

Welcome

Local Tax Club Geelong

20 June 2025

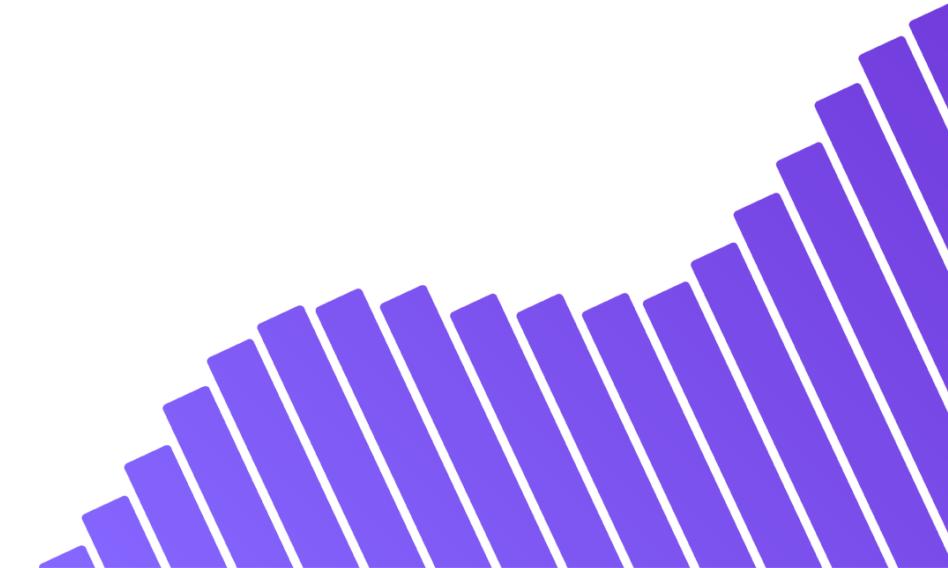
Novotel Geelong



Estate planning: International issues and residency Succession planning for structures

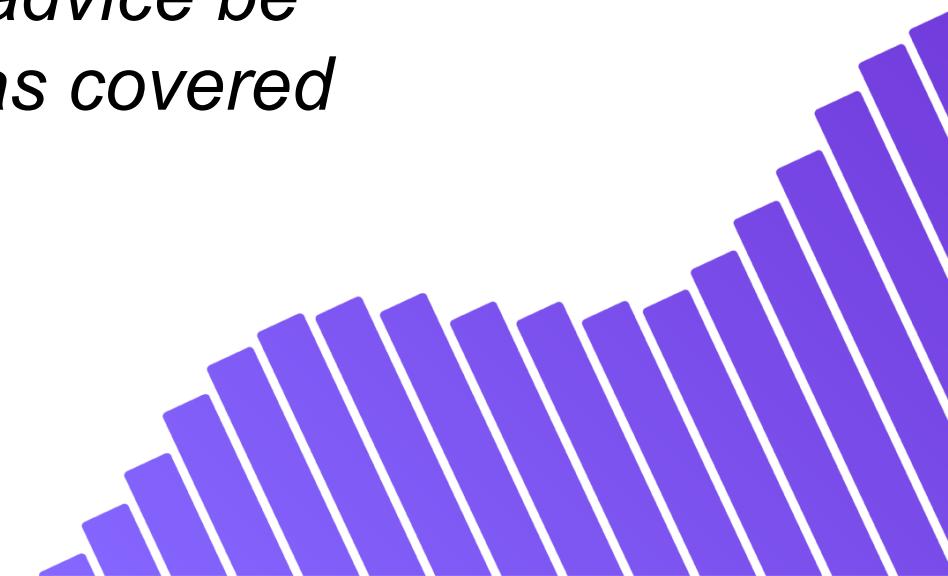
Presenter:

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Disclaimer:

This is not advice. Readers or attendees should not act solely on the basis of the material contained in this presentation. Items are general comments only and do not constitute or convey advice. Also, changes in legislation may occur quickly. We recommend that formal advice be sought before acting in any of the areas covered in this presentation.



Introduction

International issues

Residency – individuals, estates and trusts

Residency – reducing the risk

Succession planning for structures

Companies, trusts and business

Continuity and what can go wrong

Agreements

Transition of wealth and control

The numbers:

Expected \$3.5 trillion
intergenerational wealth transfer in
next 10 – 20 years
(\$175 billion / yr)

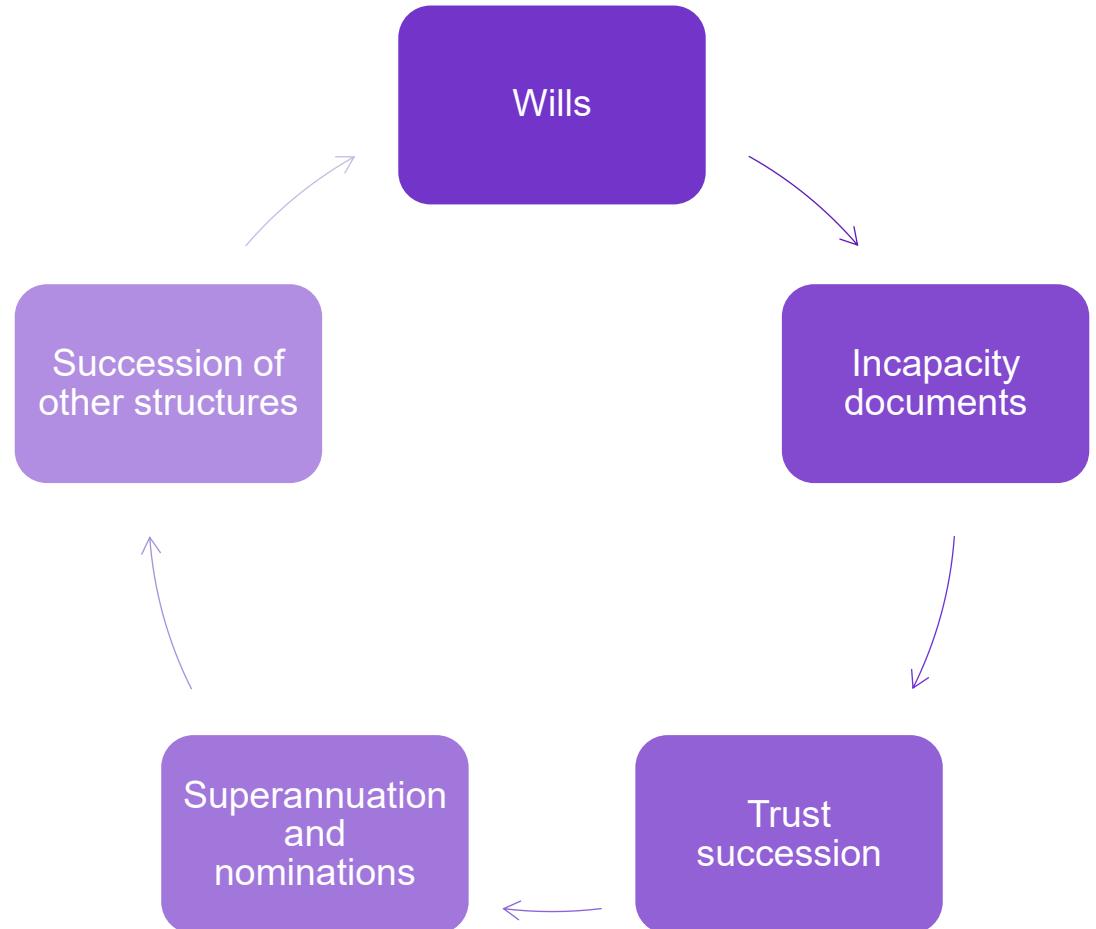
Baby boomers:

- Less than 25% of population
- Own more than 50% of private wealth
- 38% want to pass the baton to the next generation
- but 83% have no succession plan

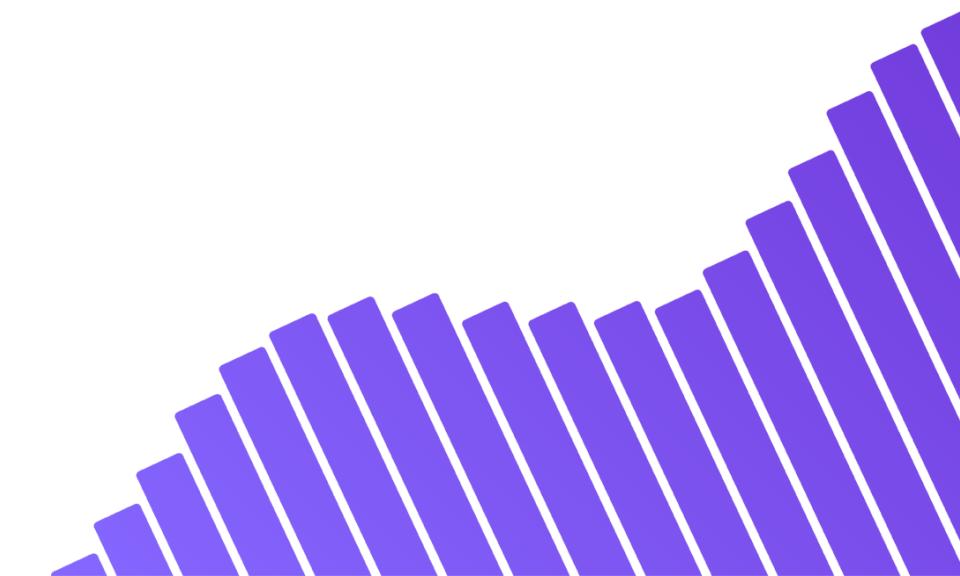
What could go wrong...?

Don't be a casualty...

- Many issues can be avoided
 - Have a sound plan
 - Have clear communication
 - Test the plan
 - Keep it up to date



International issues, residency and succession planning



International issues

- 30.7% of the Australian population were born overseas
- Where does this fit in with estates and administration?
 - non resident estates
 - non resident beneficiaries
 - unintended tax outcomes
 - control considerations



International issues

Individuals

Resident of Australia if they meet any one of the following four tests:

- 1: primary test is the '**ordinary concepts**' test - TR 2022/D2 / *Harding*
 - ordinarily live
 - factors: usual abode / intention / purpose / presence / reason for absence from Australia
- 2: '**domicile**' or 'permanent place of abode' - *Harding*
 - 'domicile' where father was born – can acquire 'domicile of choice' by intention
 - 'definitely abandoned' – abandoned in a permanent way
- 3: '**183 day test**'
 - tax resident where been in Australia continuously or intermittently during more than one half of the year
 - unless Commissioner satisfied 'usual place of abode' is outside Australia
- 4: '**Commonwealth Superannuation Scheme test**

International issues

Companies

Resident of Australia if they meet any one of the following three tests:

- 1: incorporated in Australia.
- 2: incorporated offshore and carries on business in Australia, and has its central management and control (**CM&C**) in Australia
- 3: incorporated offshore and carries on business in Australia, and has its voting power controlled by Australian resident shareholders

Central management and control:

- majority of directors Australian
- substantive management and control in Australia
 - meetings
 - high level decision making
 - registered office
 - where dividends are declared and paid from
- who directs company operations in reality and where from?

International issues

Trusts

Resident of Australia if they meet either of the following two tests:

- 1: a trustee of the trust estate was resident at any time during the income year
- 2: the CMC of the trust estate was in Australia at any time during the year of income

No requirement for trust estate to carry on business in Australia

Where multiple trustees only one needs to be an Australian resident

Executor relationship = trust relationship

- where multiple executors, provided one is Australian, then estate is Australian resident
- may still be resident if no resident executor, where can show CMC in Australia

International issues

CGT

- Div 128 rollover
 - CGT rollover where assets pass under the terms of the Will
- CGT event K3
 - Non resident at time of death
 - Non resident beneficiary
 - Deceased taxed on unrealised capital gains immediately before death
 - Included in deceased's date of death return and paid by estate

International issues

Managing K3 in an estate

LPR level

- Is the executor non resident?
- Are there other executors?
- Do they have to act?
- What happens if they don't act?

International issues

Managing K3 in an estate

Beneficiary level

- what assets are excluded from K3?
 - non CGT assets – cash
 - ‘Taxable Australian Property’

How does the Will operate?

- sell assets in estate?
- adjustment mechanisms to balance up?
- appropriation?

International issues

Estate contains

- Family home
- Investment property
- Cash
- ASX shares

Beneficiaries are Max (Aus), Christian (Aus) and Clayton (overseas)

Options to distribute estate?

- 1: All assets equally to all children
- 2: Family home and ASX shares to Max and Christian and cash and investment property to Clayton
- 3: Clayton's inheritance passes to a testamentary trust with Max and Clayton as co trustees
- 4: Sell assets and distribute cash

Which option works best?

International issues



Approximately 1.3 million Britons in Australia



UK IHT - £325,000

excess taxed at 40%
transfers between spouses exempt where have UK status



Recent budget changes – effect from 6 April
2025

Shift from 'domicile' to 'UK tax resident'



Changes

UK tax resident for 10 or more of previous 20 years
worldwide estate subject to UK IHT
includes assets they have settled on a trust (some concessions)



UK estate planning – separate Wills / power of attorney documents?

International issues

US – estate and gift tax

 2025 threshold USD \$13.99 million

US citizens - excess taxed at 40%

Includes assets at date of death plus certain lifetime taxable gifts

Unused excess of first spouse to die can be passed to surviving spouse if US citizen

Assets passing to US citizen - considerations

How do assets pass?

Qualified Domestic Trust (health, maintenance, education, or support, or the health, maintenance, education)?

US trust?

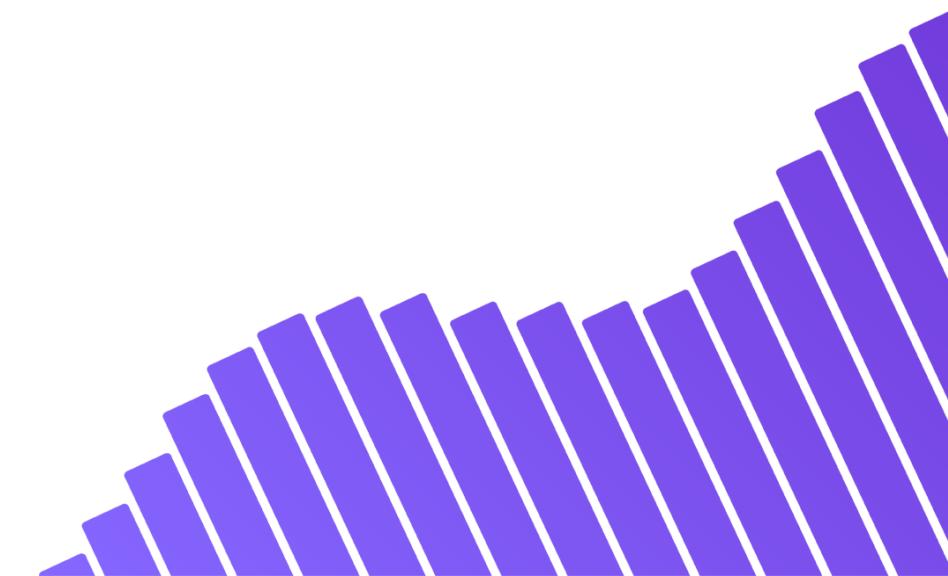
Australian trust? Consider control / decision making

Maintain flexibility in Will?

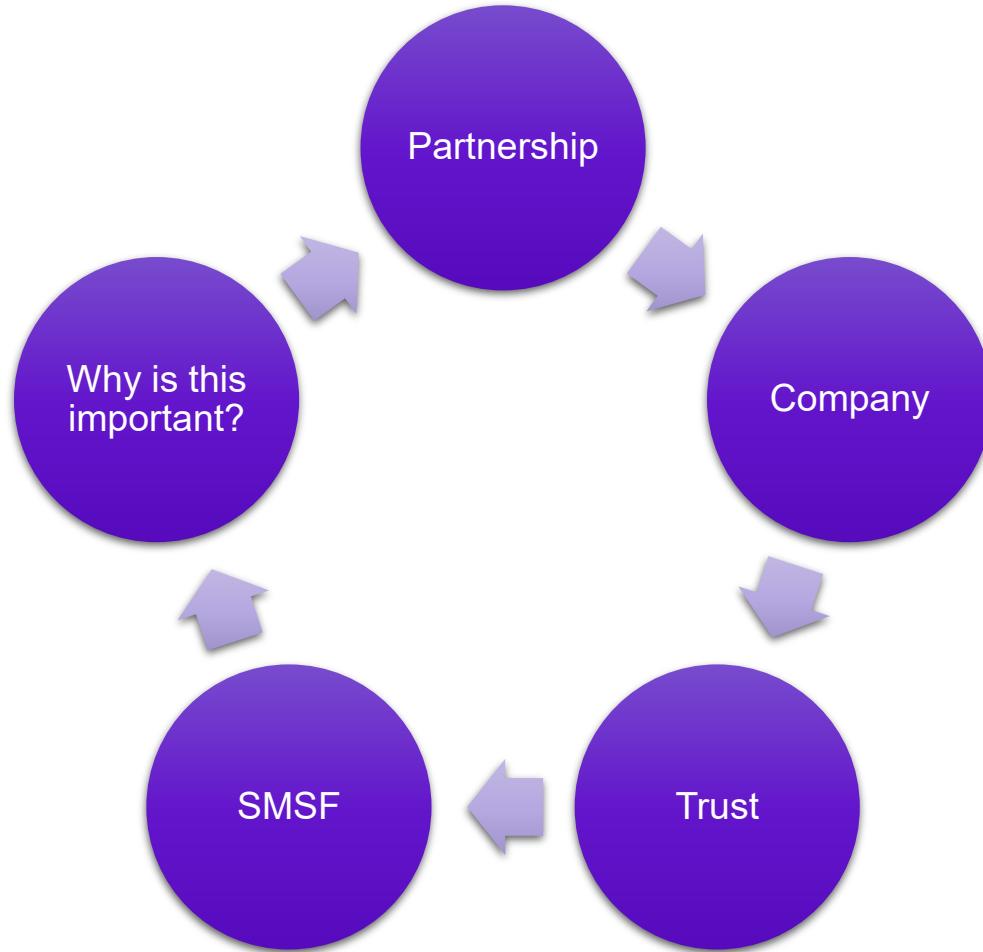
 Non US citizens lower threshold – USD \$60,000

 US estate planning – separate Wills / power of attorney documents?

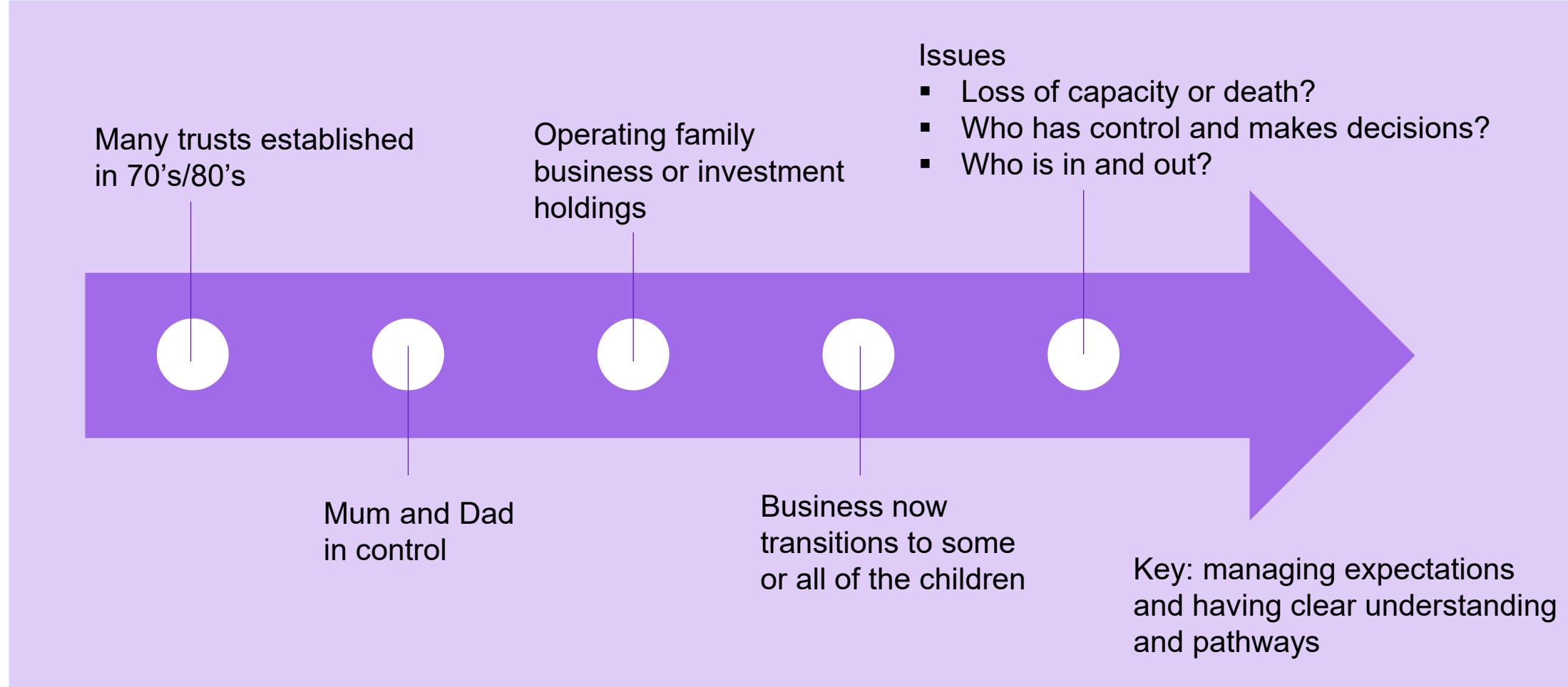
Succession planning for structures



What are the structures we see?



Trusts and businesses – happy families...or not?



What can we do?

70% of business transfers fail between generations

- 60% fail due to breakdown in communication
- 25% fail due to inadequate training for successors

What can we be doing?

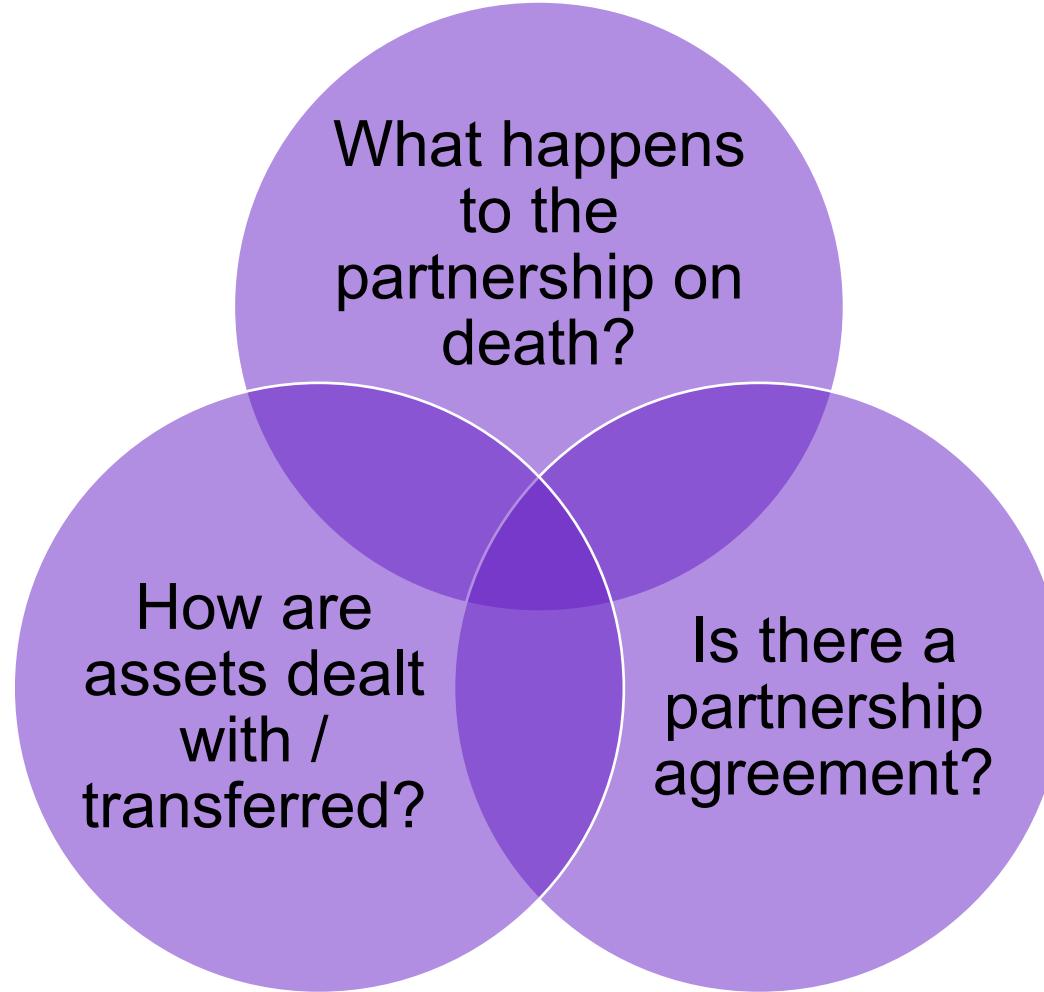
- Starting the conversation
- Who, what and how?
- What is the cost of not doing it?

Clients and their successors will thank you

What are the benefits of business succession planning?

- Ability to respond to change/unexpected events
- Allowing for generational change – preserving family harmony
- Identifying and supporting future leaders
- Managing exits – voluntary and involuntary
- Preserving brand identity
- Risk mitigation

Partnership



Companies

What happens to shares?

What happens to directors?

Consider death and incapacity

- Sole director
- Multi director
- Is it a going concern or passive company?

Companies and constitutions

Bespoke constitution

- Ability to deal with incapacity and death
- Special classes of shares with voting rights
- Controls decision making
- Mediation process for disputes and rights to equal income

Considerations

- Good option **where** concerns about future control and decision
- Provides certainty and mechanisms to deal with potential issues

Companies and agreements



Role of shareholders' agreements

- What role do shareholder agreements play in good business succession planning?
 - Describes the goals of the company
 - Allocates responsibility for decision making and ongoing business succession planning
 - Imposes protections around the issue of new shares
 - Provides for insurance cover
 - Creates external funding options
 - Dispute resolution processes
 - Restraints ensure brand/business protection
 - Imposes exit events and consequences
 - Documents valuation methodologies



Shareholders' agreements: voluntary exit

- **Triggers**
 - Retirement
 - Resignation
 - Election to dispose of shares
 - Receive offer from a third party
- **Consequences of voluntary exit**
 - Pre-emptive rights of remaining shareholders
 - Drag along / tag along provisions
 - Valuation - application of good leaver provisions

Shareholders' agreements: default events

- Triggers
 - Default under or material breach of shareholders' agreement
 - Insolvency
 - Termination for cause
 - Change in control

- Consequences of default
 - Pre-emptive rights of remaining shareholders
 - Selective buy back
 - Sale to third parties
 - Application of bad leaver provisions – should a discount to valuation be applied?

Shareholders' agreements: other involuntary exits

- Triggers
 - Death
 - Total and permanent disability
 - Trauma
- Consequences of involuntary exit
 - Pre-emptive rights of remaining shareholders
 - Selective buy back
 - Buy/Sell arrangements
 - Funding options

What are buy sell deeds and how do they work?

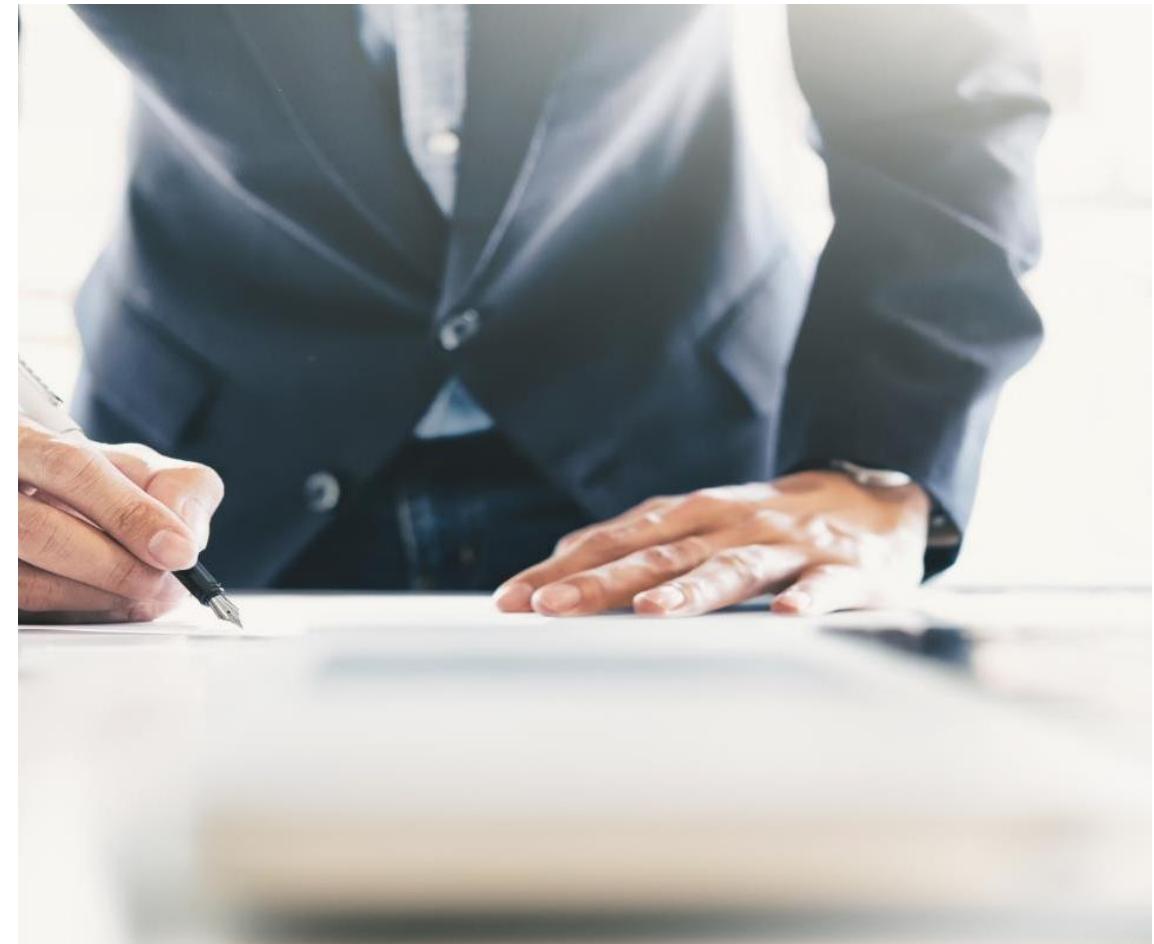
Put and call options

Trigger events

Valuation procedures

Approaches to funding

Necessary to ensure consistency between
the buy-sell deed and insurance funding



Buy-sell deeds - what are the trigger events?

- Death
- Total and permanent disability
- Trauma
- Consider definitions of disability and trauma together with terms of insurance policies

Buy-sell deeds - valuation

- Types of valuation
 - Expert valuation
 - Board valuation
 - Fixed price
 - Assets basis
 - Future Maintainable Earnings or Discounted Cash Flow

Buy sell deeds - approaches to funding

Insurance

No insurance

Vendor finance

Payments up front

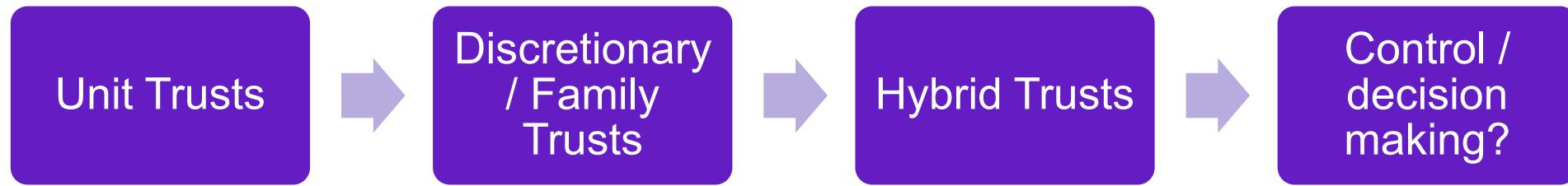
Consider interest and security

Consider timeframes for payment

Drafting tips and tricks

- Ensure provisions in SHA and buy-sell deed are aligned
- Alignment with insurance policies:
 - definitions of ‘trigger events’
 - consider timing reflects terms of any insurance policies
- Include provisions applying in circumstances where insurance policies do not pay out or do not reflect current market value
- Consider taxation consequences

Trusts



Discretionary trusts and control

What are the key roles?

Trustee

- Day to day decisions

Appointor

- Consent required to:
 - Vary the terms of the trust deed
 - Appoint and remove beneficiaries
 - Alter the vesting date of the trust

Guardian

- Consent required to:
 - ‘reserved’ or ‘restricted’ powers
 - Varying the terms of the trust
 - Making capital distributions
 - Appointing or removing beneficiaries
 - Appointing capital on vesting

Discretionary trusts – succession of key roles

Trustee

Trustee:

- Individual
- Company

Where a company:

- shares pass per terms of Will
- unless shareholder or other agreement in place

Where an individual:

- trust deed determines who has power to appoint successor (appointor)

If no provisions

- *Trustee Act*

Discretionary trusts – succession of key roles

Appointor

Guardian

What does the trust deed say?

- Is there a specific power under the trust deed?
- Does it refer to the position passing to the LPR?

What if there is no power or succession – variation?

Discretionary trusts – succession of key roles

Mercanti v Mercanti

- **FW Trust**
 - words '*trusts hereinbefore provided*' restricted the variation power to only the trusts of that trust, being clause 2, and clauses 4 to 8, and did not extend to the power to alter an appointor
 - Variation invalid
- **MMF Trust**
 - words '*trusts, terms and conditions*' applied to the trust deed as a whole, and was not limited to provisions before clause 28 despite the words 'hereinbefore contained'
 - Variation valid

Discretionary trusts – succession of key roles

Re Owies Family Trust

Family dispute between three siblings follow the death of their parents:

- Michael received control of the trust with family lawyer
- Paul and Deborah had a strained relationship with parents
- Steps were taken during lifetime of parents to name Michael and lawyer as appointor and guardian on death of the parents via deeds of variation in 2002, 2010 and 2017

Proceeding had three main areas:

- 1: validity of variations to change appointors / guardians
- 2: income distribution powers
- 3: trustee removal

Variation power:

- ‘...revoke add to or vary all or any of the trusts hereinbefore limited...’

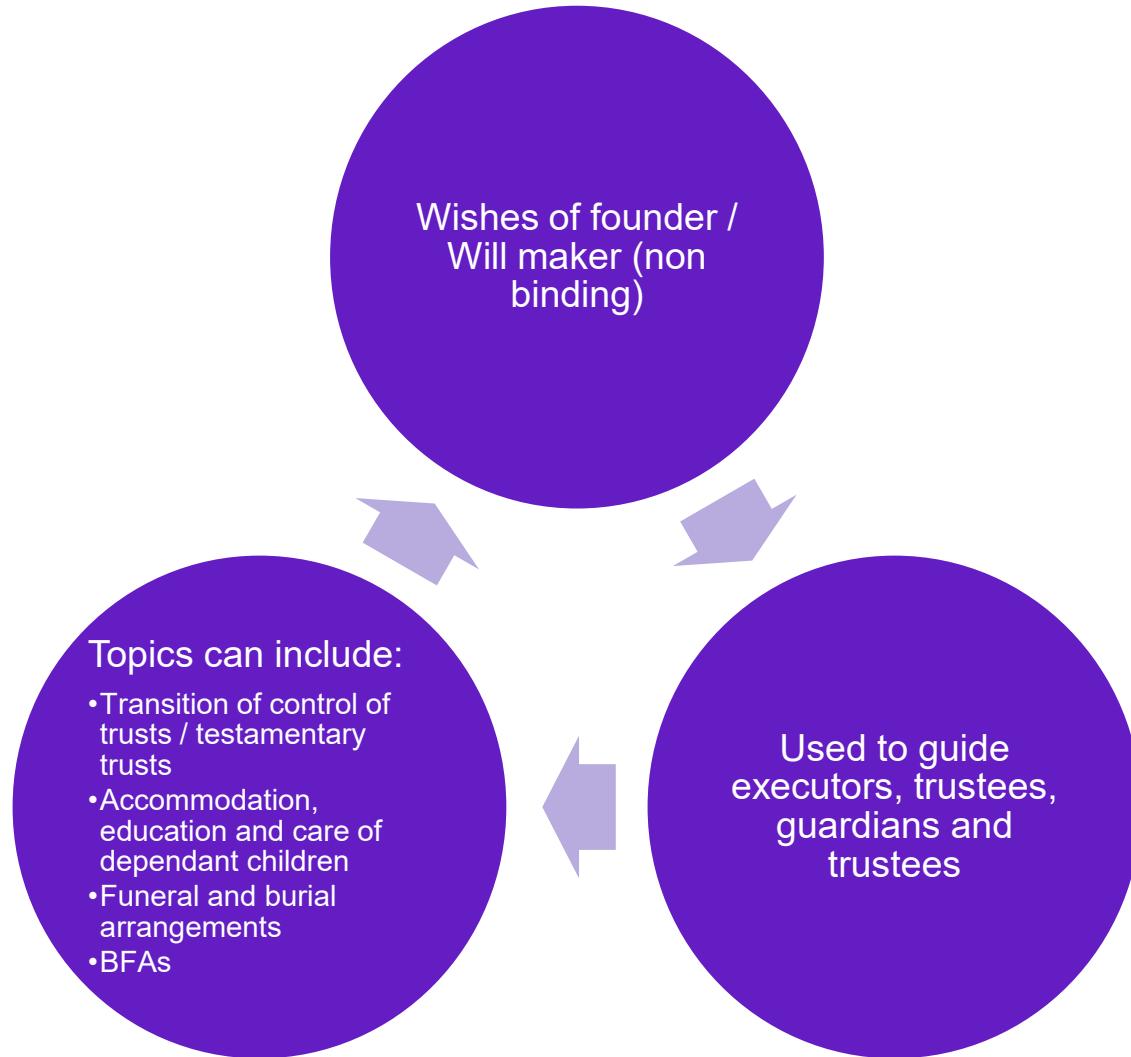
Discretionary trusts – succession of key roles

Re Owies Family Trust

Judgement:

- Reference to ‘trust’ was a reference to the primary trust in clause 2
- Definitions of appointor and guardian are ‘provisions’ and not ‘trusts’
- ‘trusts hereinbefore’ does not give the trustee power to amend the guardian and appointor
- Variations invalid

Trusts: letter of wishes



Trusts: Split trusts and bespoke constitutions

Split trust

- **Non-standard** trust deed
- Controlled by parents during lifetime
- After parents die, rights of children entrenched
- Valuation and exit mechanisms

Bespoke constitution

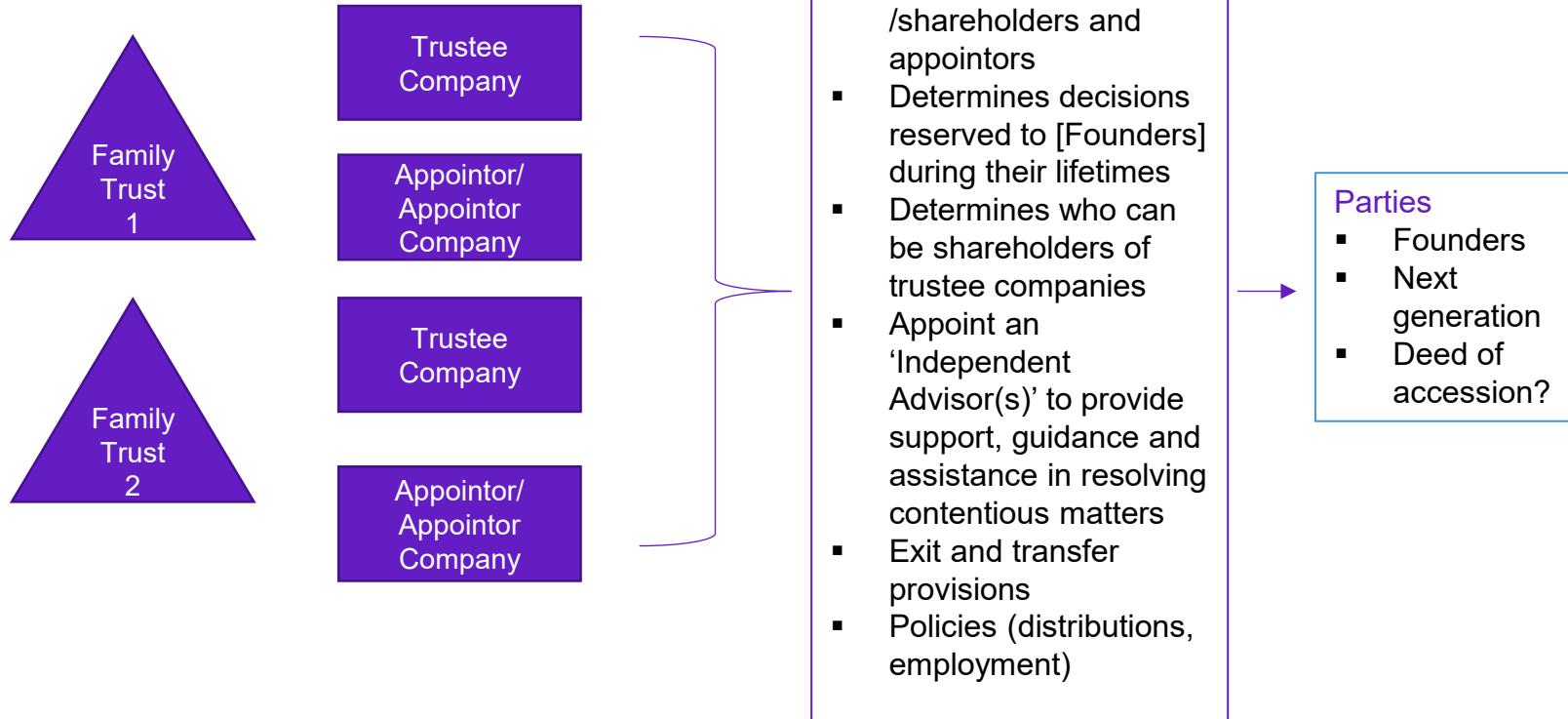
- Special classes of shares with voting rights
- Controls decision making
- Mediation process for disputes and rights to equal income
- Exit mechanisms

Considerations

- Good option **where** concerns about future control and decision
- Split trust must be implemented from establishment otherwise CGT/ duty issues

Family agreements

- Formal documentation
- Regulate decision making in operating entities
- Framework for decision making in trust structures



Family charters / constitutions / council?



Process

- Get buy-in
- Determine Values, goals and 'rules'
- Define relationship between the family and business
- Start simple
- Evolve over time
- Clarify and confirm facts (family, business and structures)
- Identify objectives
- Not binding



Charter/Constitution

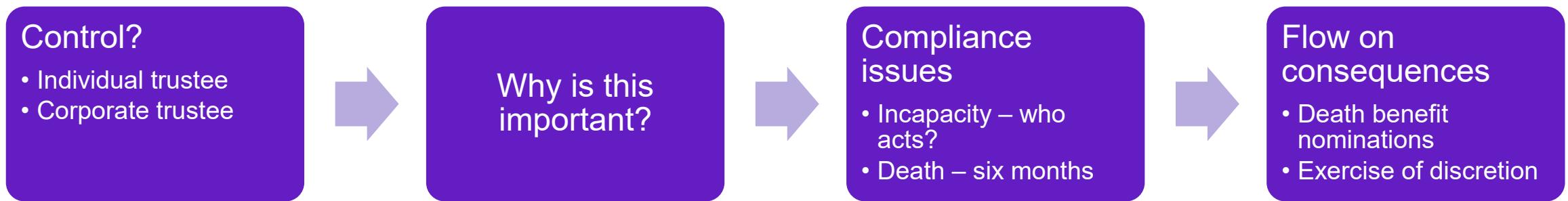
- Content
- Vision, values and belief, purpose
 - History and background
 - Goals
 - Board structure/decision making
 - Family council
 - Transfer and exit
 - Dispute resolution
 - Who can work in the business
 - Family meetings
 - Philanthropy
 - Amendment/review and updates



Council

- Family Representatives
- Voice of the family
- Comments, questions to the business
- Strategy setting
- Reserved decisions?
- Good governance required

SMSFs



Why succession goes wrong and how you can stop it

Lack of organisation and planning

Get it right before death

- list of assets and liabilities
- list of key contacts
- has the process been documented?
- are the key documents in place?
- communicate with key stakeholders

Test it – do a ‘dry run’ of death and make sure it works...

Our people



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Hall & Wilcox Private Clients team

- Succession planning: Wills, powers of attorney, incapacity, structuring and advice, trust succession and control
- Trusts: establishment, structuring, ongoing administration (including change of trustees, variations and interpretation issues)
- Estate administration: grants of representation, executor advice, beneficiary advice
- Inheritance disputes: family provision claims, Will and probate disputes
- Trust disputes, exercise of discretion, rights to information, removal of beneficiaries, variation and construction issues
- Executor advice, commission applications and disputes
- Superannuation advice including superannuation estate planning, SMSF compliance advice, death benefit nominations and superannuation disputes

Upcoming Events

Local Tax Club

18 July 2025 – Novotel Geelong

Topic: GST and real property – When things go wrong

Speaker: Andrew Spierings, ATI, Victorian Bar

Next Generation Tax Discussion

10 July 2025 – Hall & Wilcox

Yarra Valley Tax Retreat

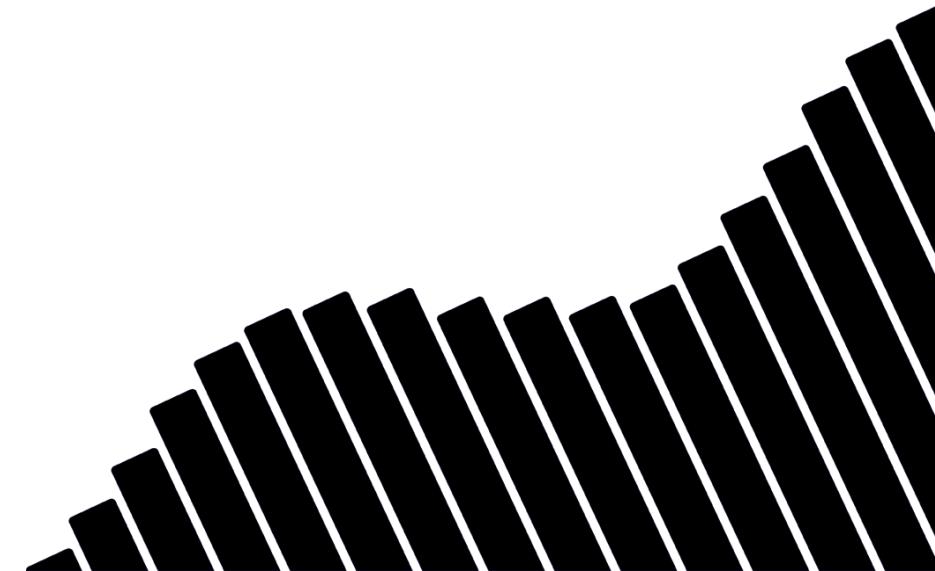
24 – 25 July 2025 - Balgownie Estate Yarra Valley

The Tax Summit

3 – 5 September 2025 - MCEC Melbourne

Thank you

Please complete your evaluation form



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