

Death and taxes

An overview of the current tax and estate planning environment

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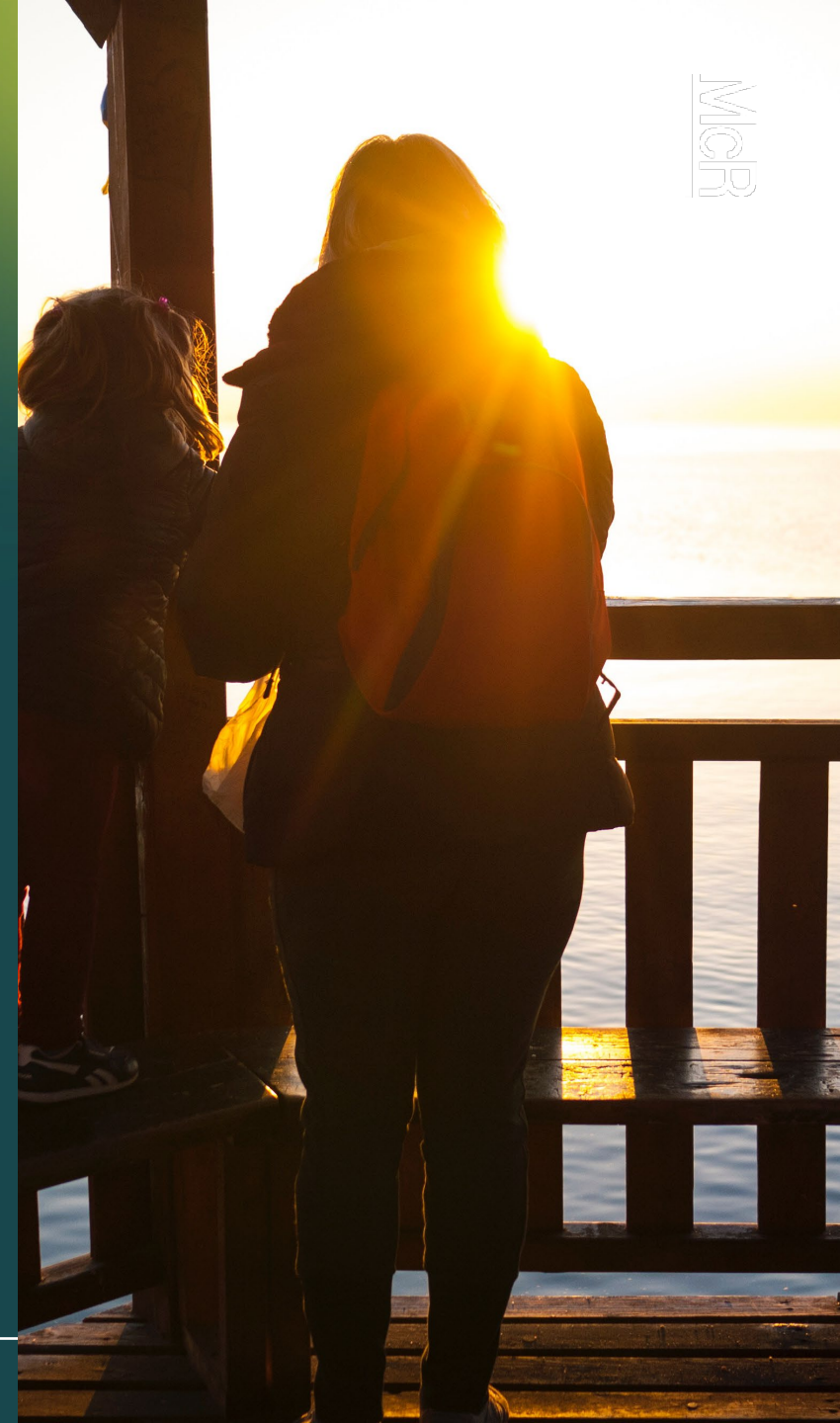


► Themes and Context

- Asset protection – from predators and creditors
- Asset preservation – multigenerational and the use of the “family bank”
- Tax planning – being tax conscious but not necessarily tax driven
- What does the budget mean for you?

► Tax overview

- Budget update
 - ▶ Negative gearing
 - ▶ CGT discount
 - ▶ Trusts
- Current cases to keep an eye on
- Defusing Part IVA risks in restructures (consolidation case study)
- Division 296
- ATO compliance – what is their current focus



► Estates overview

- Creating and preserving intergenerational legacy for the family – the rise of family charters or rule books and how best to utilise the “family bank”
- Where the government and the ATO are looking – Death duties or inheritance taxes? The potential removal of deceased estate CGT concessions?
- How to protect assets from predators and creditors – Are trusts and testamentary trusts still best so long as the control is right?





► Budget – negative gearing

Negative gearing retained for:

- Currently owned rental properties at 7.30 on 12/5/2026
- New rental properties
- Other non-residential property (commercial property, shares)

Negative gearing lost for:

- Second hand residential rental properties

Twelve month lead time to 1 July 2027.

► Budget – CGT discount

- 50% discount continues for new residential builds, option to adopt indexation
- Otherwise, indexation replaces CGT discount on everything
- Transitional period to 1 July 2027 – valuation or apportionment of 50% discount.
- Minimum 30% CGT rate for gains post 1 July 2027.
- Many unintended (?) losers:
 - ▶ Start up companies (talk about VC, R&D extensions)
 - ▶ Employee share schemes
 - ▶ Companies favour distribution not reinvestment
- Do we start holding appreciating assets in companies (30% effective tax rates) not trusts or individuals (up to 47.5%)
- Superannuation unchanged (but division 296)

► Budget – Trusts

From 1 July 2028

30% minimum tax rates, withholding regime

Non-refundable credit but not for corporate beneficiaries

Unknown issues:

- What about franking credits?
- How will it interact with CGT regime – including where 50% discount still applies
- Distribution of trust capital where there is no trust income

Makes a very complex regime incredibly more complex

Just fix it!

▶ Budget – Other?

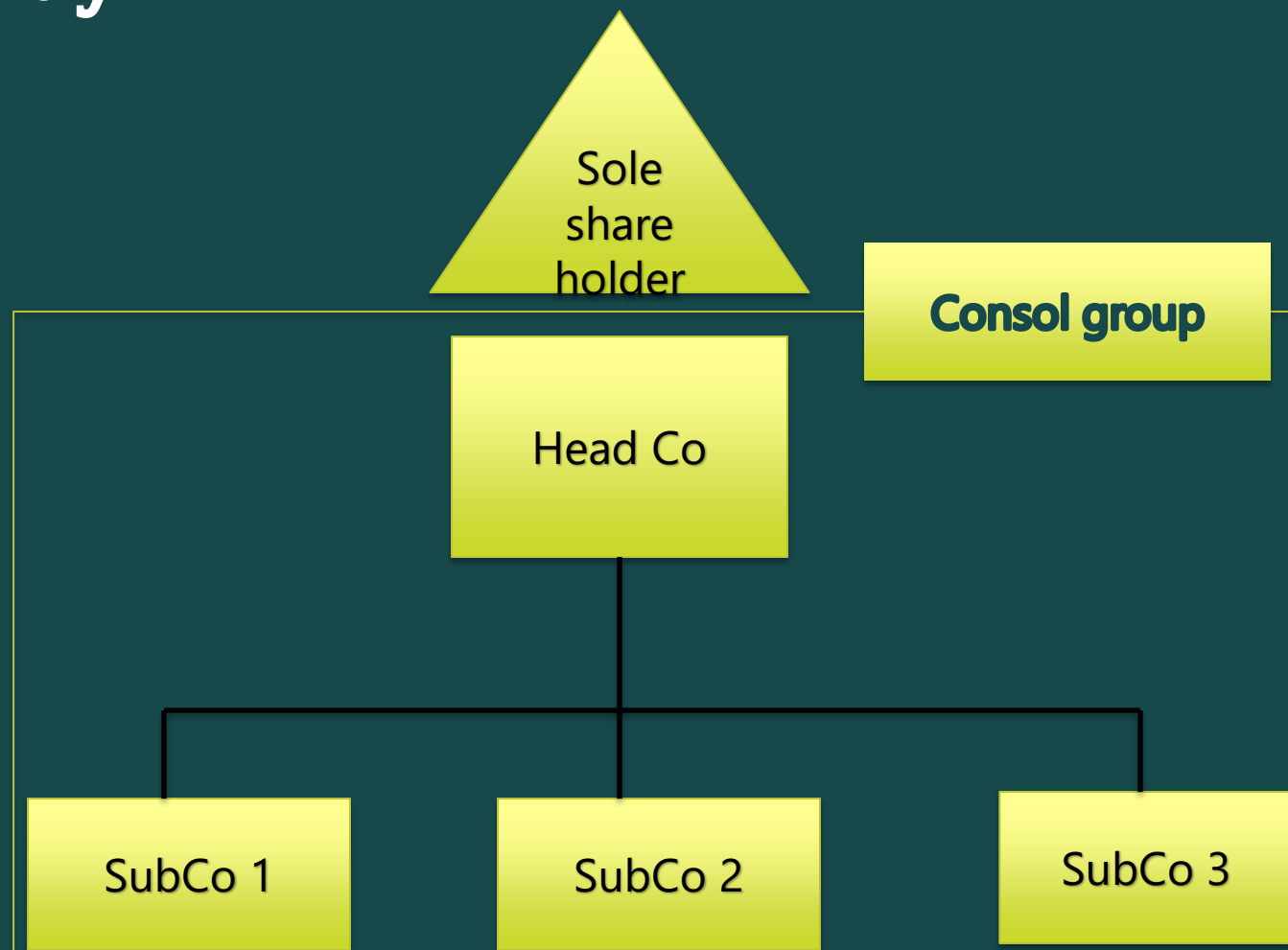
- Loss carry back provisions – up to two years for small businesses
- Extend \$20,000 instant asset write off for small business
- Early stage venture capital limited partnerships
- R&D concessions increased
- Halving fuel excise



► Current cases to watch

- SNA
- Bendel
- Merchant
- City Beach

► Consolidation and Part IVA case study





▶ ATO compliance focus

- NALI / NALE
- Division 7A – particularly section 109RB
- Family trust elections and family trust distribution tax
- All things property development
- Back to back rollovers
- 45 day holding rule for bucket companies
- Succession planning and structuring to achieve it!

► What is a family constitution or charter

Family constitutions are documents which set out the desired outcomes and fundamental rules for the ongoing management of a family business or family investments/assets

These documents often work in conjunction with other legal documents such as wills, company constitutions, trust deeds and shareholders agreements

They are designed to be specifically tailored to different family and business structures which vary in complexity and size and to also capture the core values of that family

They often have a multi-generational focus, with family education and preservation/protection of wealth key components

They encourage family members to be good ancestors and custodians of the family's wealth

► Context - guidance

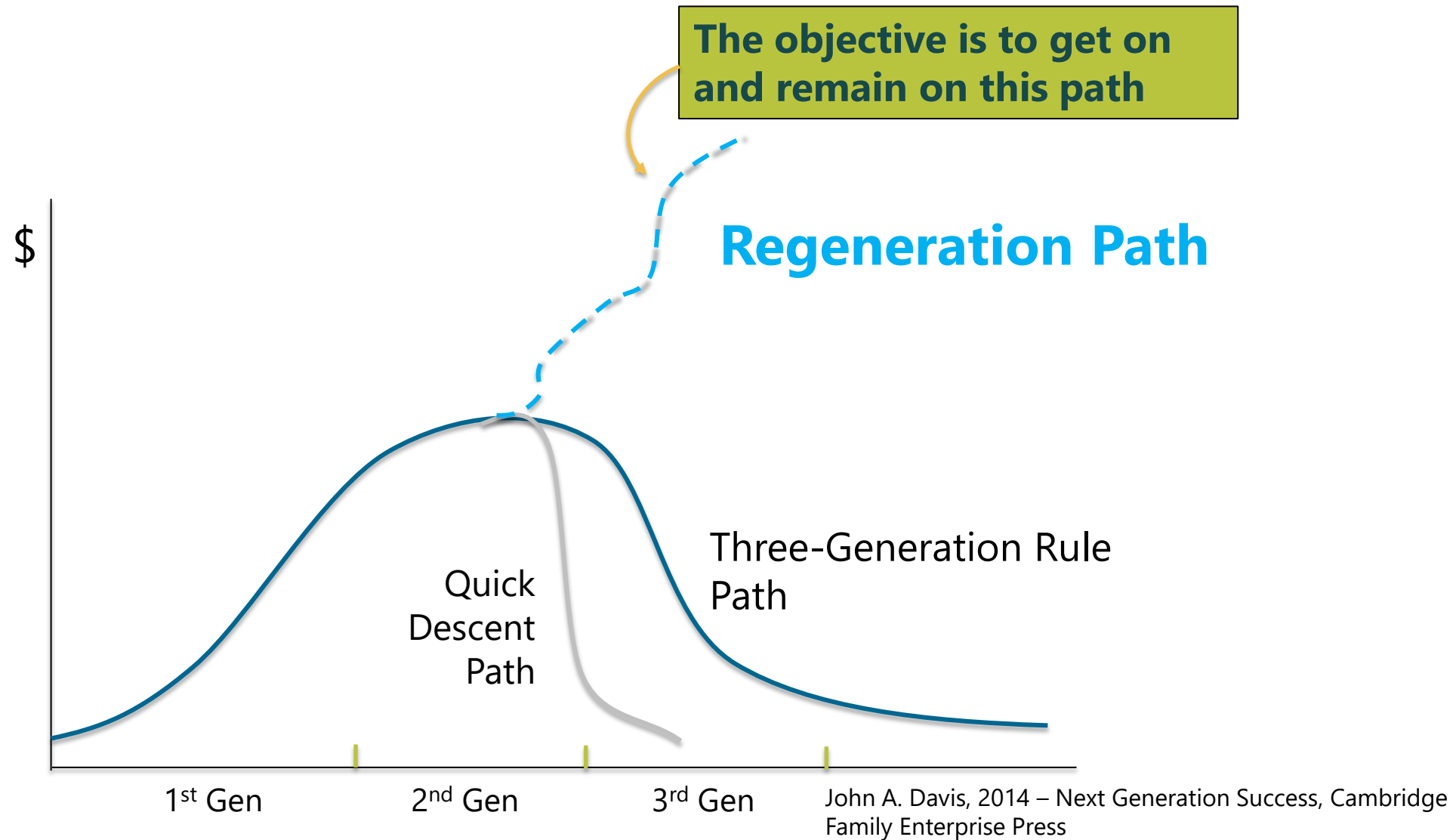
Only a third of family businesses will pass from the first to second generation in Australia, with only 15% passing to a third generation (*KPMG and Family Business Australia Survey of Family Business Needs 2005*).

As such, it will assist families if they have tools which can provide guidance and certainty as to the values and purpose underpinning a family business.

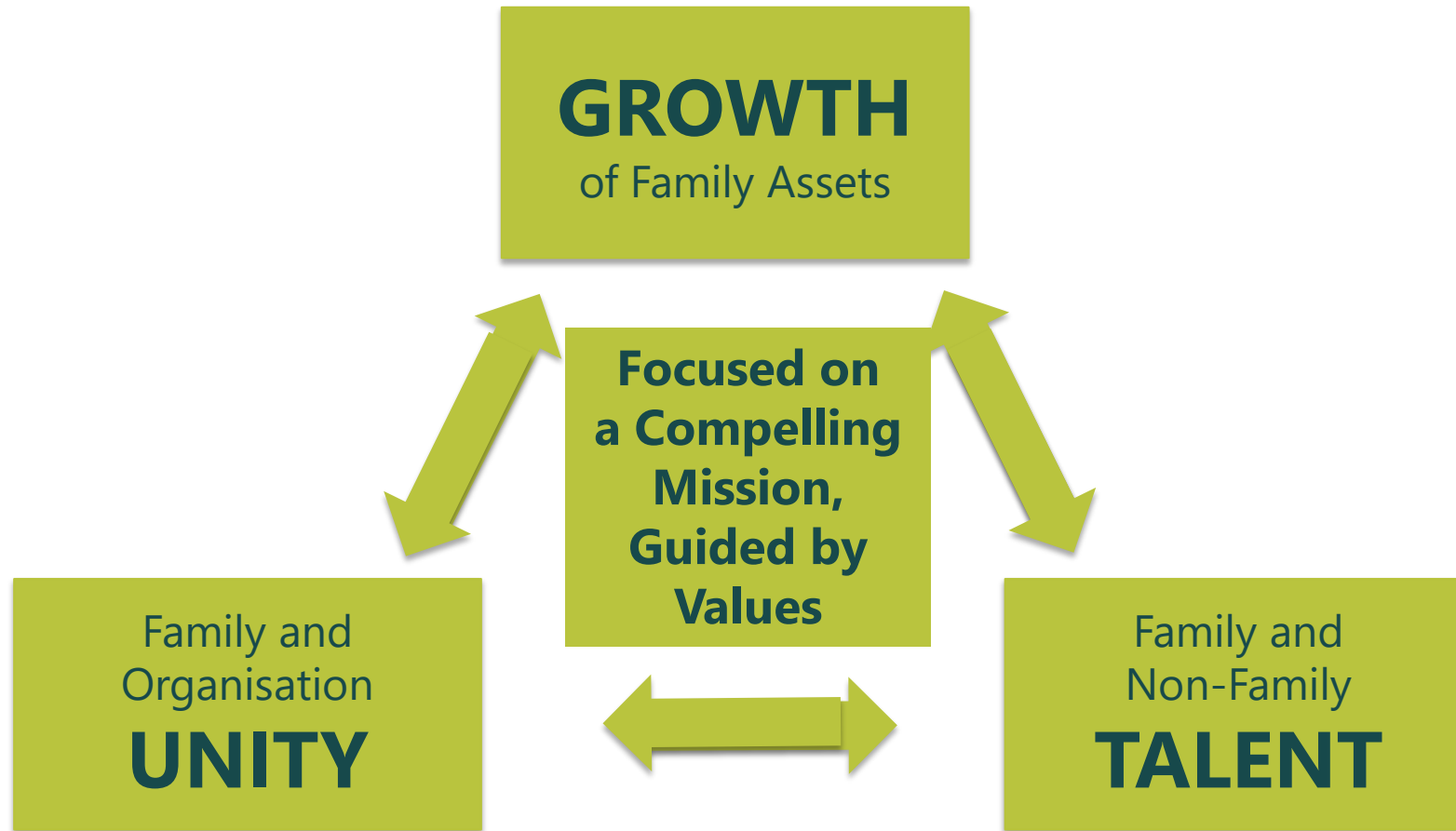
While a will provides direction as to how an individual's estate is to be distributed, there is no guidance or information that will help prepare the next generation for future roles and responsibilities that will need to be undertaken in continuing the family business or what to do with the proceeds following its sale.

Providing a framework which allows for the education of the next gen assists with regeneration and preservation of the family wealth

► Family wealth paths



► Sustaining success requires



John A. Davis, 2014 – Next Generation Success, Cambridge Family Enterprise Press

► Advantages of a Family Constitution

They assist the family to capture enduring objectives and values and to facilitate changes in control between generations

They promote and support collaboration by encouraging family members to come together to share ideas and create a document which reflects the family's values, goals and purpose

Policies created will be tailored to accommodate any family structure. Common policies being processes for family members to enter and exit the family business and if drafted correctly, the document should facilitate changes in control while allowing members to remain focused on higher priorities and goals. They should also allow for the education of family members to better understand the family business/investments

Framework for tough decision-making and streamlined processes providing a clear basis for which major decisions are to be made.

► Disadvantages

Poor drafting or lack of initial collaboration between the family will result in a document which does not accurately reflect the values and goals of the family and its business therefore the family will not have 'buy-in' to the document and the processes it mandates

Inadequate drafting to allow for periodic review and amendment will result in elements of the document being unsuitable for new generations as values change and evolve. This will be particularly relevant if younger generations wish to branch out and diversify through new business ventures

May be a need for an advisory board to be established to engage family members in decision-making. Also, the advisory board may need to determine if the new generation are prepared and equipped with the correct skills to take over from the current controllers.

► Is a family constitution enforceable?

Family constitutions act as statements of intent – they provide guiding principles

Emotionally binding rather than legally binding

However, family constitutions can refer to provisions enforceable in other documents (conflict resolution mechanisms, share transfers, confidentiality agreements)

Reasons to create a family constitution even though it is not binding include:

- Family constitutions deal with issues incapable of being addressed in binding documents
- Family constitutions can extend to family members who, in a binding document, would not normally be legally bound

Bespoke constitutions and shareholder's agreements are two formal documents often used in conjunction with family constitutions

► Guiding principles for succession planning

Family businesses often continue to be solely owned by their founders, meaning it is crucial that families address issues surrounding transfer and ownership as the family ages.

A significant contributing factor to the effectiveness of a family succession strategy is the fact that the rules are established through a process and at a time where the family was functioning constructively as a competent, rational, mutually respectful unit.

When developing the appropriate family succession strategy, as a minimum, the following factors should be considered:

- the degree of cooperation required between the generations;
- the level of flexibility and legal enforceability required by the structure;
- potential revenue costs;
- roles of each relevant family member including operators and non-operators; and
- relevant practical issues.

Opportunity to address assumptions that family members have about successors and remuneration that are likely to cause issues, conflicts and lead to disappointment when expectations are not realised.

► Are Trusts still the best way to protect your assets?

- Yes but it is all about control – less control equals more protection
- They are more flexible than companies
- But the ATO doesn't like them
- And there are fiduciary constraints – acting in good faith, duties to consider and to avoid dictation etc
- Some recent cases suggest the need to be vigilant

► Absolute discretion

- Court will not interfere where discretion exercised fairly and honestly
- Court may interfere where exercising discretion in 'arbitrary and unreasonable manner
- Court cannot interfere where power is 'absolute and uncontrolled' or 'uncontrolled and irresponsible' unless there is bad faith
- Essential component parts:
 - (1) good faith
 - (2) upon real and genuine consideration
 - (3) in accordance with the purposes for which the discretion was conferred

Karger v Paul

- *"with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present"*

See *Re Owies* – distribution of capital and income

See *Curwen v Vanbreck Pty Ltd* – discretion to exclude beneficiaries

► **When validity of resolutions can be questioned if not all potential beneficiaries are properly considered?**

Owies v JJE Nominees Pty Ltd [2022] VSCA 142

2 of 3 beneficiaries of a family discretionary trust took action against the trustee claiming that they breached their fiduciary duty to give real and genuine consideration to the two beneficiaries needs in making distributions over a period of years.

The court held that the trustees had not properly considered the 2 beneficiaries as distributions were made in the same proportion each year for several years (excluding the two beneficiaries) which was evidence of a policy of distributions inconsistent with the obligation to consider the distribution of income for each accounting period.

“An obvious, but unstated, premise on which the trustee would be expected to discharge its duties is that it would generally be informed about the differing circumstances, needs and desires of each beneficiary as an incident of the familial bonds that underpin the trust and explain its purpose. It is not to be supposed that, when those familial bonds become strained or broken, the purpose of the trust to provide for the family as a whole would change or that the trustee would be relieved of the obligation to properly inform itself.”

► *Smith v Kennedy* [2025] QSC 27

The litigation guardian for the two minor beneficiaries of the Richard Kennedy Testamentary Trust sought the removal of the deceased's brother as Trustee on three grounds:

- failure to consider or take into proper account the beneficiaries needs when making decisions affecting their welfare;
- inadequate application of trust funds which did not align with the purposes of his appointment, namely applying sufficient funds towards the maintenance, education, benefit or advancement in life of the beneficiaries; and
- deterioration of relationship, meaning it was no longer in the best interest of the beneficiaries for the Trustee to continue until the assets of the Trust would vest absolutely.

The Trustee's refusal to expend funds to pay for the beneficiaries to attend a private primary school, refusal to pay boarding school fees and dismissal of the recommendations set out in a report on one of the beneficiaries' learning difficulties demonstrated failure to sufficiently consider the best interests of the beneficiaries.

The Trustee was removed and an independent solicitor was appointed in his place.

▶ Thank you



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