Webinar

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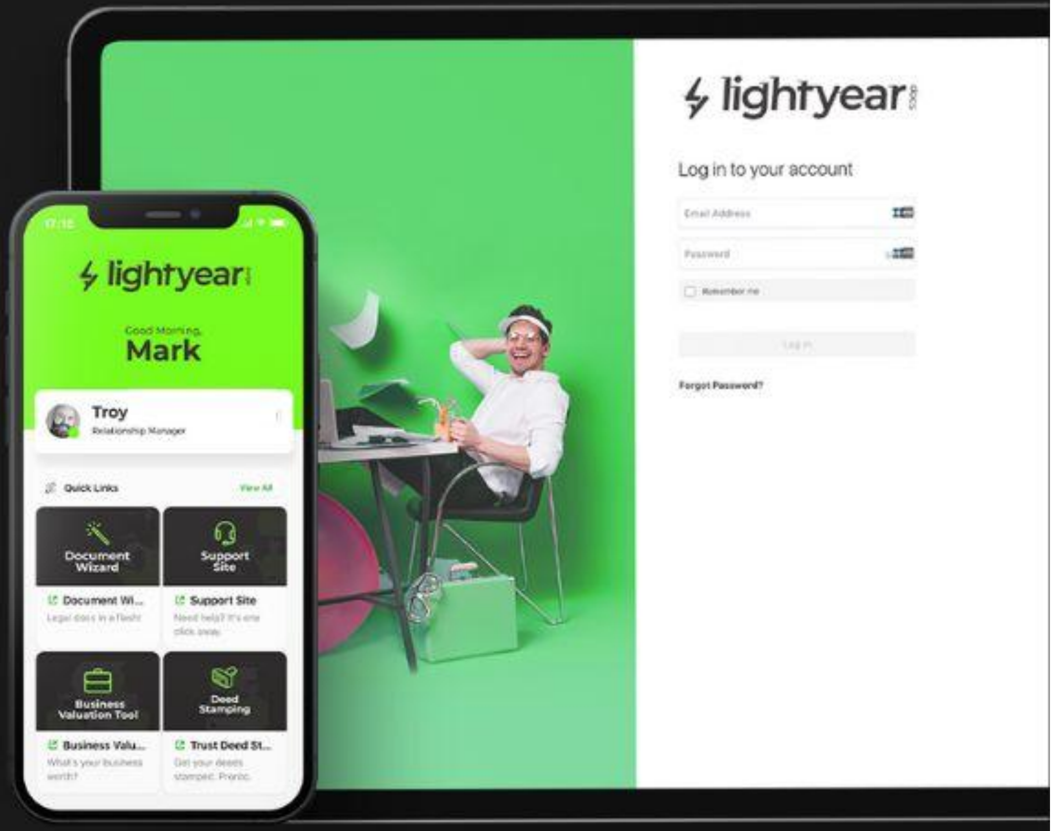
All about Testamentary Trusts



Do you want your SMSF knowledge and strategies to be 8 out of 10? Contact Talitha@lightyeardocs.com.au for our great offer

- Specialist SMSF Adviser Course on 9 – 11 May 2022 covers:
    - Contribution strategies
    - Pension strategies
    - The accountants exemption
    - SMSF Wills v BDBNs
    - Establishing SMSFs for bloodline
    - Property investment and development
    - Limited recourse borrowing

Let's test your Testamentary Trust Knowledge?

1. Does a testamentary trust document need to be prepared and attached to the Will of a client?

2. Is a testamentary trust established at the time of making the Will, the death of the testator, probate or when settled?

3. Should the Executor always settle a Testamentary Trust?

4. A testamentary trust protects the estate from a family provisions claim?

5. A testamentary trust should be optional or mandatory?

6. The best trust for superannuation benefits of a deceased is a testamentary trust known as a super proceeds trust?

7. In making a BDBN for a client that directs death benefits to the estate without elaborating on the risk of a family provisions claims, what litigation exposure is there for the adviser?

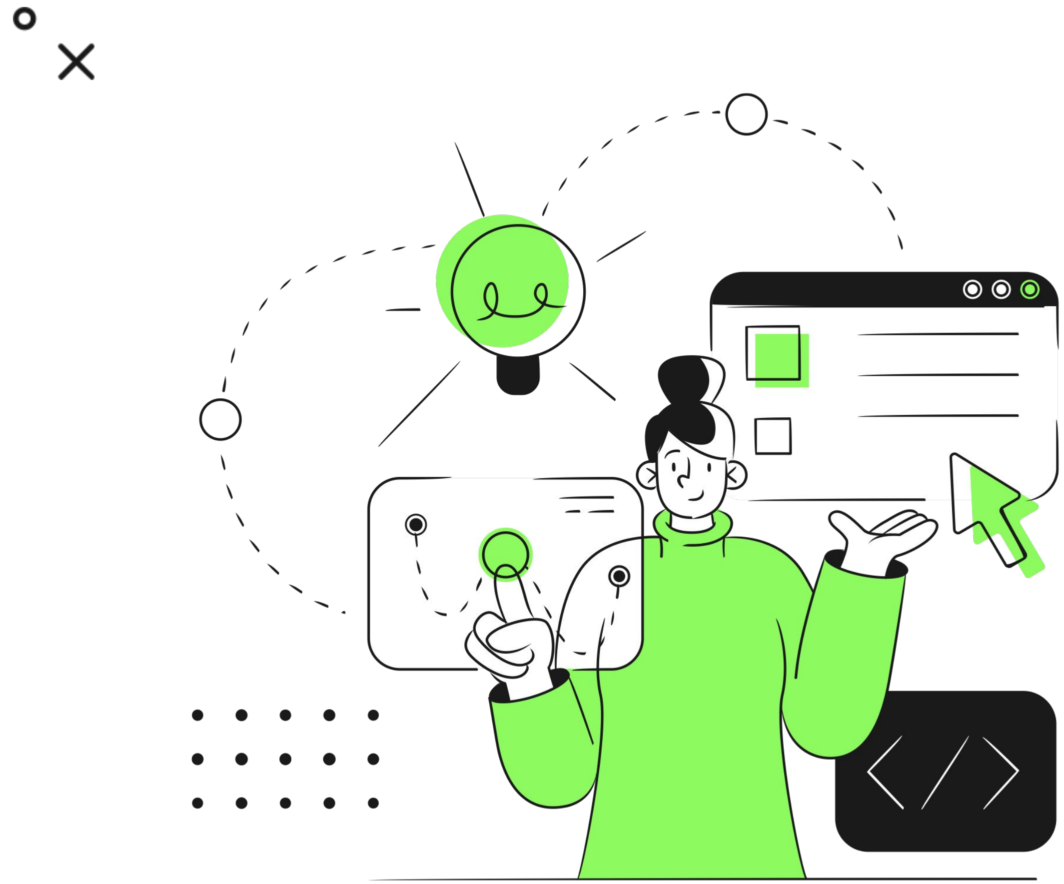
8. What is the difference between a standard TT, a super proceeds TT, a super death benefits TT and an insurance benefits TT?

What is a Testamentary Trust?

A "Testamentary Trust" is a trust that arises upon the death of a person who has put in place a mechanism to create the trust on their death. It may be optional or mandatory. It needs a trustee, a succession line of appointors, specific beneficiaries and where necessary exclusions that fit within the Income Tax Assessment Act 1936.

It does not have to be by a Will as seen in the ITAA 36. There are employer death benefits, superannuation death benefits trusts, will based testamentary trusts and insurance proceeds trusts.

Plus there are Living Trusts that are NOT interrupted by the death of an appointor, trustee or beneficiary – the holy grail – the perpetual family protection trust!!!



ITAA 36 Excepted Trust Income for Minors – Will TTs

(1) Where a beneficiary of a trust estate is a prescribed person in relation to a year of income, this Division applies to so much of the share of the beneficiary of the net income of the trust estate of the year of income as, in the opinion of the Commissioner, is attributable to assessable income of the trust estate that is not, in relation to that beneficiary, excepted trust income.

(2) Subject to this section, an amount included in the assessable income of a trust estate **is excepted trust income** in relation to a beneficiary of the trust estate to the extent to which the amount:

(a) is assessable income, of a kind covered by subsection (2AA), of a trust estate that resulted from:

(i) a will, codicil or an order of a court that varied or modified the provisions of a will or codicil; or

(ii) (ii) an intestacy or an order of a court that varied or modified the application, in relation to the estate of a deceased person, of the provisions of the law relating to the distribution of the estates of persons who die intestate;

(2AA) For the purposes of paragraph (2)(a), assessable income of a trust estate is of a kind covered by this subsection if:

(a) the assessable income is derived by the trustee of the trust estate from property; and

(b) the property satisfies any of the following requirements:

(i) the property was transferred to the trustee of the trust estate to benefit the beneficiary from the estate of the deceased person concerned, *as a result of the will, codicil, intestacy or order of a court mentioned in paragraph (2)(a)*;

(ii) the property represents accumulations of income or capital from property that satisfies the requirement in subparagraph (i);

(iii) the property represents accumulations of income or capital from property that satisfies the requirement in subparagraph (ii), or (because of a previous operation of this subparagraph) the requirement in this subparagraph.

ITAA 36 Excepted Trust Income for Minors – non-Will TTs

- (1) (c) is derived by the trustee of the trust estate from the investment of any property transferred to the trustee for the benefit of the beneficiary:
  - directly as the result of the death of a person and under the terms of a policy of life insurance;
  - directly as the result of the death of a person and out of a provident, benefit, superannuation or retirement fund;
  - directly as the result of the death of a person by an employer of the deceased person;
  - as the result of a family breakdown (see section 102AGA).

- (2A) Paragraph (2)(c) or subparagraph (2)(d)(ii) *(three year transfer rule*) does not apply unless the beneficiary of the trust concerned will, under the terms of the trust, acquire the trust property (other than as a trustee) when the trust ends.

SAPEPAA Accreditation Course Case Study

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John Smith is 83 years old and has just had a mild stroke and is now out of the hospital. His wife Sally, aged 78 is in early-stage dementia (2 years) and no longer has mental capacity. John has been looking after Sally full time. They live in Glen Iris in Melbourne and their home is paid off and valued at $2,250,000. John also has an investment property in the Gold Coast which is valued at $650,000 with no mortgage.

John and Sally's son Bruce who is aged 55 lives nearby – he has had an up and down life, a battle with drugs, alcohol, and sex addiction plus going bankrupt twice, divorced twice and in a two-year marital relationship with Shirley, aged 28 who helps John out around the house and cooks dinner for both of them.   Shirley studied law in Melbourne, worked as an associate for three years, holds her practising certificate but is taking time off after being laid off during Covid lockdowns. Bruce is retired and living in a rented house – has $250,000 in Westpac Super and gets $2,000 per month support from John for doing odd jobs around the house.

Bill is their eldest son – aged 59 who lives in Perth and works as a director of a mid-tier mining company and is wealthy. He has been married to his wife Judy for 33 years and has two children Little Bill Jnr - aged 28 and Bobby - aged 24. John and Sally love their grandchildren. Bill has John and Sally's enduring power of attorney and is the executor of his Will - which was completed in 2008..

The main source of income for John and Sally apart from the rent on the investment property is the Smith Family Super Fund which has John and Sally as the only members and directors of the Fund's corporate trustee - Smith Nominees Pty Ltd. Their accountant is not aware of Sally's problem as John has been keeping it secret. They have both been signing off accounts and tax returns since she was first diagnosed two years ago. The fund has $2.5M in assets – $1.8M in John's account-based pension(20% tax-free component) and $700,000 in Sally's account-based

SAPEPAA Accreditation Course Case Study continued

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The fund has $2.5M in assets - $1.8M in John's account-based pension(20% tax-free component) and $700,000 in Sally's account-based pension (30% tax-free component) both established in 2007 by their accountant at the time. Neither has a reversion on their pensions. The fund is running on a deed from 2005. John has been the major investor in the fund and has been 80% invested in CBA, NAB, Telstra, and ANZ stocks to get franked dividend income. There is a $1,000,000 capital gain on the shares and cash dividends fully franked for 2021 were $80,000. John tells you Bruce has been nagging to get into his Dad's SMSF with Shirley who has $20,000 in an industry-based superannuation fund. Should Bruce come into the Smith Family Super Fund? Bill is worried about Bruce having power over the family's super.

John wants to make sure that if something happens to him Sally is looked after for the rest of her life – maybe even home care. His current Will gives all of his estate to Sally and then to Bill, except for $100,000 to Bruce as John and Sally had saved Bruce's bacon so many times. Sally's Will is the same. This includes his super where he has a binding death benefit nomination that directs his super to his estate - Sally has the same.

After John's stroke Bill has flown in and decided to sort things out. He has found your name and has booked an appointment. The appointment goes well and you get on well with both John and Bill. John still wants to keep to his current Will and limit Bruce's access to family assets as he is sure Shirley only is with Bruce to access John and Sally's money and has threatened to make a contest of John and Sally's Will. John seems sprightly seeing he has just had a stroke and Bill is very determined to sort things out and will pay your fees directly.

What are some of the issues that you see?

If you need help

- The provision of a testamentary trust is on a basic terms basis in LYD templates – for something more detailed or complex come to Abbott & Mourly Lawyers
- 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 your query or document in or you can do inside the document