

### **Major Reasons for a Beneficiary Controlled Testamentary Trust**

# Increased relationship protection – in the event that the primary beneficiary’s marriage or de facto relationship breaks down. # Excepted income (low “adult” marginal rates for beneficiaries under 18). # Asset protection for “risk” beneficiaries, eg directors of trading companies, professionals. # Flexibility – each year the trustee can decide which family members or associated entities are to benefit (that choice is more limited if a family trust election is made). # Protection of assets from primary beneficiary’s hostile family members.

#### **Trustee**

The trustee is usually either the primary beneficiary or a company nominated by the primary beneficiary. Limited liability issues may influence choice of trustee.

#### **Ultimate Control**

Unlike other testamentary trusts, the primary beneficiary (rather than the executor) effectively controls the trust (once the option to use it has been taken up), unless bankrupt or lacking decision making capacity (when control reverts to the executor). Special provisions apply to the trust after the primary beneficiary dies.

#### **Income, Losses, Loans and Pension Benefits**

Beneficiaries are taxed on all income spent on or allocated or paid to them, with credit for any tax already paid, eg dividend franking credits. Loans to the trust may need to be on arm’s length rate terms. Income and assets can be counted for Government means tests purposes for non-excluded beneficiaries of the trust.

#### **Capital Profits (Usually Subject to a 50% CGT Discount)**

If assets that were owned by the Willmaker are distributed to beneficiaries, no taxable CGT event occurs until the beneficiaries dispose of them. Otherwise capital profits are taxed as a capital gain for the selected capital beneficiary.

## BCTT Will

Wills creating BCTTs are effectively both

- # A relatively short revocation, control & division document
- # An extensive trust document, akin to a family trust or an SMSF Deed

### Part A

**Revocation,  
Control &  
Division**

### Part B

**Adjustment  
& Executor  
Discretion**

### Part C

**BCTT Terms  
& Executor  
Powers**

### Part D

**Definitions**

### ***Will Creating BCTTs***

While the format of a Will creating one or more BCTTs can vary in the way it is set out, a typical format is one where the Will is broken into parts. Such a format has the revocation, control and division aspects of the Will at the front (these Part A clauses are personal to the Willmaker and can vary considerably from Will to Will – see the notes to the following slide), followed by the more standard administrative aspects of the Will.

#### ***Part B***

Part B also gives the executor discretionary powers in respect of the formation of any of the BCTTs, eg in respect of some or all of the estate assets:

- by-passing the default BCTT;
- establishing a flexible life interest, with the nominated primary beneficiary as primary life tenant and the primary beneficiary's children as the capital beneficiaries; and
- establishing more than one BCTT for a primary beneficiary, ie parallel BCTTs.

Part B frequently includes a clause instructing the executor to adjust estate distributions to reflect benefits that 2 or more primary beneficiaries such as children might receive from non-personal estate sources, eg:

- superannuation – account balances and (if applicable) SMSF reserves;
- family and other discretionary trusts (usually including unpaid allocations of trust income);
- wages and capital contribution foregone in helping develop a family business; and
- lifetime gifts.

#### ***Parts C and D***

Part C of the Will includes the terms of the default BCTTs and the administrative powers of executors and trustees. Part D sets out the definitions applying to particular words that are used in the Will, eg “child” and “dependant”.

## Part A Clauses in a Will Creating BCTTs

- Part A is the part of the Will that is personal to the Willmaker
  - Part B varies depending on the number of primary beneficiaries (other than a surviving domestic partner) & the extent of non-personal assets such as superannuation
- Parts C and D are often very similar to other Wills creating BCTTs

### *Clauses Frequently Appearing in Part A of a Will Creating BCTTs*

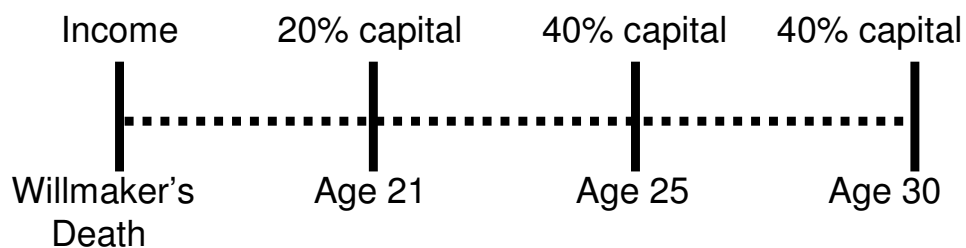
- Introduction to the Will identifying the Willmaker and dating the Will.
- Revocation of previous Wills and codicils and the setting out of limitations, eg limiting the Will to Australian assets or excluding assets in a particular country.
- Contemplation of marriage clauses preventing a Will from being revoked if the willmaker marries a particular person.
- Appointment of immediate and reserve executors, as well the nomination of any preferred advisors (the executors are responsible for the initial administration of the deceased estate and are also usually trustees of all trusts created by the Will other than the BCTTs).
- Initial administration of the deceased estate, including payment of all enforceable debts.
- Specific bequests, eg of personal chattels or cash, to individuals or charities.
- Provisions (if applicable) dealing with the control of self managed superannuation funds, family trusts and other non-fixed trusts (these clauses are always subject to the trust Deed governing the particular fund or trust).
- Created of the alternative of a right of occupation or life tenancy in respect of a family home owned solely or as tenants in common (to ensure retention of CGT and land tax exemptions).
- Creation of a default BCTT with the willmaker's domestic partner as the primary beneficiary.
- Guardianship of young children – often accompanied by a clause providing for funding of the care of those children.
- Creation of one or more primary, secondary and/or tertiary education funds for children, grandchildren or other beneficiaries.
- Creation of default BCTTs for children or other primary beneficiaries.
- Reserve benefit clauses, eg in the absence of surviving descendants.

## BCTTs – Staggered v Single Release of Funds

Wills creating BCTTs set a age or time for release of funds by an executor to BCTT trustee

Willmaker can choose **single time release** dates for each primary beneficiary, eg age 18, 21, 25 or 30 years

Alternatively, a **staggered time release** can be chosen, eg



### **Types of Beneficiary Controlled Testamentary Trusts (“BCTTs”)**

There are 3 main types of BCTTs, ie:

#### **Fully Discretionary (Sole Trust or Parallel Trusts)**

Subject to options for the primary beneficiary to choose that are set out in the Will, a separate trust is established for each primary beneficiary, eg partner, children sharing the estate. If there is to be a single minimum age or time release of the estate capital, a single age or date is set in the Will for the transfer of control of funds from the executor to the BCTT trustee. If there is to be a staggered age or time release of the estate capital, 2 or more ages or dates (plus percentages) are set for the transfer of control of funds to the BCTT trustee.

Parallel trusts are an option provided for in the Will, in the event that a primary beneficiary wants to utilise separate trusts, eg one BCTT providing security to bank and the 2<sup>nd</sup> BCTT free of such security.

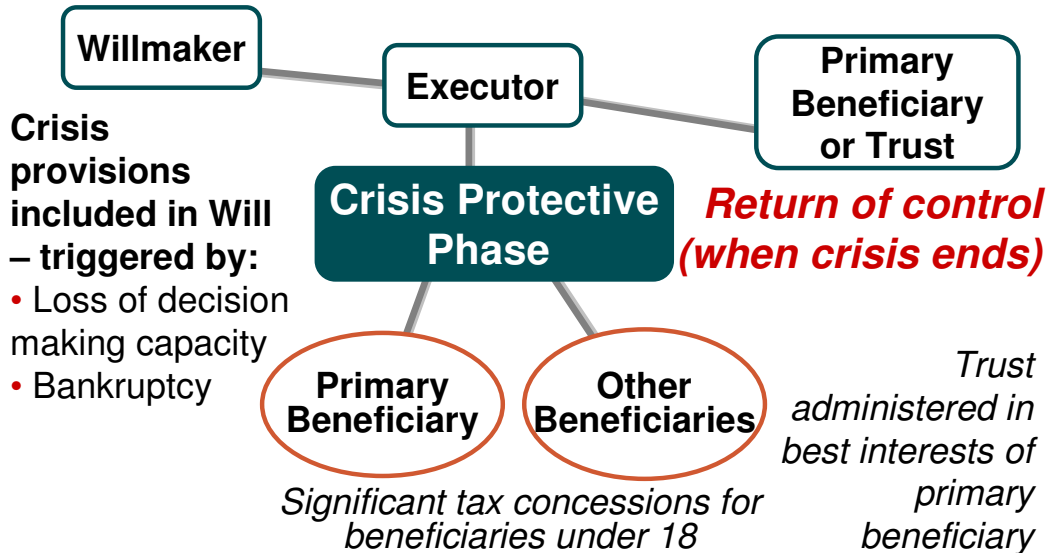
#### **Flexible Life Interest**

An alternative or additional option set out in the Will to the default option of a fully discretionary beneficiary controlled testamentary trust – with this option the trust capital is held for eventual payment to the children of the primary beneficiary. Often this option is utilised with the possibility or probability of a new domestic relationship in mind. A beneficiary controlled flexible life interest operates in the same way as an executor controlled flexible life interest, but with the primary beneficiary acting as (or choosing) the trustee.

#### **Superannuation Death Benefits Testamentary Trust**

This is a (usually) fully discretionary trust, but with a class of discretionary beneficiaries limited to all or some of the death benefits dependants of the deceased.

# Crisis Provisions in a BCTT



## **Loss of Capacity**

The primary beneficiary may have (permanently or temporarily) as a result of an illness or injury lost the capacity to handle their own affairs and, importantly, to administer an otherwise beneficiary controlled testamentary trust (see separate pocket summary) where the trustee has the discretion to choose income and capital beneficiaries.

Rather than allowing the trust to continue on regardless, the crisis provisions in the Will require the executor to assume control of the trust and administer those assets in the best interests of the primary beneficiary until the primary beneficiary regains capacity or dies.

## **Bankruptcy**

An unfortunate possibility of an outright inheritance is that if the intended beneficiary is bankrupt, eg because of the enforcement of a personal guarantee, the inheritance is paid to the bankrupt's creditors.

Given that the Willmaker is not the one owing the debt, the Willmaker can choose to place terms and conditions on the inheritance and include a crisis "trigger" in the Will if the intended beneficiary is bankrupt or unable to benefit from the inheritance. The executor assumes control of the trust and administers those assets in the best interests of the primary beneficiary until the primary beneficiary regains solvency or is free of the financial crisis.

## BCTTs – Further Reading

**Australian Master Estate  
Planning & Succession  
Guide – Chapter 31**

**You Can't Take It  
With You –  
Chapter 11**

**The latest version of this Pocket Summary is at  
[www.mooreslegal.com.au/services/epss/pocket-summaries](http://www.mooreslegal.com.au/services/epss/pocket-summaries)**

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### **Further Reading**

- The 1<sup>st</sup> edition of the ***Australian Master Estate Planning and Succession Guide*** by Allan Swan is scheduled to be published by **CCH** in 2011.
- The 1<sup>st</sup> edition of ***You Can't Take It With You*** by Andrew Simpson was published by **Wrightbooks** in 2009.
- The 5<sup>th</sup> edition of ***Tax Issues in Family Law Property Settlements*** – The Difference Between Hacking and Carving by Peter Szabo was published by **MOORESLEGAL** in 2008.

### **About the Author of the Pocket Summaries – Allan Swan**

In addition to his main role as a principal of the **MOORESLEGAL** estate planning team (working in the areas of **Asset Protection, Trusts, Superannuation, Tax and Estate Planning**) Allan is also the principal of **APTSTEP**, a provider of training and materials. Allan's current presentation topics are:

- Asset Protection Planning (includes pages 1 & 5 of this Pocket Summary)
- Blended Families
- Business Structures Overview
- Estate Planning – Key Cases and Rulings
- Estate Planning – Practical Case Studies for 2010
- Estate Planning – Tax and Strategic Issues (all)
- Funding Estate Planning
- Ruling from the Grave
- SMSFs – Planning Issues
- Superannuation Death Benefits (all)
- Superannuation Overview
- Testamentary Trusts (all)
- Trusts – Income and Capital Distributions (1)
- Trusts – The A-Z (1).

Contact Allan on 03 9843 2153 for further information regarding on the content of the topics, the fees charged and to schedule a presentation, workshop or seminar.