husband

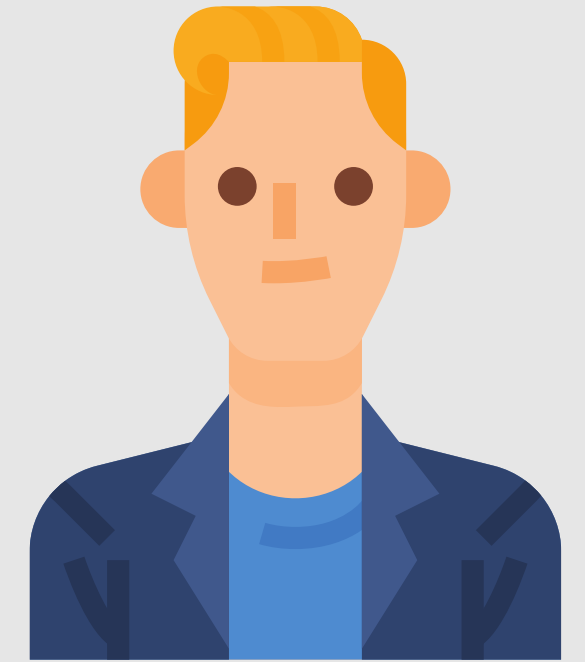
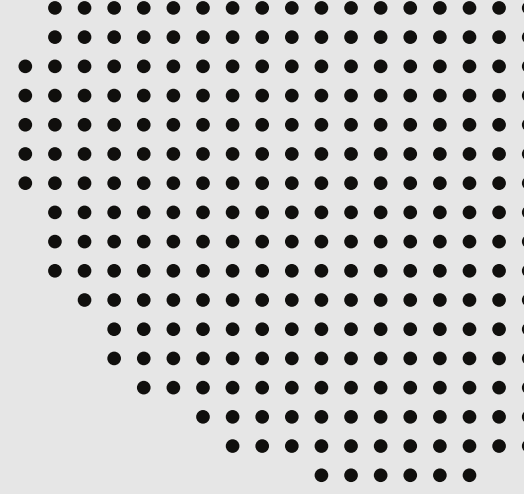
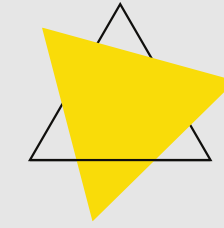
Member & Trustee

Trustee



# Wareham v Marsella

## Facts



Member & Trustee

Trustee

Swanson  
Superannuation  
Fund



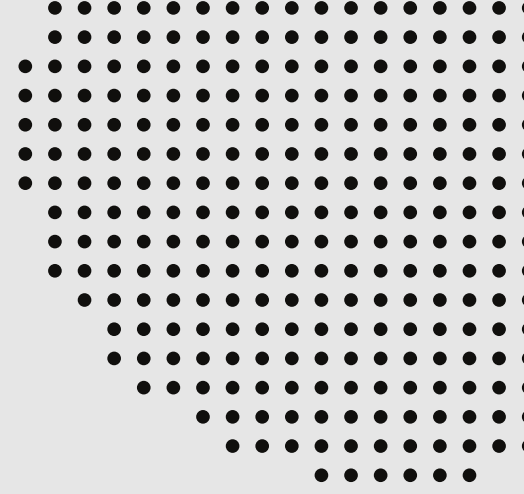
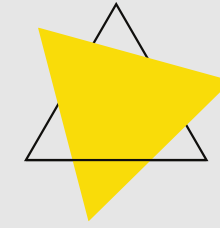
### **BDBN made, but...**

- Lapsed in death
- Invalid - made to grandchildren, who are not SIS dependants



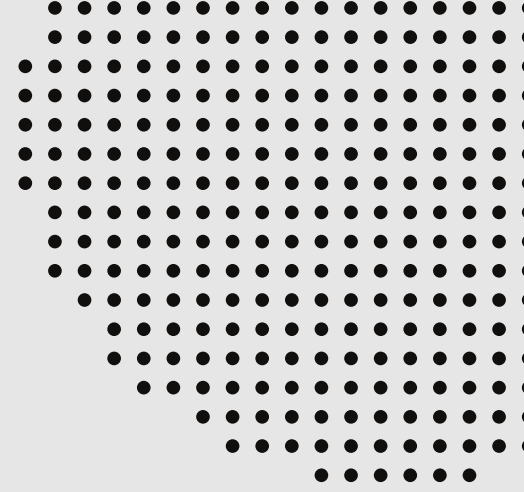
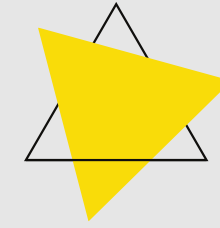
# Wareham v Marsella

## Facts



# Wareham v Marsella

## Facts



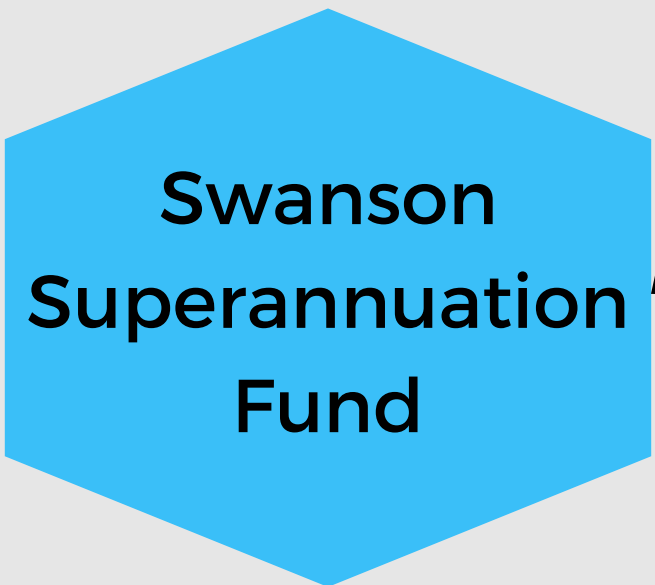
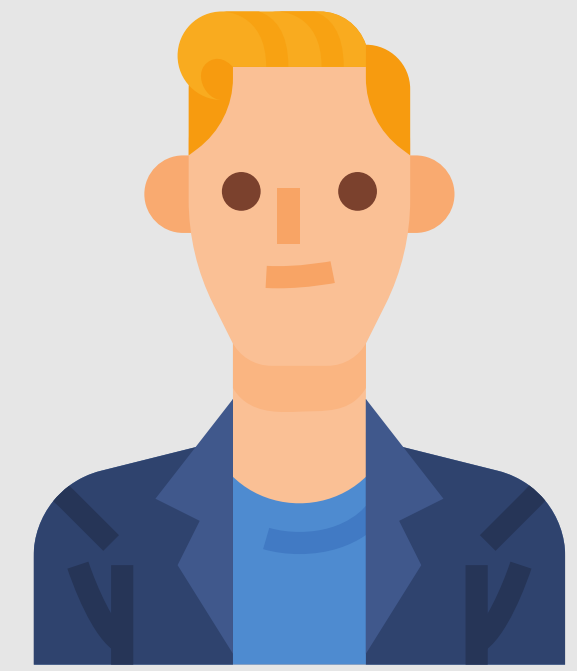
### Accounting advice sought:

- Pay out death benefits as soon as practicable
- Consider all interests of dependants
- Obtain specialist advice

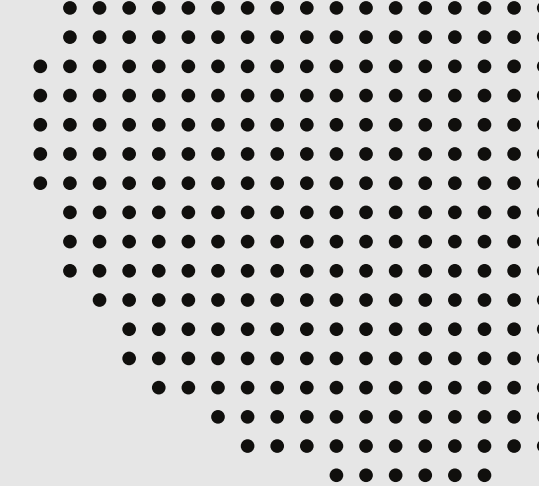
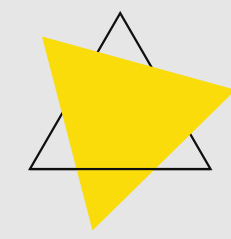


# Wareham v Marsella

## Facts

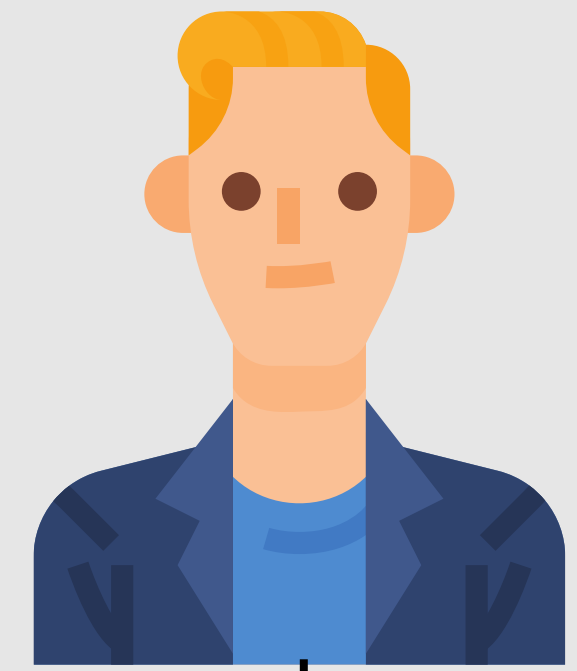
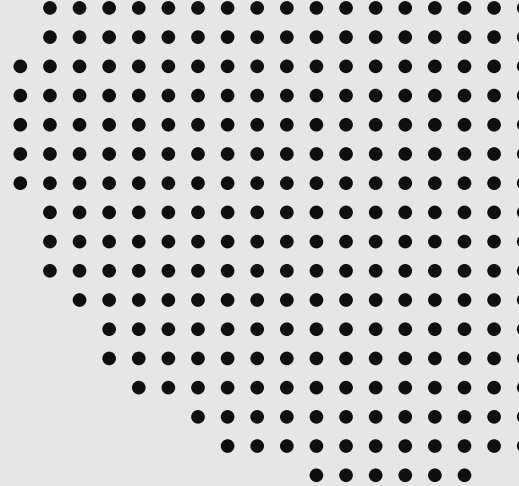
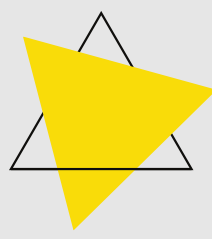


Trustee



# Wareham v Marsella

## Facts



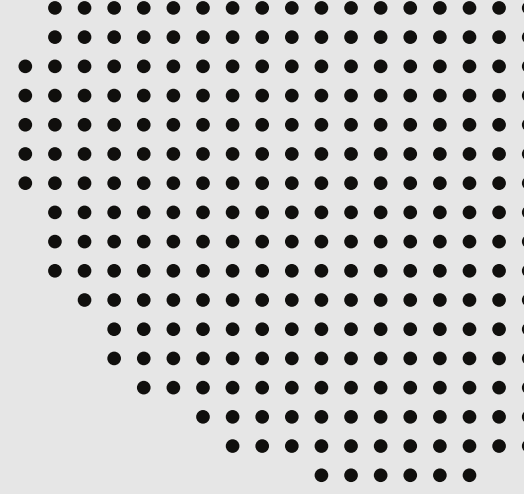
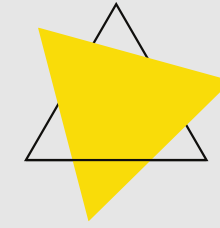
Trustees

Swanson  
Superannuation  
Fund



Resolution made to pay out  
death benefits to Caroline  
and wind up the fund

# Wareham v Marsella Facts

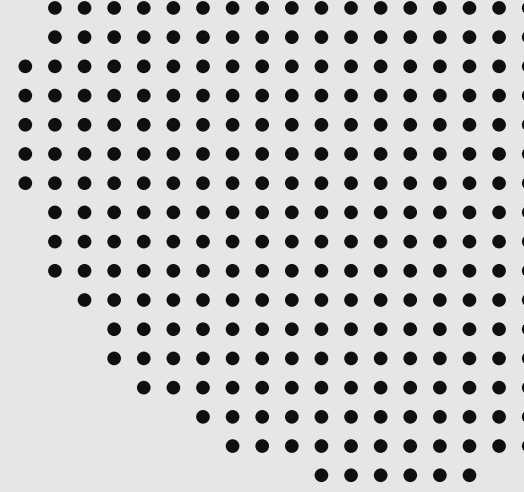
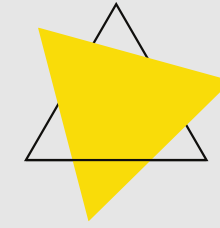


SMSF assets  
are being sold.



# Wareham v Marsella

## Facts



SMSF assets  
are part of the  
estate.

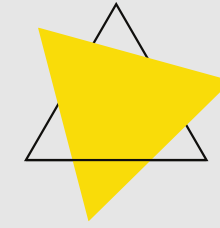


# Wareham v Marsella

## Facts

Superannuation  
is not an estate  
asset.

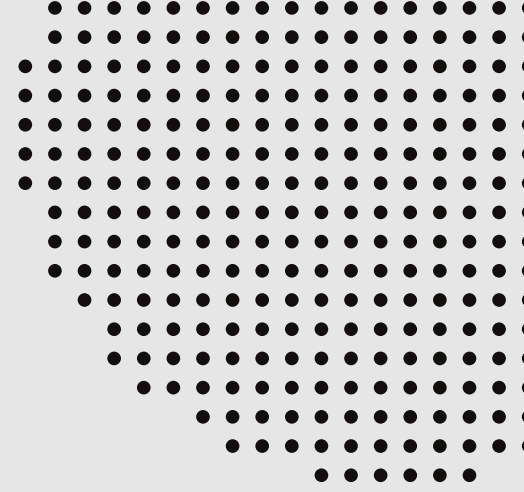
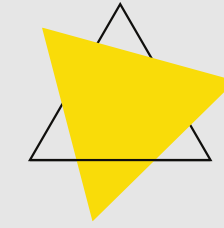
Also, Riccardo is neither a  
Member, Trustee or  
Beneficiary of the Fund,  
and as such [the trustee] is  
not required to consult  
with him on any matter  
relating to the  
administration of the Fund.





# Wareham v Marsella

## Facts

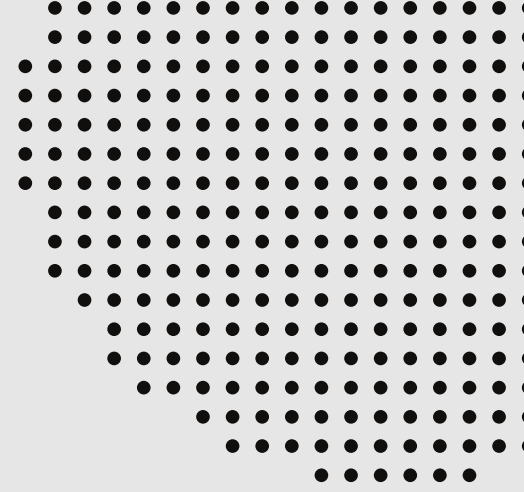
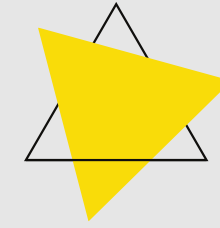


I'm taking you to court to remove you as trustees and get an injunction restraining distributions.



# Wareham v Marsella

## Outcome



Supreme Court of Victoria decided that the trustees' discretion was not exercised in good faith: there was a "grotesquely unreasonable outcome"



Results:

- Caroline and Martin removed as trustees of the fund
- Decision to pay out death benefits to Caroline was set aside

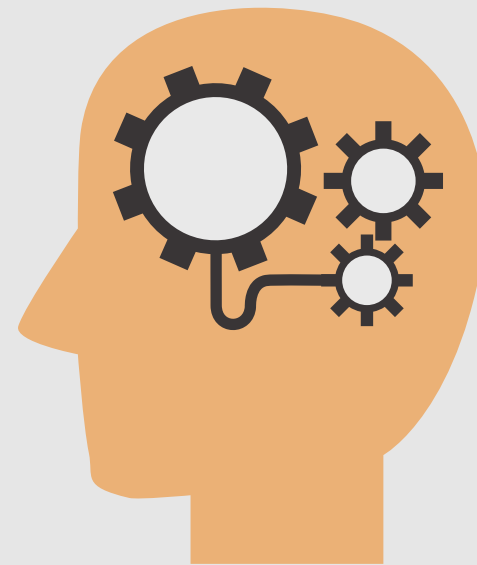
# Challenging Trustee Discretion

## "Good Faith" Principles

**Trustee's decision will not be disputed, provided that:**



Discretion is  
exercised in  
**good faith**



Trustee gave **real**  
**and genuine**  
**consideration** to the  
exercise of power



Power is not  
exercised for an  
**improper or ulterior**  
**purpose**

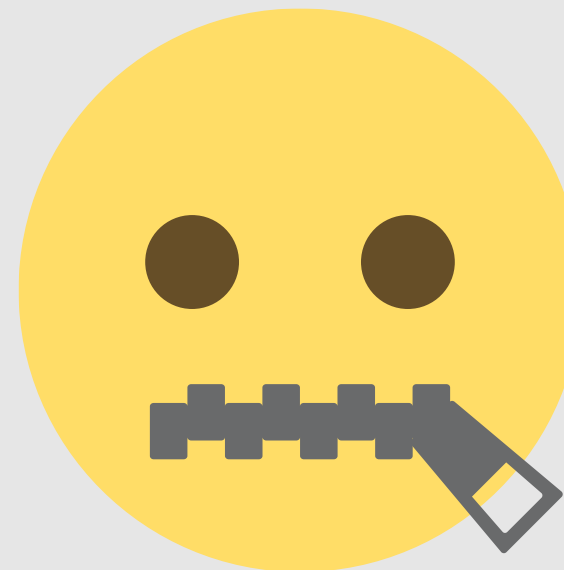
# Challenging Trustee Discretion

## "Good Faith" Principles

### Additional principles:



Trustee must  
inform itself of  
**relevant matters**



Trustee is **not bound**  
**to give reasons** for  
decisions

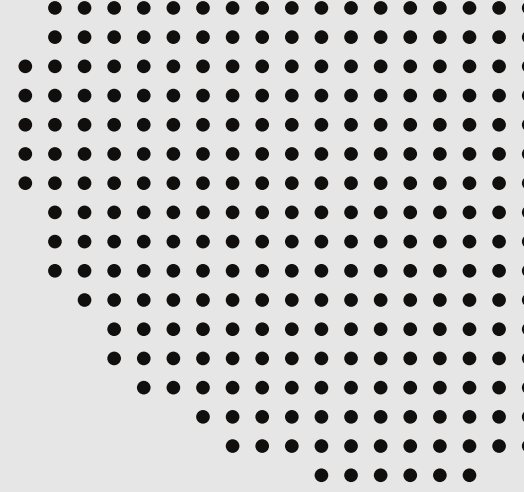
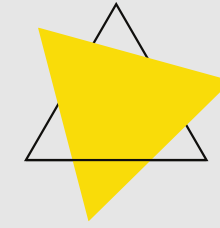


Court is **not going to**  
**enquire into fairness** or  
reasonableness of outcome

But a "grotesquely unreasonable"  
outcome may indicate bad faith or  
discretion not exercised in good faith

# Wareham v Marsella

## Was there 'good faith'?



**Failed to give “real and genuine consideration”.**



### **Re correspondence between solicitors:**

- Incorrect assertions re Riccardo as a beneficiary
- Tenor of correspondence
- Failure to obtain “specialist legal advice” prior to making decisions

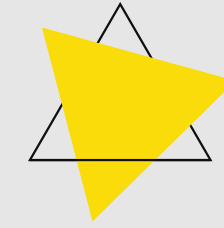


### **Re payment of death benefits 100% to Caroline:**

- Did not consider Riccardo’s relationship with Helen (substantial period of time - 32 years of marriage)
- No death benefits paid to Riccardo at all – “grotesquely unreasonable”
- Did not exercise power for an improper purpose, but failed to give real and genuine consideration
- Personal conflicts

# Wareham v Marsella

## Key Takeaways



Seek specialist advice



Familiarise self  
with trust deed



Make enquiries



Not required to give  
reasons for decisions



Keep records and  
document decisions



Watch tone and accuracy  
of correspondence

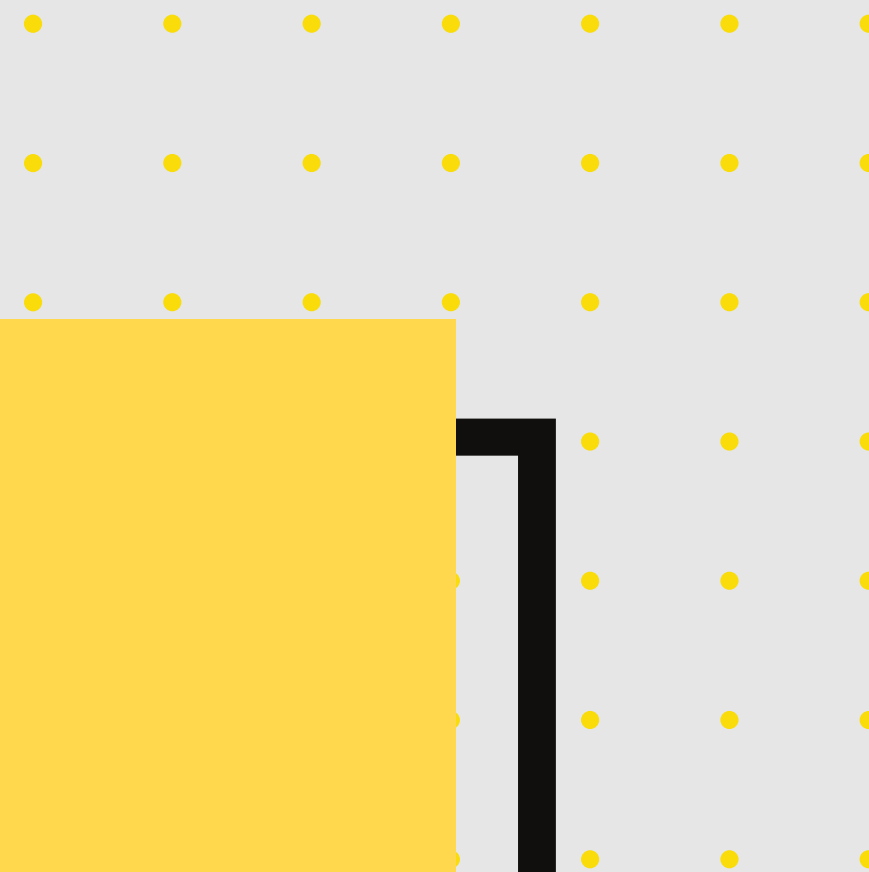


Separate legal  
representation in  
administration

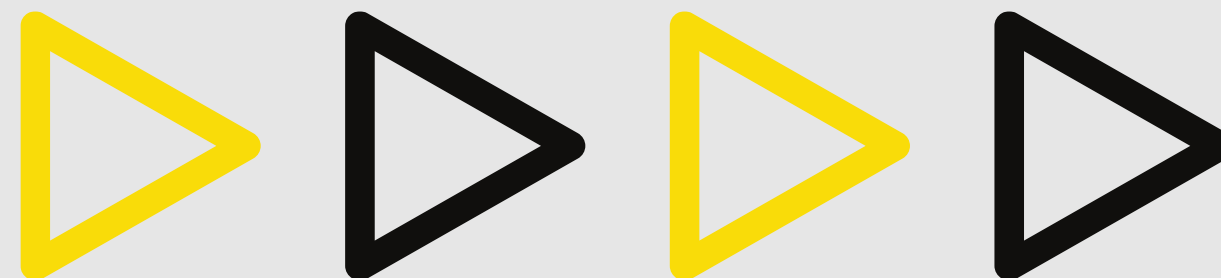




# Q & A



**Nathan Yii**  
Principal, Nathan Yii Lawyers

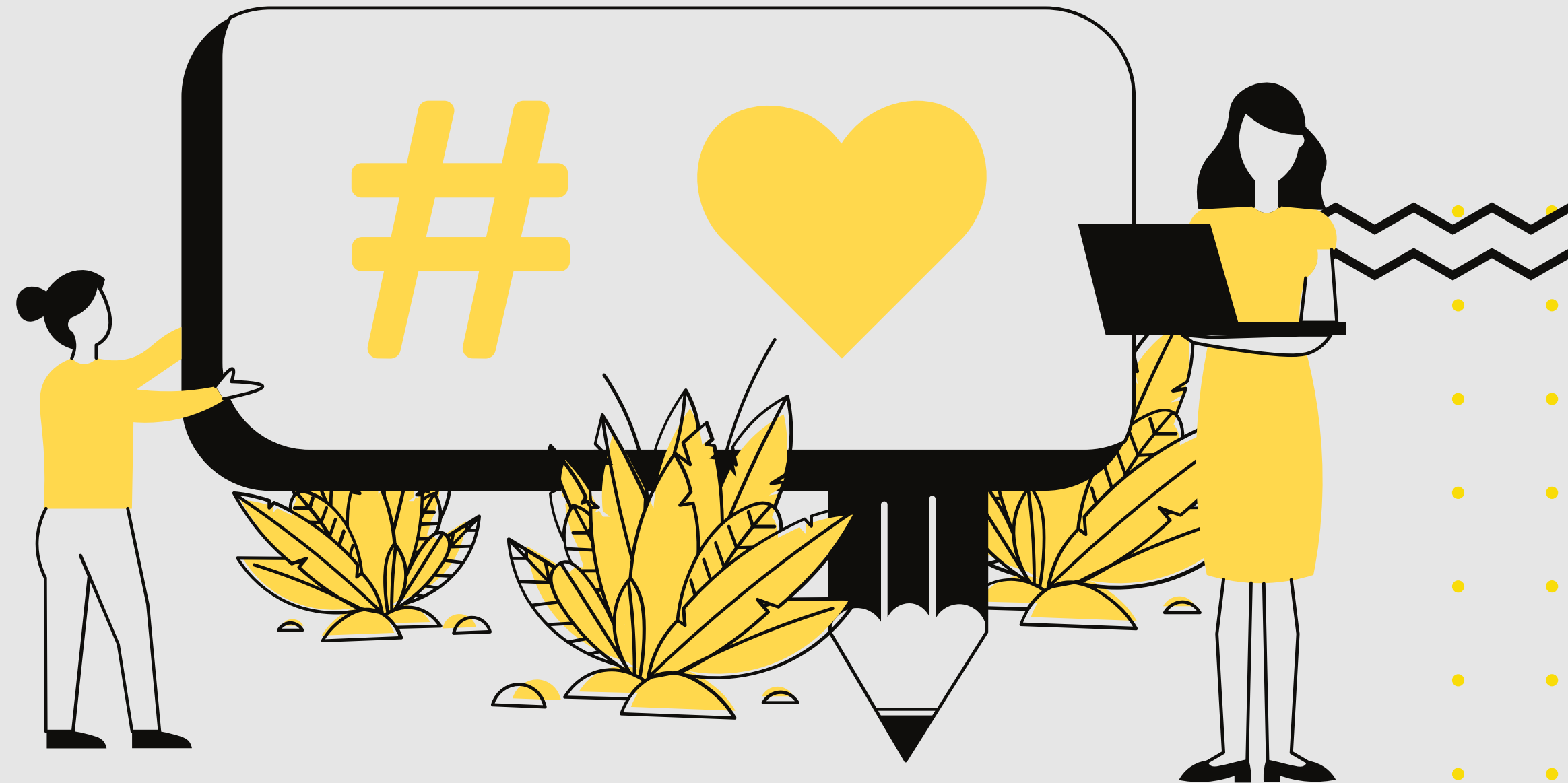
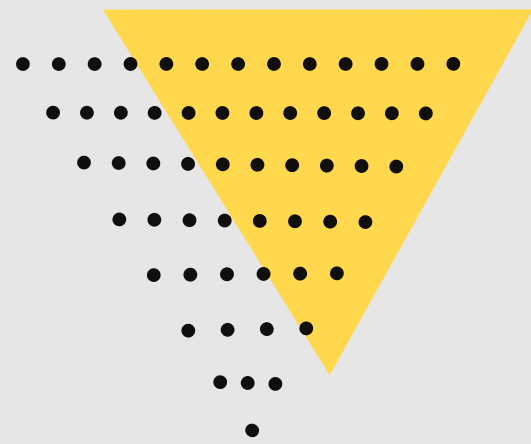


**What was  
your key  
takeaway?**





**How would you rate today's session?**  
**Do you have any feedback?**

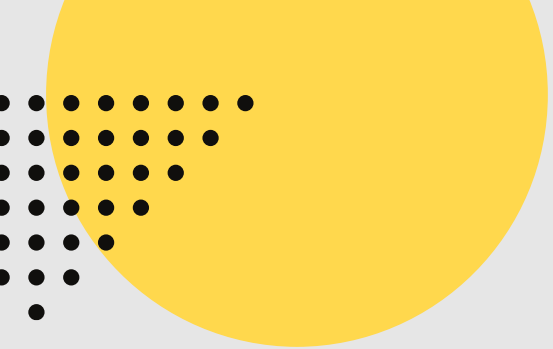




# THANKS!

[taxnuggetsacademy.com.au](https://taxnuggetsacademy.com.au)

Follow us on LinkedIn, Facebook, Instagram and YouTube



## **Disclaimer**

All publications & materials are prepared for training, educational & general information purposes only & should not be relied on as (or in substitution for) legal, accounting, financial or other professional advice.

Current as of September 2022.

