

Estate Planning Strategies for Blended Families

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\$3.2 Trillion on Litigated Claims

Baby Boomers to pass on \$224b a year by 2050



Aleks Vickovich

Wealth editor

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Baby Boomers will pass on an estimated \$224 billion each year in inheritances by 2050 as record housing and super wealth, and fewer heirs, create a \$3.5 trillion bonanza for younger generations, including the poorest Australians.

In the first-ever official study of wealth transfers in Australia, the Productivity Commission has projected a fourfold increase in the value of inheritances over the next 30 years.

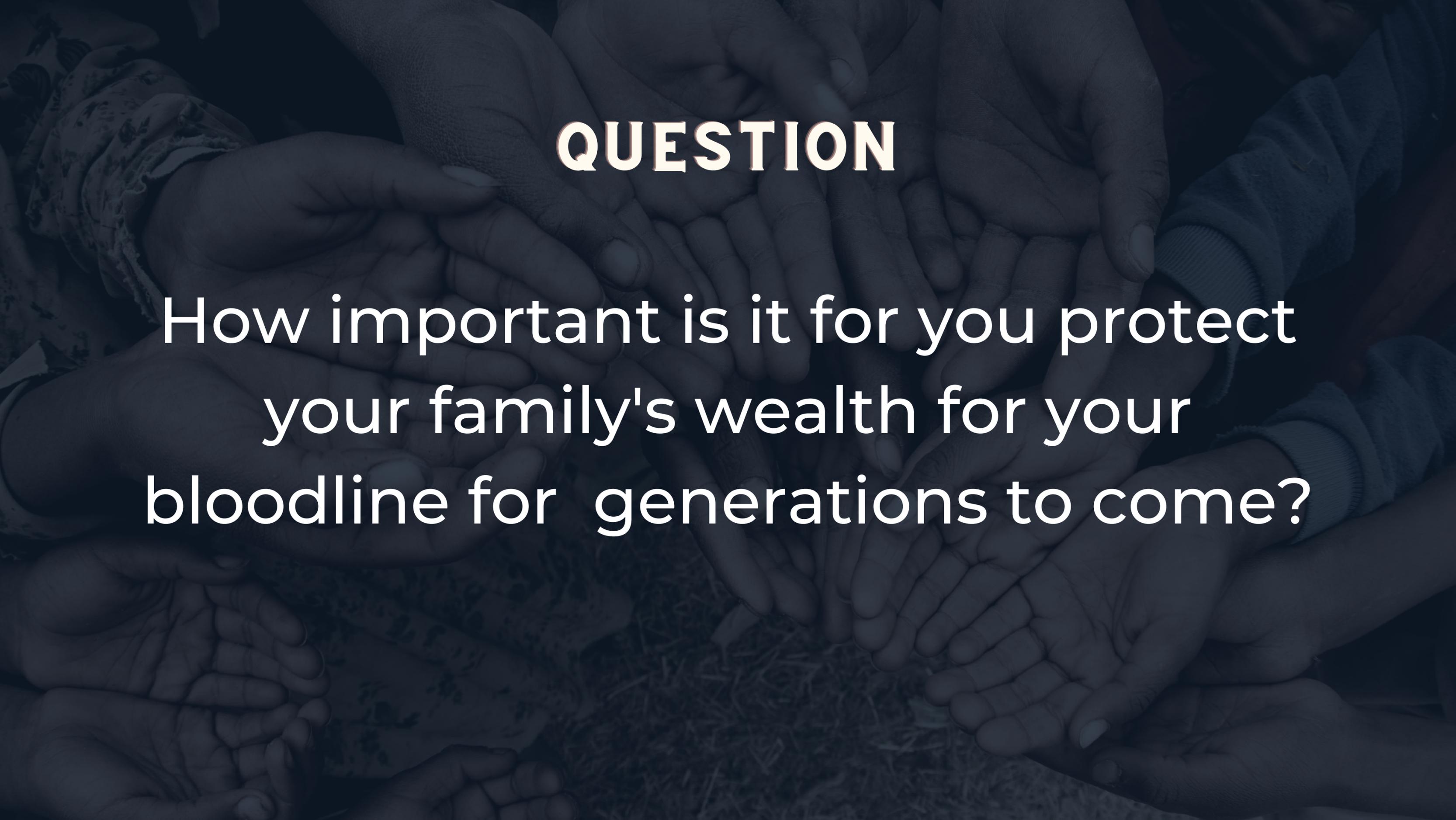
Next SAPEPAA Adviser Course
with Grant Abbott - Live on the
Gold Coast and also streamed:
5-7 December 2022



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Succession, Asset Protection & Estate Planning Advisers Association

Leave a Legacy



QUESTION

How important is it for you protect your family's wealth for your bloodline for generations to come?

Case Study

- John Smith is 53 years old and is married to Sally - aged 43 and they have two children - Jan and Liam - age 14 and 12
- John has a 28 year old daughter - Jenny who has mental health issues and he supports monthly. He pays Jenny's mother to look after Jenny as she is no good with money. He feels morally obligated to look after Jenny.
- John has a \$1.5M home in Clontarf NSW held jointly with Sally. Owns a business in a company that sells widgets. He owns all the shares and the company is worth \$2M
- John's Will gives everything to Sally - Jan and Liam. He also has super with CBus of \$600,000 which is directed to his estate via a BDBN.
- John's lawyer is the Executor of the estate and administrator charging a flat fee of 5%.

**ESTATE CONTESTATION IN AUSTRALIA:
AN EMPIRICAL STUDY OF A YEAR OF CASE LAW**

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I INTRODUCTION

Estate litigation is a source of ongoing concern. Issues have been raised both in the media¹ and academic literature² about matters such as the frequency with

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1 See, eg, Rachel Browne, 'Where There's a Will, There's a Writ', *The Sydney Morning Herald* (online), 9 May 2014 <<http://www.smh.com.au/nsw/where-theres-a-will-theres-a-writ-20140509-zr5ib.html>>; Renee Viellaris, 'Kids Fight for Your Cash as Legal Squabbles among Families Eat into Estates', *The Courier Mail* (online), 13 April 2013 <<http://www.couriermail.com.au/news/queensland/kids-fight-for-your-cash-as-legal-squabbles-among-families-eat-into-estates/story-e6freoof-1226619468014>>; Richard Ackland, 'Where There's a Will, There's a Chance for Wasteful Litigation', *Sydney Morning Herald* (online), 13 April 2012 <<http://www.smh.com.au/federal-politics/political-opinion/where-theres-a-will-theres-a-chance-for-wasteful-litigation-20120412-1wwfk.html>>.

“ In Australia, about 50% of Wills are contested usually by family members unhappy with the distribution of their parents' estates.

The boom in family provision claims across Australia recently has been of significant benefit to legal professionals and many firms are offering 'no win/no fee' options to draw in additional claimants.

University of Queensland research showing that three-quarters of family provision claimants are successful in their claims is further encouraging potential claimants to also consider proceeding with a claim.

Source: Author Monica Bryant-NOrved

NSW: Family Provisions Claims

Division 1 Applications for family provision orders

57 Eligible persons (cf FPA 6 (1), definition of “eligible person”)

- (1) The following are *eligible persons* who may apply to the Court for a family provision order in respect of the estate of a deceased person—
- (a) a person who was the spouse of the deceased person at the time of the deceased person’s death,
 - (b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person’s death,
 - (c) a child of the deceased person,
 - (d) a former spouse of the deceased person,
 - (e) a person—
 - (i) who was, at any particular time, wholly or partly dependent on the deceased person, and
 - (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,
 - (f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person’s death.

Matters to be considered

60 Matters to be considered by Court (cf FPA 7–9)

- (1) The Court may have regard to the matters set out in subsection (2) for the purpose of determining—
 - (a) whether the person in whose favour the order is sought to be made (the *applicant*) is an eligible person, and
 - (b) whether to make a family provision order and the nature of any such order.
- (2) The following matters may be considered by the Court—
 - (a) any family or other relationship between the applicant and the deceased person, including the nature and duration of the relationship,
 - (b) the nature and extent of any obligations or responsibilities owed by the deceased person to the applicant, to any other person in respect of whom an application has been made for a family provision order or to any beneficiary of the deceased person's estate,
 - (c) the nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered,
 - (d) the financial resources (including earning capacity) and financial needs, both present and future, of the applicant, of any other person in respect of whom an application has been made for a family provision order or of any beneficiary of the deceased person's estate,
 - (e) if the applicant is cohabiting with another person—the financial circumstances of the other person,
 - (f) any physical, intellectual or mental disability of the applicant, any other person in respect of whom an application has been made for a family provision order or any beneficiary of the deceased person's estate that is in existence when the application is being considered or that may reasonably be anticipated,

Claim within 12 months of date of death

- (g) the age of the applicant when the application is being considered,
- (h) any contribution (whether financial or otherwise) by the applicant to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the applicant,
- (i) any provision made for the applicant by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate,
- (j) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person,
- (k) whether the applicant was being maintained, either wholly or partly, by the deceased person before the deceased person's death and, if the Court considers it relevant, the extent to which and the basis on which the deceased person did so,
- (l) whether any other person is liable to support the applicant,
- (m) the character and conduct of the applicant before and after the date of the death of the deceased person,
- (n) the conduct of any other person before and after the date of the death of the deceased person,
- (o) any relevant Aboriginal or Torres Strait Islander customary law,
- (p) any other matter the Court considers relevant, including matters in existence at the time of the deceased person's death or at the time the application is being considered.



Justice Jeremy Curthoys, who was scathing of lawyers' "indefensible" legal fees. Credit: WA News

Legal fee scandal: Lawyers 'feast' on Perth family estate

\$600,000
estate
decimated
by over
\$500,000 in
legal fees

Control is crucial - be careful where you fit in

- Be careful with control in the event of dispute
- For estate planning purposes - who is the Executor
- In any testamentary trust who are the appointors and trustee - who are the beneficiaries
- For SMSFs who are the surviving controllers - the Trustee - is there a valid BDBN of SMSF Will
- For companies, who are the Successor Directors - if any - will shares be drawn into conflict
- Trusts generally sit outside of family provisions claims but Owies case is a dampener



Blended Family Protection Strategies



Strategy One - Testamentary Trust for each family

Testamentary Trusts

- Do not escape family provisions claims
- Never insert proposed testamentary trust deed into a Will only the general terms and conditions in case the laws or cases change
- Can use a Family Protection Trust as the core TT documents
- Family law and litigation protection plus family provisions claims for next generation
- Separate TT's for superannuation and also insurances

Elizabeth Hurley's son cut from father's family trust

Bang Showbiz · 14 hrs ago



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Elizabeth Hurley's son has been cut from his father's family trust.



Strategy Two - Family Protection Trust

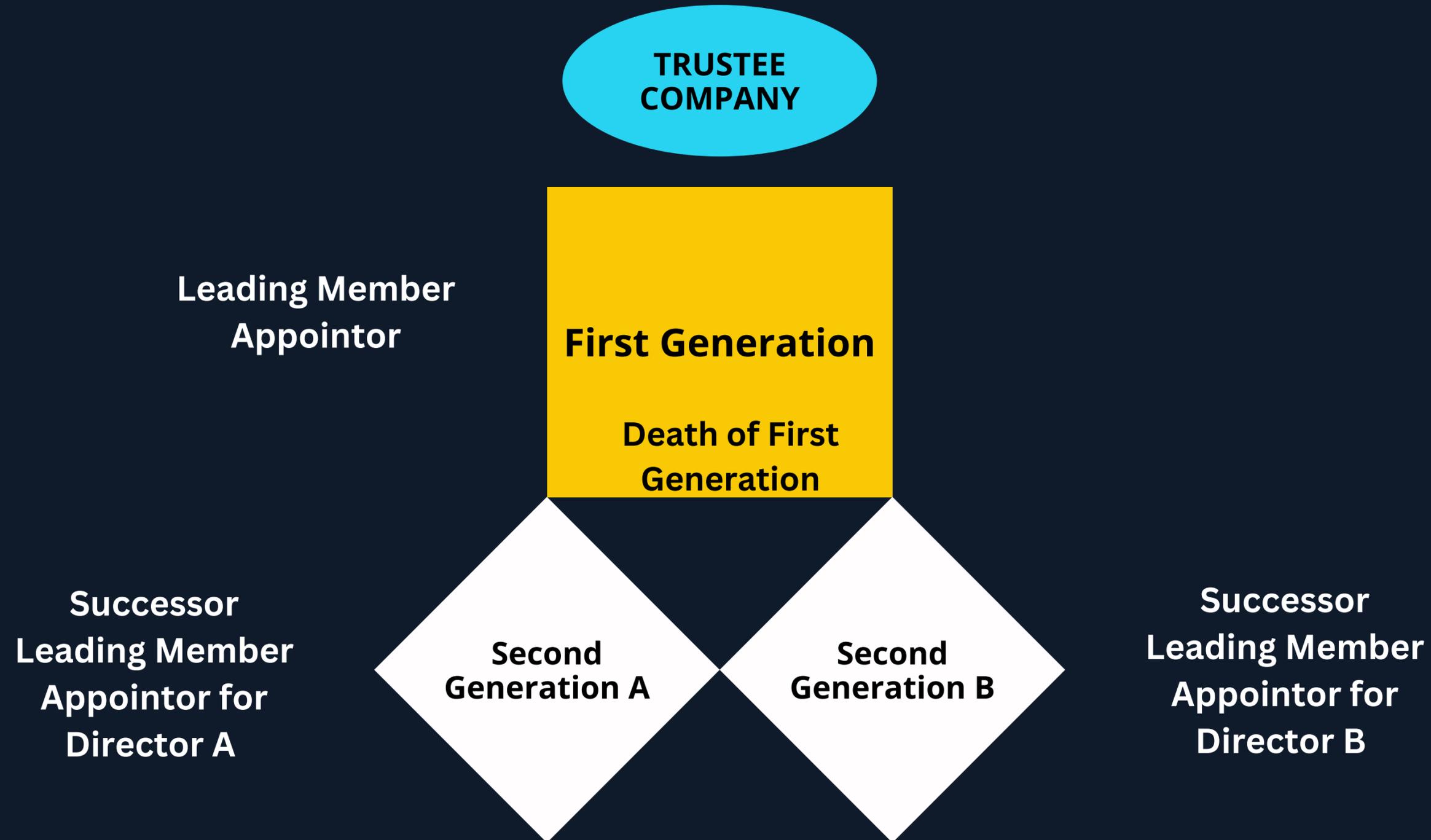
Key Features for Family Protection Trust

- NO named primary beneficiary
- Leading Member and successors are core beneficiaries
- Extends to bloodline children, grandchildren and relatives plus companies, trusts and other entities they control
- Also can make specific or class exclusions
- To be used with a Family Protection discretionary trustee company
- Family Protection Trust = LMĐT (different in name)



Strategy Three - Multi-generational trust splitting

Split Trust - how it works



TD2019/14

Example 2 – separating the control of some of the assets of an existing trust that does not result in creation of a new trust

13. *The Kingdom Family Trust is a discretionary trust settled in 1970 for the benefit of Ian King and his family members – his wife Maria and his children Katarina and Laura. Ian King is the current appointor of the Kingdom Family Trust.*

14. *The trustee of the Kingdom Family Trust is Emperor Pty Ltd (Emperor), a company jointly owned by Ian and Maria. Together with their daughters, Ian and Maria are also the directors of Emperor.*

15. *The Kingdom Family Trust is in the business of property development and the operation of retirement villages. Ian is 70 years old and wishes to reduce his involvement in the family's business activities.*

16. *Ian and Maria King decide that now is an appropriate time for greater responsibility for the administration of the Kingdom Family Trust to be placed on Laura who is currently taking increased responsibility for the property development business. To facilitate the desired succession planning goal, the trust deed is amended to:*

- (a) *allow for the appointment of additional trustees in respect of some of the assets of the trust fund*
- (b) *allow for separate appointors in respect of the different parts of the trust fund*



PROMISSORY NO

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Strategy Four - Gift and Loan Back -

The Protector

holder referred to as Payee to pay

Making it work

1. Who and what is being protected
2. Build a Family Protection Trust
3. Irrevocable Gift to the Trust
4. Cash, bill of exchange, cheque or promissory note to fund the irrevocable gift - ensures protection with no asset transfers - no CGT or stamp duty
5. Loan of cash or cash instruments back to the gifter or gifters
6. Mortgage deed to secure property and securities deed to secure PPSR assets
7. Call option for uplifts and asset claim



Strategy Five - Superannuation and Life Insurance

Superannuation and Life Insurance

- Superannuation can be paid directly to a dependant by the Trustee of a Fund and must do so if there is a valid and legal BDBN or SMSF Will
- For insurance policies the payment goes direct to the nominated beneficiary - check the policy
- Protected from family provisions claims with the potential exception of notional estate in NSW - other states are fine
- Special purpose testamentary trusts can be built directly with superannuation and life insurance