

Legacy Trusts v Testamentary Trusts

With Grant Abbott, Abbott & Mourly
Lawyers and SAPEPAA Chairman



20 July 2022



The Keys to SAPEP Success



- **Next Course** – 20 August for three days with accreditation through LightYear Training Group
- **Membership**– First year fees includes certification
- **Fiji Conference**– November 12 – 15



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

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

Family Provisions Claims – who can't claim??

Succession Act 2006 No 80

Current version for 1 December 2018 to date (accessed 10 June 2020 at 11:59)

[Chapter 3 Part 3.2 Division 1 Section 57](#)

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.

Note. Section 60 sets out the matters that the Court may consider when determining whether to make a family provision order, and the nature of any such order. An application may be made by a tutor (within the meaning of the [Civil Procedure Act 2005](#)) for an eligible person who is under legal incapacity.

Note. “De facto relationship” is defined in section 21C of the [Interpretation Act 1987](#).

Estate Planning is only going to get bigger and more contested

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



Aleks Vickovich

Wealth editor

Dec 7, 2021 - 12.15am

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.

Let's Review Trusts – includes Testamentary and Legacy Trusts

- **Discretionary** – The trustee has discretion as to the distribution of capital and income amongst a range of beneficiaries
- **Fixed Trusts** – There are fixed entitlements for fixed beneficiaries. Beware some fixed trusts are not fully fixed.
- **Hybrid Trusts** – Functionally a fixed entitlement but with discretionary entitlements at the direction of the fixed user

Key Issues with a Trust

- **Beneficiaries** – Have no right or entitlement to any assets of the trust – *Gartside v Inland Revenue Commissioners* [1968] AC 553 and *Lygon Nominees Pty Ltd v Commissioner of State Revenue* [2005] 60 ATR 135
- **Deed is the Law** – When dealing with any provision of a deed you are dealing with a set rule of law. If a deed says on vesting that all capital must be paid to bloodline beneficiaries the Trustee is bound by that – albeit with a discretion as to the quantum.
- **Rule against perpetuities** – designed for use when there were death duties in Australia so that the Trust had to vest at some time. Applies in all States except South Australia
- **Updating Deeds** – there is a law within the deed providing for an upgrade of one or more rules in the Deed and in many cases the entire deed – provided the Settlor is not benefited.

Trusts and Bankruptcy

- **Exempt Assets:** Section 116 deals with superannuation both before and after retirement – excluding pensions. For SMSFs need to shift to a retail or industry super fund
- **Void Transactions:** Subject to clawback:
 - For undervalued transactions – section 120 – five years/four years if a related party and transferor was solvent and two years for unrelated
 - If the transfer was done to avoid trustee in bankruptcy where the transferor was about to become insolvent – section 121
- **Valuations:** It is important to get valuations to show that a transaction is valued both at the gift and loan level

Trusts and Family Law

- **Kennon v Spry [2008] HCA 56** – interesting case with multiple judgements and investigation of numerous discretionary trust updates and upgrades over a period of 30 years. All came back to control which Dr Spry never gave up. High Court looked through amendments.
- **Control is the Key** – appointor/trustee
- **Harris v Harris [2011] FamCAFC 245** – held Mother controlled the Trust
- **Morton v Morton [2012] FamCA 30** – brothers controlled the Trust
- **Even more effective post death for next generation:**
- MacDowell v William [2012] FamCA 479 cannot review Mother's Trust
- Balken & Vyner [2020] FamCA 955 husband did not control deceased father's Family Trust

Trusts and Estate Planning

- **Pass control to the Family** – with the right chain of appointors and a defined set of beneficiaries family assets can be held within the trust for the benefit of generations to come – subject to vesting and the rule against perpetuities
- **Family Provisions Claims** – they sit outside the estate and are not subject to a family provisions claim except if the trust comes from the estate such as a testamentary trust
- **But NSW** – there is a three year claw back if assets are transferred with the intent to minimise the distribution of assets for family provisions purposes



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Abbott & Mourly Lawyers specialise in
asset protection, estate planning,

Here is
your Data
Capture
and
Education
Tool

THE GUIDE TO TESTAMENTARY TRUSTS

Inclusive of a data capture to help establish your own for one or all of your family

Key Facts with Testamentary Trusts

- If they flow from the Testator's Will they can only be established after all expenses, taxes, gifts and any family provisions or contested Will claim
- Favourable tax concessions for Minors – who are treated as adults
- If they flow from a Will cannot pollute with non TT assets or lose your tax concessions
- Superannuation death benefits can be paid directly by the Trustee of a retail, industry or SMSF into a testamentary trust for the benefit of the beneficiaries. On vesting of the trust it must be for the benefit of the beneficiaries. **It does not go through the Will!**
- Insurance is the same as superannuation and can use one TT for both

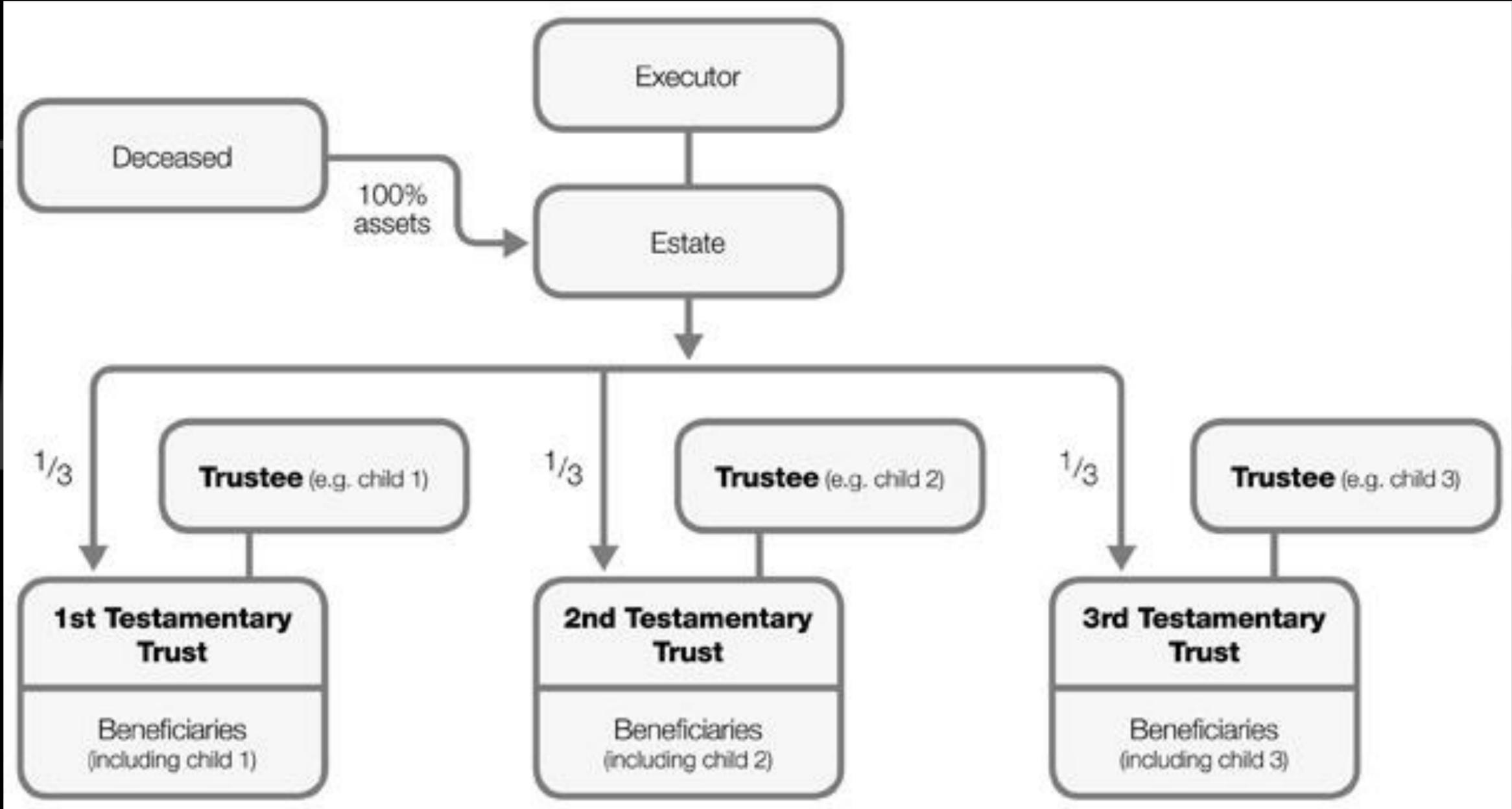
When to use a Testamentary Trust

- If there is an ex-spouse or de facto – no matter how long ago
- If the beneficiary is young, needs support, is an addict or has problems managing money
- The beneficiary is in a de facto relationship
- The beneficiary is disabled and can use a special disability trust for Centrelink purposes
- Desire asset protection
- Seek to keep the family wealth in a trust specifically built for bloodline of the Testator – so no direct spousal benefits
- Want specific assets to be held by specific beneficiaries
- If a number of dependants can use a testamentary trust for each one

What to charge

- First and foremost they should be the “go-to” option for all estate planning through a Will, Super or Insurance
- It is all about asset protection and keeping assets in the family bloodline
- The average charge for a Testamentary Trust is \$1,750 - \$2,250 per person but can bundle with EPOA and SMSF Will
- Top legal firms charge up to \$20,000
- Not a fan of including the whole trust deed in the Will as it locks in that deed – better using broad directions for the Executor to build the Testamentary Trust

Multiple Testamentary Trust



Living/Legacy Trust's are Effective

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.



© Bang Showbiz Elizabeth and Damian Hurley

Before Stephen Bing took his own life last year, he won a court battle overturning his father's attempt to exclude his children, Damian Hurley, 19, and Kira Bonder, 23, from a family trust but that decision has now been overturned on appeal.

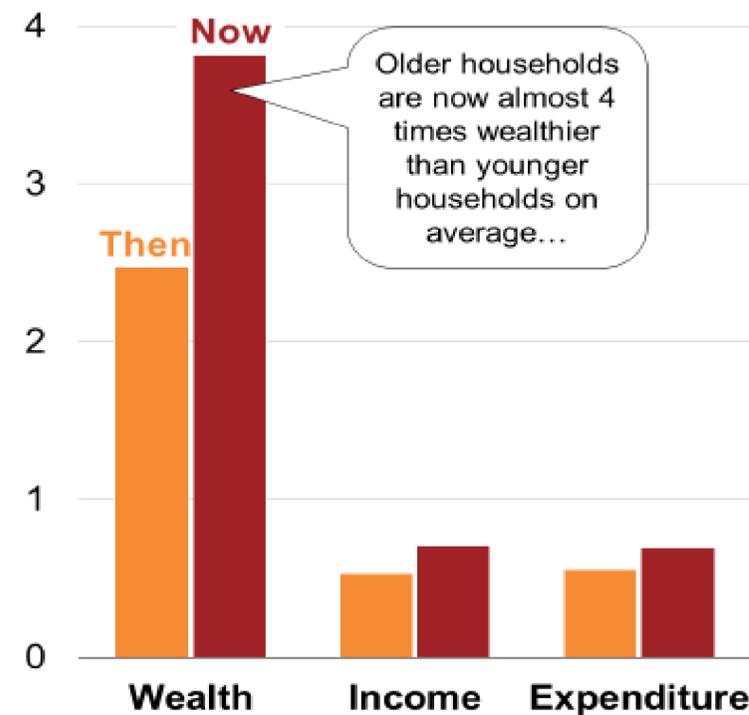
Plus next Gen is coming for your wealth with IGTT of 20% and increased Super death benefits tax

The Henry Review of Australia's tax system noted that 'a bequest tax levied at a low flat rate, and designed to affect only large bequests, could be an efficient and equitable component of Australia's future tax system'.¹⁴¹ Australia is one of only seven OECD countries that do not levy any inheritance, estate, or gift taxes.¹⁴²

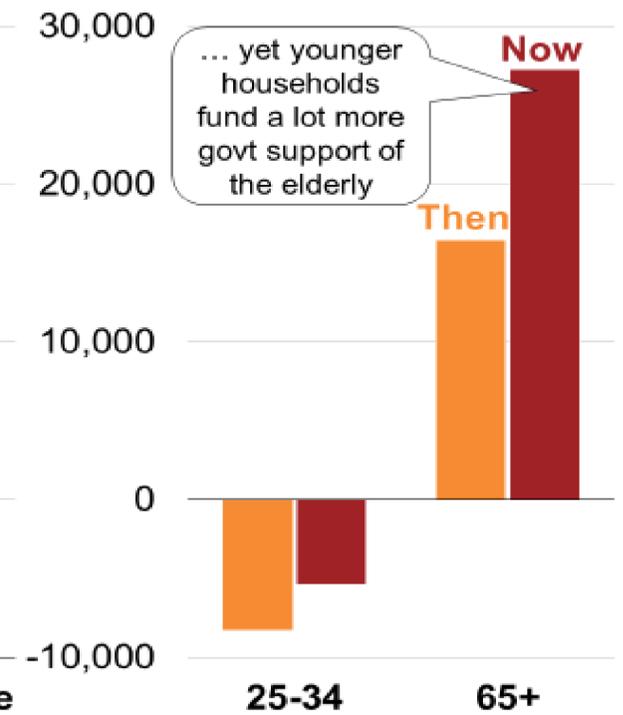
An IGTT/income tax swap could also boost disposable income for young people. For example, if all inheritances above \$500,000 were taxed at 20 per cent, and the revenue was used to fund income tax cuts, most people under 50 would be ahead financially.¹⁴³

Current super death benefits taxes are too low. A higher tax on super bequests paid to non-dependents would better capture the value of the super tax-breaks accumulated by the deceased over their life.¹⁴⁷

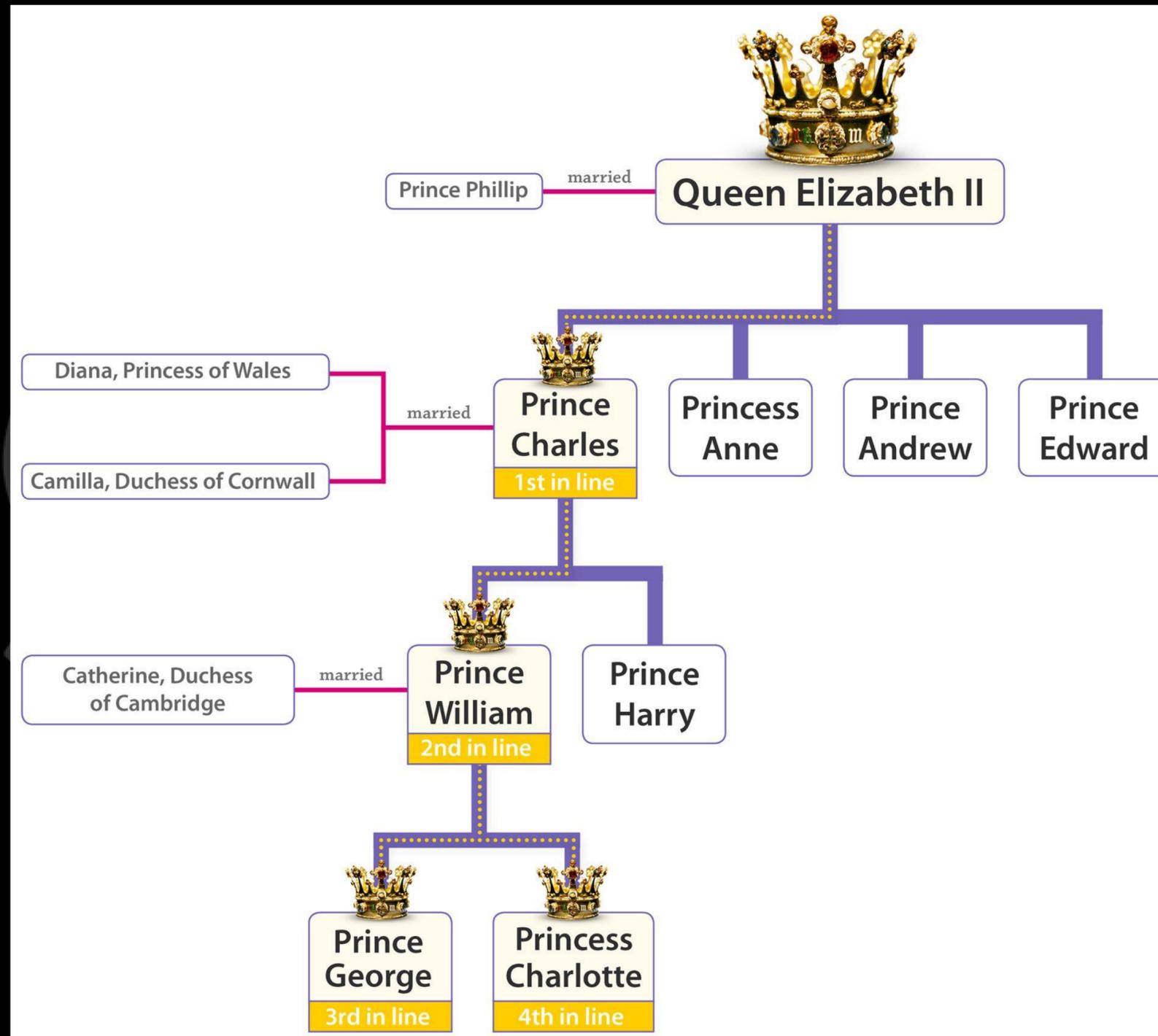
Ratio between older (65+) and younger (25-34) households, then (1986-1994) and now (2016)



Annual net benefit per household, in 2016 dollars



A Successful Family Succession Line



Leading Member Discretionary Trust

- **Core Terms:** The same as a standard discretionary trust
- **Principal Beneficiary:** It is the Leading Member Appointor and their bloodline
- **Capital:** Trustee can set aside for one or more beneficiaries to the exclusion of others. To come: building sub-trusts on the death of the main Leading Members for the benefit of next generation
- **Appointors:** Succession of Leading Member Appointors
- **Trustee: Company** – use a special purpose Leading Member discretionary trustee company. This ensures shares are passed to the next Leading Member and not caught up in litigation or the estate of a deceased

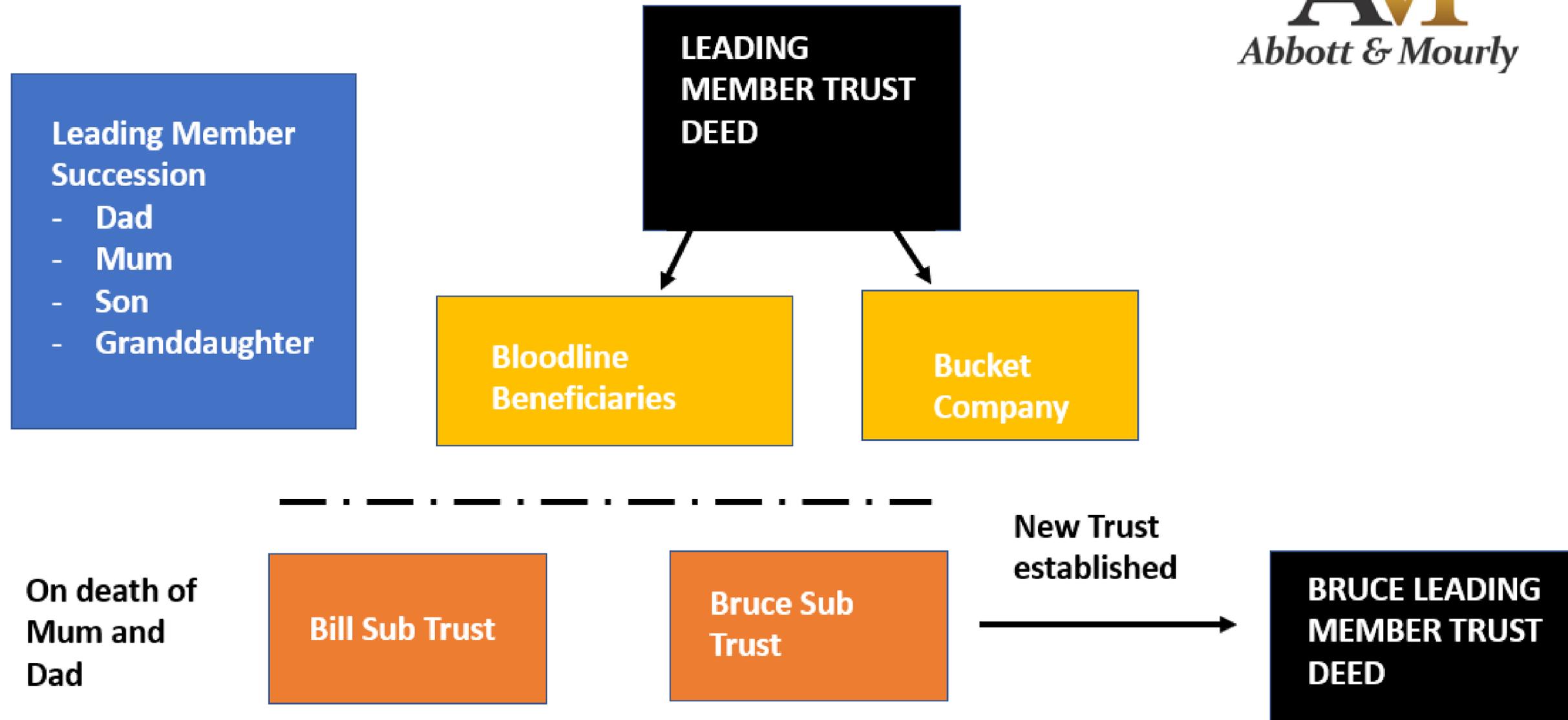
TD 2012/21 ATO on resettling trusts

- “Even though Clark and Commercial Nominees were decided in the context of whether changes in a continuing trust were sufficient to treat that trust as a different taxpayer for the purpose of applying relevant losses, the ATO accepts the principles set out in these cases have broader application. Relevantly, the principles established by those cases are also relevant to the question of the circumstances in which CGT event E1 or E2 may happen as a result of changes being made to the terms of an existing trust pursuant to a valid exercise of a power in the deed (including a power to amend). In light of those principles, the ATO accepts that a change in the terms of the trust pursuant to exercise of an existing power (including an amendment to the deed of a trust), or court approved variation,[4] will not result in a termination of the trust and, therefore, subject to the observation in paragraph 27 below, will not result in CGT event E1 happening.[5]
- 25. On this basis the 'Creation of a new trust - Statement of Principles August 2001' was withdrawn on 20 April 2012.”

Will v Living Trust



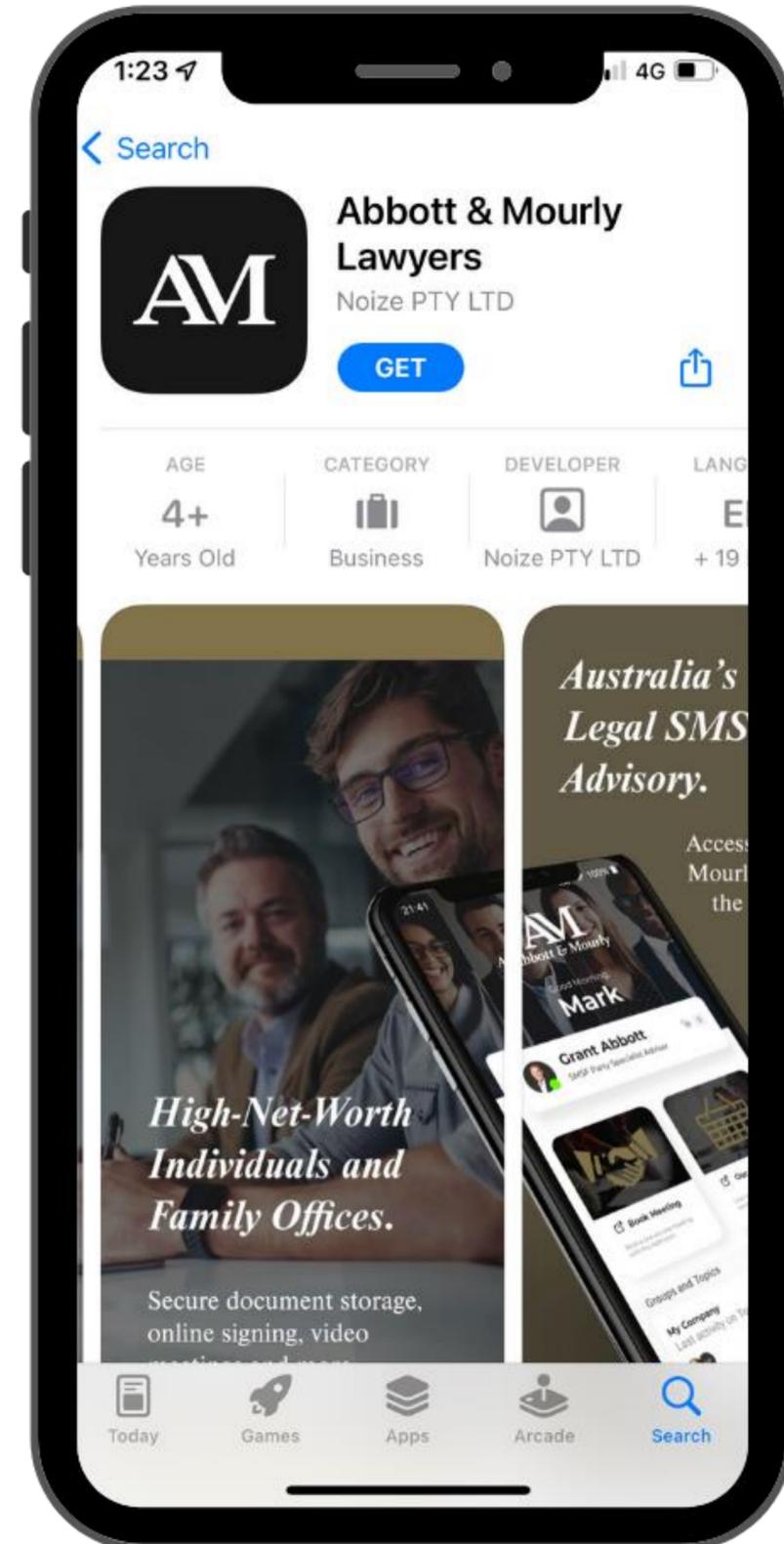
Living Trust's in Practice



If you need legal help

- The provision of tax advice is our specialty
- Abbott & Mourly can provide sign off on any LightYear documents with a legal letter of advice if you are concerned
- Download the Abbott & Mourly app and send the query or document in or you can do inside the document

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CALL TO ACTION

- From 13 – 15 November SAPEPAA has its first even international conference at the Sheraton Beach and Golf Club at Fiji with intense learning and meeting other like-minded advisers
- LightYear Training Group now offering four different courses – SAPEPAA adviser accreditation, SMSF specialist adviser accreditation, Advanced Estate Planning and Mastery of Trusts. Contact Talitha@lightyeardocs.com.au for the latest deals
- For SAPEPAA members important training session on 3 August on Gift Loan back strategy – Re Permewan – the Protector
- If you are not using LightYear Docs then you are missing out on now over 190 documents on the platform that provide the tool for the new Hybrid SAPEPAA accountant and planner



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