Testamentary trusts post-death: bespoke planning opportunities

by Matthew Burgess, CTA, Director, View Legal

Abstract: It is clear that there is a growing need for estate planning to utilise appropriate structuring. Wills using testamentary trusts should be the starting point for any comprehensive estate planning exercise. The difficulty in many such exercises is that serious attempts to devise and implement a plan are often not made until some triggering event, such as financial or matrimonial misfortune, life-threatening illness or death, stimulates action. This article considers options available for implementing trust structures after death when appropriate planning was not done during a person's lifetime, and the post-death strategies which can be used to fix estate planning problems. In such a case, it is possible to establish a trust following a person's death, including an estate proceeds trust or a superannuation proceeds trust. The article discusses the benefits and limitations of these strategies in turn, and also includes a summary of child maintenance trusts.

Introduction

In light of fundamental changes to the taxation regime and the expanding wealth of Australia's ageing population, there is a growing need for estate planning to utilise appropriate structuring.

It is well established that wills utilising testamentary trusts (TTs) should be the starting point for any comprehensive estate planning exercise to ensure wealth passes efficiently to the intended recipients and that the transfer takes place at the intended time.

Asset protection strategies and the use of special purpose trusts are important issues to consider in estate planning, particularly where potential beneficiaries are in financially high risk occupations, such as professional practice, or in business, and where there is a risk that a personal relationship of a beneficiary may degenerate in the future.

Potential beneficiaries that fall into any of these "at risk" categories will be exposed to losing assets, unless appropriate structures are put in place under the estate plan.

The difficulty in many estate planning exercises is that serious attempts to devise and implement a plan are often not made until some "triggering event" stimulates action.

Often the triggering event is itself an issue that may jeopardise the ability to implement appropriate strategies, for example, financial or matrimonial misfortune or life-threatening illness.

The focus of this article is on options available for implementing trust structures after death when appropriate planning was not done during a person's lifetime, and the post-death strategies which can be used to "fix" estate planning problems.

Strategies where there is no TT in a will

While the best approach is to always "begin with the end in mind" and ensure that a person's estate planning documentation achieves their objectives (for example, by including a TT), it is possible to establish a trust following a person's death, such as an estate proceeds trusts (EPT) or a superannuation proceeds trust (SPT).

These "after-death trusts" should be considered as an asset protection and tax planning tool. In certain circumstances, they can be used to create a "set and forget" structure that provides peace of mind now, while still accommodating the needs of evolving family dynamics in the future.

What is an estate proceeds trust?

Before looking at how an EPT operates, it is useful to provide an overview of Australian intestacy law, as these rules are relevant to the quantum of the proceeds that will act as the capital fund of the EPT.

If a person dies without a will, the law says that their assets will be distributed to their family, as determined by a set formula (the "intestacy" rules). The set formula is different in every Australian jurisdiction. There are a range of issues that determine which jurisdiction's rules will apply.

The intestacy rules will also apply where a person dies without a valid will in relation to all of their assets. In this regard, it can in fact be possible to die "partially intestate". This simply means that there are assets in a person's estate that are not validly dealt with under the will.

The following summary gives a broad example of the way in which the intestacy rules often work (although as noted the position varies in each state). If a person dies leaving:

- their spouse (including a de facto spouse), but no children: their spouse receives everything;
- their spouse and children: their spouse receives the first $150,000 and one-half of the balance of the estate if there is one child, or one third of the balance if there is more than one child. The children share the balance between them;
- children but no spouse: their children receive a share each, but only once they turn 18 years of age or get married;
- no spouse or children: the person's parents will share the estate (if both are alive then equally); and
- no spouse, no children and no parents: their siblings share equally.

The amount received by each person will depend on the value of the estate and whether any other beneficiaries are entitled to the assets of the deceased.

If the person does not have any family members who qualify, then the assets may pass to the government bono vacantia.

Estate proceeds trust

A proceeds trust can be either an "estate proceeds" trust (where the proceeds were originally part of the deceased estate), or a "non-estate proceeds" trust (where the proceeds originate from an asset which does not form part of the deceased estate). Some common examples of non-estate proceeds are those funded by superannuation entitlements or life insurance.

An EPT is a trust established by a deed after the death of the deceased. It is most commonly used to obtain advantageous income tax treatment for income allocated to minor beneficiaries.

Generally, an EPT is more restrictive than an ordinary TT established pursuant to the terms of a will. The key difference between an EPT and a TT is that the minor beneficiaries (persons under 18 years of age on establishment of the trust) must be the ultimate capital beneficiaries of the trust, meaning the assets of the trust must ultimately vest in them. In contrast, there is complete flexibility when nominating the ultimate capital beneficiaries of a TT.

The main advantage of an EPT is the concessional tax treatment of income distributed from the trust and the ability to split income according to the financial circumstances and needs of the deceased's children.

Diagram 1 illustrates how EPTs work.

The income distributed from the EPT may be used to pay for the children's education, living and other expenses. Any income received by a minor will be taxed at the normal adult rate, rather than the penal rate that normally applies to income distributions to infant children.

This means that, assuming the children are not earning other income, they will be eligible, once rebates are taken into account, for more than $20,000 tax-free for income received by each child each financial year. Any additional income will be taxed at the ordinary adult marginal rates.

There are numerous technical issues that must always be reviewed before establishing an EPT, including:

- the person distributing the assets to the EPT must have received them under the will of the deceased;
- the transfer of assets into the EPT must occur within three years of the deceased's death;
- the concessional rates of tax are very unlikely to be available to the grandchildren of the deceased;
- while assets in excess of what the willmaker's children might have received on an intestacy can be contributed to the EPT, only the income generated by that portion of the capital which the willmaker's children would have received on an intestacy will be entitled to the concessional rates of taxation; and
- any assets that do not form part of the willmaker's estate (such as assets owned as joint tenants with a spouse or insurance policies that are owned by the surviving spouse) will not be able to be contributed to the EPT.

Diagram 1

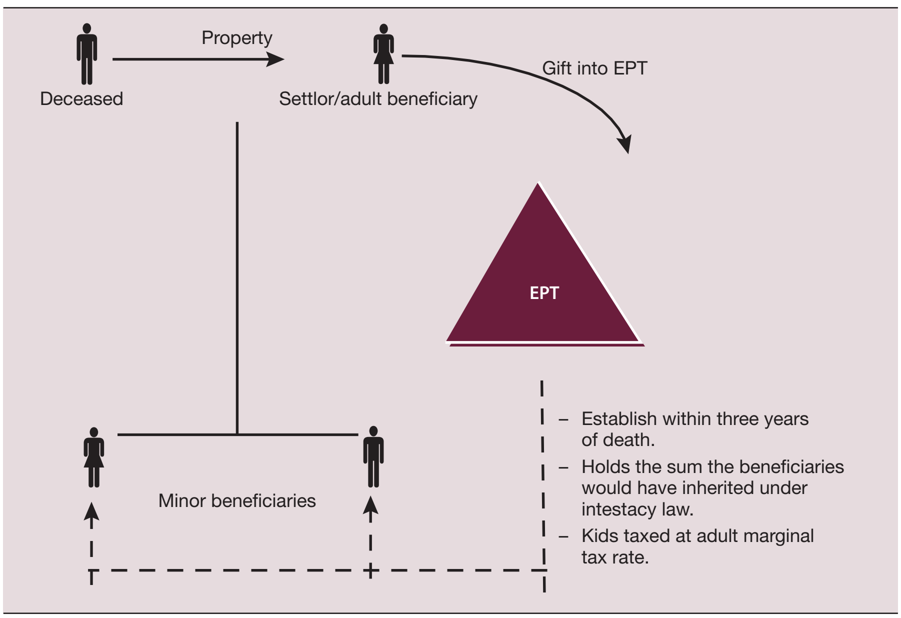


Table 1 provides a brief summary of the key technical differences between an EPT and a TT.

Despite these limitations, an EPT can be of particular benefit where no TT has been established and:

- for families with minor children where extra income would be needed to support the surviving family members should a parent die; and
- where legitimately minimising tax and having flexibility in relation to tax planning is important.

What is a superannuation proceeds trust?

An SPT is a trust that is established solely to receive superannuation proceeds on the death of a fund member. An SPT can be established by a will or by deed after the death of an individual.

Before considering the issues relating to establishing a post-death SPT, it is relevant to consider the operation of an appropriately crafted SPT in a will and the taxation and asset protection benefits it affords.

SPT established in a will

The *Income Tax Assessment Act 1997* (Cth) (ITAA97) provides that a superannuation death benefit, paid to a death benefit dependant as a lump sum, is not assessable income. A death benefit dependant is defined as:[2]

- a spouse or former spouse of the deceased;
- a child, aged below 18, of the deceased;
- a person with whom the deceased had an "interdependency relationship";[3] and
- a person financially dependent on the deceased just before they died.

Where there are death benefit dependants under a deceased estate who are potential recipients of superannuation benefits, it

Table 1

EPT	TT
Established by the beneficiary who has received (via a will) the property from the deceased person's estate, within three years of their death.	Established by deceased person's will.
No CGT exemption on transfer of assets from estate to EPT.	CGT exemption on transfer of assets from estate to TT.
No stamp duty exemption on transfer of assets from estate to EPT.	Stamp duty exemption on transfer of assets from estate to TT.
Only children of the deceased can receive concessional tax treatment on distributions, limited to the income from the assets received by the EPT which the children would have received on an intestacy.	Children and grandchildren can receive concessional tax treatment on income distributions earned on all assets of TT.
CGT is payable on the transfer of any assets from the EPT to beneficiaries, including on vesting.	No CGT is payable on the transfer of any assets from the EPT to beneficiaries, including on vesting.[1]

is often an appropriate estate planning strategy to allow for a separate SPT under the will in addition to any TT, so that a tax-free distribution of the superannuation proceeds can be achieved via a protected structure. Other estate assets can be distributed to a TT that has beneficiaries who are not death benefit dependants.

A death benefit received by a legal personal representative (LPR) is treated as income to which no beneficiary is presently entitled. The LPR is, therefore, liable for any tax liabilities.[4]

Where the superannuation proceeds are paid to an SPT, the LPR is taxed in accordance with how the person or persons intended to benefit from the estate would be taxed were they to have received the payments directly. That is, the ATO will generally adopt a "look-through" approach as if the death benefit had been paid directly to the recipient.

To ensure that any receipt of superannuation proceeds is tax-free, the LPR should ensure that, at least on receipt of the superannuation proceeds by the SPT, the only capital beneficiaries of the SPT are those who meet the definition of "death benefit dependant".[5] Diagram 2 gives an example of making distributions under a will to a TT and an SPT.

In practical terms, this means that, where there is more than one death benefit dependant, the terms of the SPT should provide that they receive the trust capital in specified shares on vesting.

In particular, the ATO has confirmed that it appears to be the clear intention of the legislation that the fact that a payment is made to a trustee, rather than directly to the dependant, should not obscure the fact that the payment is ultimately for the benefit of the dependant.[6]

This is particularly the case where[7] the death benefit dependant is the sole beneficiary of the trust and, therefore, absolutely entitled to the income and capital of the trust.

The requirement that death benefit dependants receive the capital on the ending of the trust is also driven by the requirements of the *Income Tax Assessment Act 1936* (Cth) (ITAA36),[8] which sets out the basis on which trust property must be regulated when the trust ends, in order to access the excepted trust income provisions. There is limited guidance about whether the ATO will require all the income beneficiaries of an SPT to be death benefit dependants.

The conservative position would be to limit the income beneficiaries of the SPT to death benefit dependants only. In particular, the guidance available in relation to whether tax will be payable on receipt of the superannuation proceeds under the ITAA97 indicates that the income and capital beneficiaries should be limited to death benefit dependants.[9]

It is arguable, however, based on the ATO's comments in TR 98/4, that an SPT can include a broad range of discretionary income beneficiaries. While TR 98/4 sets out the ATO's view in relation to child maintenance trusts (CMT), established to access the concessional taxation rates for minors under the ITAA36 (discussed in more detail below),[10] it can by analogy be argued that the comments apply to similar types of trusts (including SPTs).

TR 98/4 also confirms that the trust deed may contain mechanisms to prevent the rule in *Saunders v Vautier*[11] from applying. The rule in *Saunders v Vautier* is that the beneficiaries can agree to wind-up and distribute the assets of a trust among themselves where they are absolutely entitled to the trust property. One example is to include additional discretionary income beneficiaries so that the ultimate beneficiary cannot call for the distribution of trust property upon attaining 18 years.

In practical terms, it appears that the ATO only tests the range of potential beneficiaries of the SPT at the date at which the superannuation proceeds are received by the SPT.[12] Therefore, even if a trustee takes the conservative approach, that is, to limit the range of potential income beneficiaries to ensure tax-free receipt of proceeds,[13] following receipt of the proceeds, it may be possible for the range of beneficiaries to be expanded to include non-death benefit dependants.

For completeness, as superannuation proceeds do not automatically form part of the estate of the deceased member, it may be necessary to ensure that appropriate nominations are made by the member to direct that the superannuation death benefits are paid to the LPR for distribution under the will and, if appropriate, to any SPT established.

Post-death SPT

A form of SPT can also be established after the death of a superannuation fund member. It can be useful where there are substantial superannuation assets, the willmaker had not incorporated TTs into their will and there is a death benefit dependant.

This style of SPT is of particular benefit to a surviving spouse with infant children, where tax effective income splitting is important. Diagram 3 gives an example of this.

In Diagram 3, following the death of the husband, the wife (in default of any other decision by the trustee of the self-managed superannuation fund (SMSF)) would be

Diagram 2

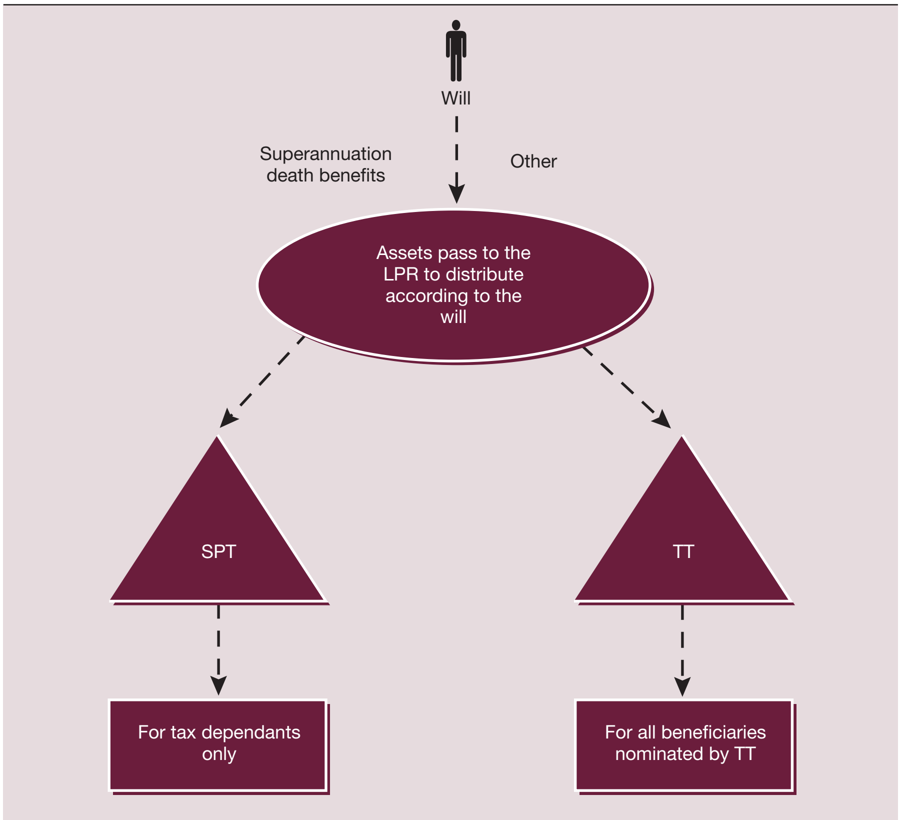
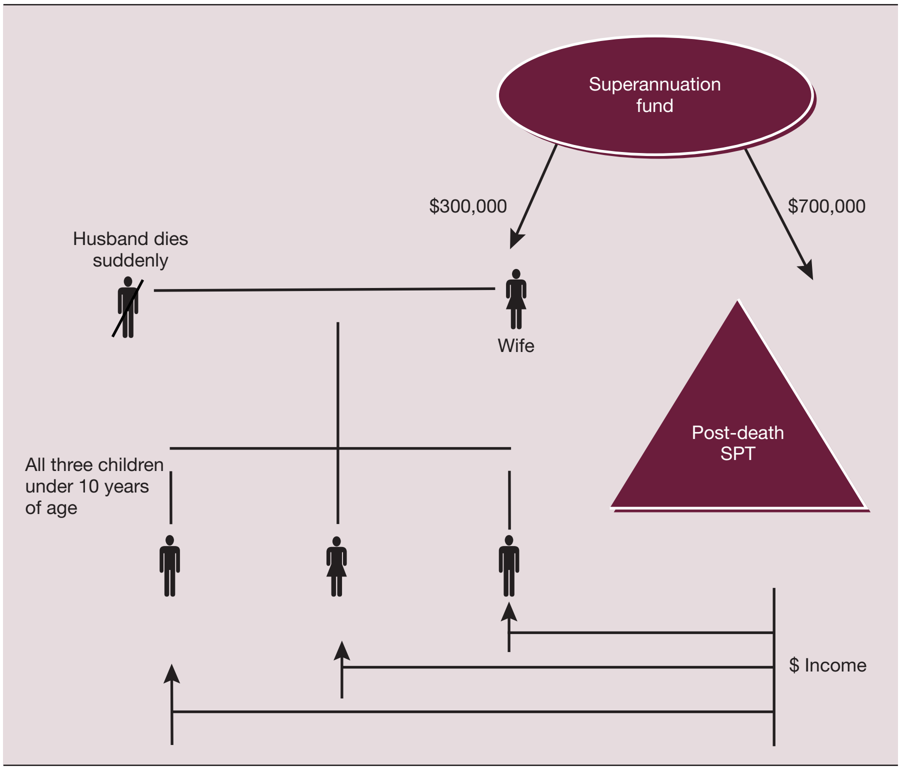


Diagram 3



entitled to receive his $1m superannuation death benefit.

The wife, in her capacity as trustee of the SMSF, distributes $700,000 to an SPT that she establishes and controls.

Income and capital distributions to the infant children can then be used to pay for food, accommodation, school fees, clothing, holidays etc.

Each year, the wife is able to distribute over $20,000 (once rebates are taken into account) to each of the three children (ie over $60,000) tax-free under the excepted trust income rules of the ITAA36.

There are a number of technical provisions that need to be satisfied to ensure access to this outcome.

Similar to an EPT, an SPT established following the death of a member of a superannuation fund is significantly more restrictive than an SPT established pursuant to the terms of the former member's will, for example:

- many trustees appear to adopt an interpretation of the superannuation laws that prohibits any such payment (more detailed comments in this regard are set out below). Often, there is no clear pathway to allow the trustee of a superannuation fund to distribute to an SPT unless the SPT has been established under the deceased's will;
- minor beneficiaries must be the ultimate capital beneficiaries of the SPT, meaning the assets of the trust must ultimately vest in them;
- the concessional rates of tax will generally not be available to the grandchildren of a member; and
- depending on the situation, the assets transferred must not exceed the entitlements that the minor beneficiaries would have received if the deceased superannuation trust member had not left a valid will (ie if the deceased had died intestate).

Difficulties can arise when relying on the ability to establish a post-death SPT, as in many cases, superannuation fund trustees might not have discretion to pay proceeds to an SPT under their trust deed or indeed at law.

Under s 62 of the *Superannuation Industry (Supervision) Act 1993* (Cth), a death benefit can only be paid to:

- a death benefit dependant of the relevant member; or
- the member's LPR, being the executors or administrators of their estate.

On one view, the trustee of a post-death SPT satisfies neither criterion, and as such, there are often significant difficulties in arranging for the superannuation benefits to be paid directly to the trustee of the SPT. If the superannuation benefits are paid to a death benefits dependant, and then gifted to the SPT, arguably the fund will not be eligible for excepted trust income treatment.[10]

That is, unless the money passes directly from the superannuation fund into the SPT, there is a real risk that the ATO will not allow access to the excepted trust income provisions (unlike an SPT established in a will).

A "prescribed person" is defined in the ITAA36[14] as any person, other than an "excepted person",[15] under 18 years of age at the end of the income year.

Division 6AA ITAA36 will apply, where the beneficiary of a trust is a "prescribed person", to so much of the beneficiary's share of the net income of the trust that is not "excepted trust income".[16]

Specifically, income of a trust estate is "excepted trust income" where the income was derived directly as a result of the death of a person and out of a provident, benefit, superannuation or retirement fund.[17]

Consequently, it is likely to be problematic for accessing the excepted trust income treatment where there is a subsequent gift of superannuation proceeds from a death benefit dependant (who is not a "prescribed person") to the trustee of the SPT.

For these reasons, a post-death SPT is generally seen as a structure of last resort.

Asset protection limitations of EPTs and SPTs

As summarised above, a critical requirement of a valid EPT or SPT is that the minor children or death benefit dependants are absolutely entitled to the capital of the trust on its vesting.

As set out above, the *Saunders v Vautier* case sets the framework for the concept of absolute entitlement, where it was held:[18]

> "I think that principle has been repeatedly acted upon; and where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until expiration of that period, but may require payment the moment he is competent to give a valid discharge."

The judgment has been interpreted as meaning that where a beneficiary who has attained legal capacity (ie the age of 18) and has a vested and indefeasible interest in a trust asset, they can issue a call to the trustee requiring the transfer of the asset to them.

This power undermines the ability for an EPT or SPT to be used to preserve the trust assets from any risks of spendthrift or irresponsible beneficiaries once they attain majority.

Further, the trustee must be very cautious in the exercise of their role if the trust continues after the minor beneficiaries attain 18 years of age, to ensure they do not breach their trustee duties.

Some practical steps which can be taken by a trustee to minimise the potential risks in this regard include:

- ensuring that the trust deed for the trust is crafted so that:
  - only the primary beneficiary can receive distributions of capital; and
  - the primary beneficiary obtains ultimate control of the trust upon turning 18 years (for instance, via the principal role);
- limiting distributions of income only to the primary beneficiary or their guardian wherever possible and appropriate; and
- once the primary beneficiary has reached 18 years of age, a letter from the trustee should be provided to the beneficiary:
  - enclosing a copy of the trust deed and financial statements for the trust;
  - confirming that while absolute entitlement to the trust fund will vest with the primary beneficiary on the vesting day, until that time it is the responsibility of the trustee to administer the fund on behalf of the beneficiary;
  - confirming that the primary beneficiary is automatically nominated as the principal on their 18th birthday (assuming the deed has been crafted in this manner) and has unilateral power to change the trustee at any time, thus obtaining ultimate control of the trust at that date; and
  - summarising the main benefits of maintaining the trust in existence.

As set out above, the rule in *Saunders v Vautier* does not generally have the same operation with a standard TT, as there are normally gift over provisions that avoid its application.

What is a child maintenance trust?

While a CMT is not strictly a post-death trust, it is relevant to include a brief summary of CMTs as they are a post-relationship structure regulated by essentially the same provisions of the tax legislation as EPTs and SPTs.

Child maintenance trusts are specifically provided for in the ITAA36.[10] As with the other types of trusts dealt with in this article, the main advantage of a CMT is the ability for income of the trust to be treated as excepted trust income.

In particular, the rules allow income derived by infant children via distributions from a testamentary trust to be assessed at the normal, individual adult rates. As a result, over $20,000 is tax-free and the balance is taxed at the adult marginal rates. For most families, this can mean significant tax planning opportunities.

As set out above, in the vast majority of cases, access to the excepted trust income concessions is only available following someone's death. One key trust arrangement that falls outside this general position, however, is the CMT structure.

A CMT is another form of trust contemplated by Div 6AA that should be considered whenever there is a personal relationship (referred to as a "family") breakdown and either party is responsible for making child support payments. This is because a validly established CMT can also create access to the excepted trust income provisions and the resulting tax concessions.

Given the significant percentage of personal relationships that breakdown irretrievably, many of which then result in child maintenance obligations being imposed, it is important to be aware of the planning opportunities afforded by CMTs.

What is a "family breakdown"?

The ITAA36 defines a transfer of property as a result of a "family breakdown" to include legal obligations arising from a range of situations such as:

- the breakdown of a formal marriage;
- the breakdown of a de facto relationship; and
- where a child has been born outside a "traditional" relationship arrangement (for example, a "one night stand").[19]

Child maintenance trusts are potentially available in relation to children who are:

- born of the union of the relationship that has broken down;
- adopted children; and
- step-children.

The ITAA36 and excepted trust income

Child maintenance trusts are specifically provided for in the ITAA36.[10] As noted above, the main advantage of a CMT from a tax perspective is the ability for income of the trust to be treated as excepted trust income.

A CMT, like most trusts, must be established by deed but, in contrast to many of the other types of trusts contemplated by the excepted trust income rules, cannot be created by a will.

There are also other requirements that must be met before the income of the trust is treated as excepted trust income, including:

- the children named as the "primary beneficiaries" of the trust must be younger than 18 at the time the trust is established;
- income must be derived by the investment of property transferred to the trustee of the trust for the benefit of the primary beneficiary/beneficiaries, as a result of a "family breakdown", as set out above;
- there is no set time frame in which a CMT must be established following the family breakdown, although they should ideally be set up at the time of the property settlement; and
- the children for whose benefit the trust is established must ultimately receive all of the capital from the trust in equal shares.

Both in relation to tax planning and asset control, it is important to note that potential income beneficiaries of a CMT may include persons other than children of the relationship subject to the family breakdown, without jeopardising access to the excepted trust income concessions.

Non-arm's length arrangements

The income of a CMT can be generated from non-arm's length arrangements. However, any income which results from non-arm's length transactions must be of equal value to that which would have been derived on an arm's length basis in order to be considered excepted trust income.

The arm's length requirement is set out in detail in s 102AG(3) ITAA36. In particular, this section provides that if any two or more parties to:

- the derivation of excepted trust income; or
- any act or transaction directly or indirectly connected with the derivation of that excepted trust income,

were not dealing with each other at arm's length, then the excepted trust income (if any) is only so much of that income as would have been derived if they had been dealing with each other at arm's length.

> *"The conservative position would be to limit the income beneficiaries to death benefit dependants only."*

Due to the strict requirements for a valid CMT, particularly on the ultimate vesting of the assets in the children of the relationship that had a family breakdown, one approach often used is to contribute depreciating assets such as plant, equipment and motor vehicles to the trust. These assets can be leased, either to a related individual or business entity for value.

Provided the lease repayments are on an arm's length basis, then the income will be able to be distributed to infant children as excepted trust income.

Other issues to consider

While there can be tax planning advantages to utilising a CMT, there are also a number of potential pitfalls (in addition to the matters set out above). Some of the things to specifically consider before establishing a CMT include:

- TR 98/4 which sets out in detail the Commissioner's position in relation to CMTs and should be studied carefully before implementing the structure;
- the CGT relief afforded by Subdiv 126-A ITAA97 due to a marriage breakdown does not extend to assets transferred to a CMT;
- similarly, in relation to non-capital assets (eg depreciating assets), there will generally be no roll-over relief available for asset transfers to the CMT;
- generally, there will also be no stamp duty relief available for dutiable assets transferred to a CMT, although anecdotally it appears some state revenue offices do allow an exemption; and
- it is often extremely difficult to establish a CMT unless both parents work collaboratively, which obviously may not be the case where the personal relationship has otherwise broken down.

Court-ordered wills

While not technically a "post-death" strategy, it is prudent to include reference to the ability of the courts to alter wills where the willmaker has lost capacity to do so themselves.

The case of *Re Matsis; Charalambous v Charalambous*[20] (*Re Matsis*) was the first case that allowed a court-ordered will where the primary objective was not because the relevant incapacitated person had no will at all, rather that the pre-existing will did not achieve the appropriate asset protection and tax planning objectives of the ultimate beneficiaries.

The case involved a businessman who had accumulated some millions of dollars of wealth and who had signed an "interim" will, which did not incorporate any TTs, sometime before losing capacity to dementia. On the application of the ultimate beneficiaries, the court allowed them to introduce comprehensive TT provisions into the will as if they were inserted before the willmaker's death.

This decision is particularly important because there are other cases, such as *Hausfeld v Hausfeld*,[21] where similar requests have been denied.

In *Hausfeld*, an application was brought by the willmaker's son for leave to make an alteration of a will on behalf of his father. At the time of the proceedings, the willmaker was 91 years of age and lacking testamentary capacity to alter his will due to dementia.

The son, who was married at the time of the proceedings, sought an order for the will to be altered by substituting his wife for himself as one of the beneficiaries.

The reason behind the application was held to be primarily because the son was a respondent to litigation in which it was alleged that he had engaged in misleading or deceptive conduct, resulting in the possibility that he could be found liable in whole or part to the claims made against him, giving rise to significant damages and possible bankruptcy.

The court denied the son's application on the basis that it was not appropriate:

> "… for the court to authorise an alteration to Colin Hausfeld's will in order to defeat his son's creditors. Whilst [the court] accept[s] that Colin Hausfeld, if he were capable, could leave the share of his estate that would otherwise pass to his son to his son's wife in the expectation that she would provide for his son out of that share if his son were made bankrupt, [the court] do[es] not think that the court should condone such a course. The policy of the law is that people should pay their debts so far as they are able. It is not that they be sheltered in the way proposed."

In contrast to the *Hausfeld* matter, arguably, the important factors in *Re Matsis* that led to a successful application were that:

- evidence was able to be shown that the will that was in place before the willmaker lost capacity was largely seen by him as an "interim" document;
- the only person who could have brought a challenge against the estate was the willmaker's daughter, who indicated in the proceedings that she was independently wealthy and had no intention of challenging the estate;
- the ultimate beneficiaries of the estate (and the people bringing the application) were the willmaker's grandsons. While each of them potentially had asset protection risks, none of them were aware of any potential litigation against them;
- the change to the existing will did not alter any of the provisions in relation to, for example, executorship or any specific gifts;
- while the grandsons lost direct entitlement by the inclusion of the TTs, they were still ultimately the likely potential beneficiaries via the trust structures; and
- the court accepted evidence that the willmaker may well have himself implemented TT provisions had he not lost capacity.

A further case that referred to both *Re Matsis* and *Hausfeld* is *Gau v Gav*.[22] Broadly, the decision confirmed that each case will turn on its own facts, and on the proper construction of the succession legislation in each state and territory.

In considering the appropriateness of making an order, the court noted that the court's jurisdiction to grant a statutory will was protective in nature, in that it is for the benefit and interests of the person who requires the court's protection.[23]

The court concluded that in these circumstances, the primary judge failed to properly consider the "compelling evidence" that the testatrix would have made the changes if she had testamentary capacity.

Therefore, if before the court there is a request that would neither offend the policy of the law nor exhibit moral obloquy if implemented by the willmaker when they had capacity, then, if all other requirements of the statutory will rules are satisfied, the court should approve the will.

While the intentions of the parties seeking benefit from the statutory will application (here, effectively, the son who was involved in property settlement proceedings) have some relevance, they should generally be considered relevant only "at the margins".

The current guidance about the scope of the court's powers to alter wills reinforces the importance of having a comprehensive estate plan. However, in granting an application for a statutory will, the court will consider the facts and circumstances of each case.

Conclusion

While EPTs and SPTs can be established after death to partially replicate the same outcome as if an appropriately drafted TT had been included in a person's will, there are significant limitations with these trusts.

Broadly speaking, these limitations include:

- access to excepted trust income treatment is significantly reduced;
- the range of beneficiaries will be narrower than a TT;
- practical difficulties in contributing assets to the post-death trust (eg administration barriers and increased tax and stamp duty costs); and
- limited asset protection.

Considering the significant limitations of post-death trusts compared to TTs, they should not be considered as an appropriate proactive estate planning strategy. Rather, they are an avenue of last resort.

Matthew Burgess, CTA
Director
View Legal

Acknowledgment

The author gratefully acknowledges the assistance of the directors and staff at View Legal in the preparation of the article, particularly Patrick Ellwood, Tara Lucke, Hayden Dunnett and Naomi Arnold.

References

1 See PS LA 2003/12.
2 S 302-195 ITAA97.
3 S 302-200 ITAA97.
4 S 99 of the *Income Tax Assessment Act 1936* (Cth) (ITAA36).
5 S 302-195 ITAA97.
6 ID 2001/751 (which has since been withdrawn on the basis that its view has been subsumed into s 302-10 ITAA97).
7 ID 2001/751.
8 S 102AG(2) ITAA36.
9 S 302-10 ITAA97.
10 S 102AG ITAA36.
11 (1841) 4 Beav 115.
12 For example, see PBR 1011741138466.
13 S 302-10 ITAA97.
14 S 102AC(1) ITAA36.
15 S 102AC(2) ITAA36.
16 S 102AG(1) ITAA36.
17 S 102AG(2)(c)(v) ITAA36.
18 (1841) 4 Beav 115 at 116.
19 S 102AGA ITAA36.
20 [2012] QSC 349.
21 [2012] NSWSC 989.
22 [2014] QCA 308.
23 Ibid at [52].