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STAMP DUTY CONUNDRUMS IN ESTATE PLANNING

'DONE TO DEATH'

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Taxation Aspects of Estate Planning and Business Succession
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The Estate Specialists

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About the Author

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Born in Adelaide, Greg Welden was educated at Pooraka Primary School, and later Nailsworth High School. He graduated in 1993 and from here commenced his Law Degree at Flinders University. Admitted to the Supreme Court in 1998.

The early years of his career were spent in Port Augusta where he developed a solid grounding in all facets of the Law. He returned to his home town of Adelaide in 2007, where, working in both small and large firms, he was able to develop his passion for Estate Law. Today, Greg shares with clients an intimate knowledge of all facets of Estate Planning and Estate Administration, including complex asset protection strategies, business succession planning, complicated Probate matters in all circumstances, estate administration and litigation including Inheritance Claims and Probate Disputes.

As a member of the Law Society of South Australia he actively participates on the Succession Law Committee and regularly provides seminars to members of the public, community groups, professional bodies including other solicitors and has written articles in publications for solicitors dedicated to Estate Planning.

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Introduction

Tax, or the financial charge, should never be the motivating factor in any commercial decision, but as practitioners it is a significant factor which must be at the forefront of our minds.. The driving force should be the practical outcomes that are desired by the client.

Having decided on the preferred practical outcome, clients are not impressed when suddenly hit by an unexpected tax liability or, worse still, if they find out they could have saved or deferred tax had they used a different approach.

Understanding, even at a basic level, the possible or likely outcomes of various commercial decisions will greatly assist both you and your clients particularly in estate planning where the shifting of wealth, passing on of assets to the next generation or theprotection of assets for the benefit of the current generation is desired, almost, above all else.

The purpose of this paper is to focus upon one such tax. Often the poor cousin of Capital Gains Tax ("CGT"), Stamp Duty is often overlooked and can arise in unlikely places causing embarrassment for you, the advisor, and a pain in the…hip pocket, for your client.

What is Stamp Duty and how is it connected to the American Revolution?

Stamp Duty is historically a tax upon certain specified instruments or documents upon which a stamp signifying the amount of Stamp Duty paid is impressed or is fixed.

More recently, many stamp acts have departed from this basic approach and require, in certain circumstances, an instrument to be brought into existence and impose duty upon that instrument. An example of this might be a disclaimer of an interest in a deceased estate, which is available in all States of Australia, often taking place by a beneficiary verbally, or via less than formal means, expressing a desire to waive or disclaim an interest in the estate. As we will see, there is an approach that will avoid the requirement to pay Stamp Duty but, if unavoidable, an instrument or document will need to be created upon which the disclaimer will be recorded and upon which a stamp can thereafter be affixed.

Stamp Duty was first introduced in England on 28 June 1694, during the reign of William and Mary. During the 18th and early 19th centuries, stamp duties were extended to cover newspapers, pamphlets, lottery tickets, apprentices' indentures, advertisements, playing cards, dice, hats, gloves, patent medicines, perfumes, insurance policies, gold and silver plate, hair powder and armorial bearings.

Armorial bearings

The *Stamp Act* 1765 was an act of the Parliament of Great Britain that imposed a direct tax on the British colonies in America to help pay for troops stationed in North

America after the British victory in the Seven Years' War[1] and the French and Indian War[2]. The act required that many printed materials be produced on stamped paper produced in London, carrying an embossed revenue stamp.

The stamp tax had to be paid in valid British currency, not in colonial paper money. The Americans said there was no military need for the soldiers because there were no foreign enemies on the continent, and the Americans had always protected themselves against Native Americans.

The act was very unpopular among colonists and considered it a violation of their rights to be taxed without their consent—consent that only the colonial legislatures could grant. Their slogan was "*no taxation without representation*".

The episode played a major role in defining and enabling the organised colonial resistance that led to the American Revolution in 1775.

In Australia, Stamp Duty was first imposed in New South Wales in 1865, in Queensland in 1866 and in Victoria in 1879. It was first imposed in South Australia in 1886 by the *Stamp Act* 1886 (SA). Each State and Territory has its own Stamp Duty laws[3]. The various juridications are often different in approach and results.

Where a deceased has assets or financial links crossing State borders, the tax consequences may differ. There may also be different tax consequences where there are assets or financial links located overseas.

In South Australia these duties are currently imposed by the *Stamp Duties Act* 1923 (SA), and of course is the act I am most familiar with.

In the early history of Stamp Duty it was often a fixed duty and paid in advance and impressed on blank paper. That pre-stamped paper was then used for the preparation of the instrument, there are some older provisions still reflect that practice.

Duty levied on instruments not transactions

The general principle in Stamp Duty law is that duty is levied on the instrument not on the transaction. It was described in *D.K.L.R. Holding Co. (No2) Pty Ltd v Commissioner of Stamp Duties* (NSW)[4] by Mason J in the following terms:

> *It is a fundamental principle of the law relating to Stamp Duties that duty is levied on instruments, not on the underlying transactions to which they give effect Commissioner of Stamp Duties (Qld) v Hopkins (1945) 71 CLR*

[1] The Seven Years' War was fought between 1754 and 1763, the main conflict occurring in the seven-year period from 1756 to 1763. It involved most of the great powers of the time and affected Europe, North America, Central America, the West African coast, India, and the Philippines. The two major opponents were Great Britain and France.

[2] The French and Indian War (1754–1763) was the North American theatre of the worldwide Seven Years' War. The war was fought between the colonies of British America and New France, with both sides supported by military units from their parent countries of Great Britain and France, as well as Native American allies. The war was fought primarily along the frontiers between New France and the British colonies, from Virginia in the South to Nova Scotia in the North.

[3] Duties Act 1997 (NSW), Duties Act 2000 (Vic), Duties Act 1999 (ACT), Duties Act 2001 (Tas), Duties Act 2001 (Qld), Stamp Act 1921 (WA), Stamp Duties Act 1923 (SA) and Stamp Duty Act 1978 (NT).

[4] (1981-1982) 149 CLR 431

351 at P. 360. As we shall see then we come to consider the liability to duty on each of the instruments in the case of a conveyance the statutory command is that it attracts duty on the property can fade.

The decision in Commissioner of Stamp duties (NSW) v Perpetual Trustee Co Ltd (Quigley's Case) (supra) strongly supports the proposition that we should look to the legal operation of the particular instrument, not to the net result of the transactions. There are a person who was beneficially interested in real and personal party, subject only to a life interest of another person in part of it, executed a deed of settlement whereby he conveyed the property to a trustee on trust for himself for life with certain remainders over in favour of others. The question was whether the deed of settlement was liable to duty under section 66(1) of the Stamp duties act 1920-1924 (NSW). It was argued that the deed did not convey the beneficial interest during the lifetime of the settlor because it remained after the conveyance where it was with him before and that, accordingly, the value of that beneficial interest should be deducted from the value of the property conveyed. The argument was rejected by the court.

The Changing Landscape

The challenge for lawyers, accountants, Commissioners and seminar presenters is the ever changing and fluctuating laws that relate and apply to the impost of duty throughout Australian jurisdictions.

By way of a small example, below are the changes announced to occur in South Australia.

State Budget Changes

In the 2015-2016 State Budget the following relevant Stamp Duty changes were announced, and if effected, will remove a large number of contentious items from the pool of dutiable assets (but not residential property, which is the most common dutiable asset in estate planning). It was announced that Stamp Duty will no longer be applied in the following circumstances:

- on purchases and gifts of shares – from 18 June 2015;
- on non-real property transfers. This includes non-fixed plant and equipment, receivables, goodwill, business assets, statutory licences, intellectual property and aquaculture leases – from 18 June 2015;
- on non-residential real property transfers (i.e. conveyance duty on commercial property, but not farming land) – reduced by a third from 1 July 2016, a further third from 1 July 2017 and abolished from 1 July 2018;
- on the issue, redemption and transfer of units in a unit trust – from 1 July 2018;
- on landholding entities (companies partnerships and trusts) that hold commercial real property – from 1 July 2018;
- on main residences transferred to special disability trusts – from 18 June 2015.

That is just a taste of changes to be implemented in South Australia and of course, may not stop there with each State Government attempting to generate and excite and simulate business particularly the building and farming sector.

Stamp Duty legislation, its application in certain specific situations and the variation of legislation throughout Australia make it a far more tricky question than most solicitors and accountants are ever aware of, however the consequences of an inadvertent transfer or transaction could be significant.

You have been warned.

Transfer in Accordance with Will

Generally the death of a taxpayer does not raise Stamp Duty issues; we all know that death duties have been abolished.

The issue arises when property is to be transferred to a beneficiary.

Each State and Territory provides a Stamp Duty exemption or concession (ie levy a nominal duty of $10 or $20) where the deceased's dutiable property is transferred to the legal personal representative, (LPR) to a trustee or beneficiary under a Will or pursuant to the laws of intestacy. Where assets are transferred to a beneficiary under a power of sale contained in the Will, a Stamp Duty exemption or concession may or may not apply depending on each jurisdiction.

As a general guide to how the provisions vary between jurisdictions[5];

State or Territory	Stamp Duty provisions	Legislative references
NSW, VIC, ACT, TAS	Exemption applies to a transfer of dutiable property by the executor made under or in conformity with the trusts contained in the Will of the deceased person if the transfer is not made for valuable consideration.	s63 Duties Act 1997 (NSW) s42 Duties Act 2000 (Vic) Section 69 Duties Act 1999 (ACT) s47 Duties Act 2001 (Tas)
QLD	Exemption applies where the transfer gives effect to a distribution in the estate of the deceased person.	s124 Duties Act 2001 (QLD)
WA	Transfer made to a beneficiary from a person in a fiduciary capacity shall be charged with nominal duty.	s73AA(1)(b) Stamp Act 1921 (WA)
SA	Exemption applies where the transfer is in pursuance of the Will of a deceased person.	s71(5)(h) Stamp Duties Act 1923
NT	Conveyance made by trustee to a beneficiary where the trustee acquired the dutiable property by virtue of the operation of a testamentary instrument.	s4 definition of exempt instrument or transaction Sch 2 Stamp Duty Act 1978 (NT)

Appropriation

Various legislation provides relief from an adverse duty consequence if any Will or any instrument by which any trust is declared contains a direction to convert any property into money, and to pay the proceeds to any beneficiary and, instead of converting the

[5] Refer to schedule 1 – for stamp duties transfers under a Will

property into money the executor, administrator or trustee, proceeds to transfer the property *in specie* to the beneficiary, this conveyance shall not be chargeable with duty, as a conveyance of sale or as a conveyance operating as a voluntary disposition *inter vivos*. The relief is only available in the case of an *inter vivos* trust if the beneficiary is a beneficiary by virtue of an instrument that is duly stamped.

If it were not for this provision, the conveyance would be dutiable with *ad valorem* duty as the beneficiary does not have an interest in the property, rather the beneficiary only an interest in the proceeds.

Where an appropriation is made in satisfaction of a legacy pursuant to an express power given under a Will, the concession given under the Will shall apply since such appropriation would have been made '*under and in conformity with the trusts contained in that Will'*.

Where, however, a distribution is made by means of appropriation by the administrator with the consent of the beneficiaries, the concession is not available since any appropriation other than pursuant to an express power in the Will is not treated by as being '*under and in conformity with trusts contained in the Will'*.

Disclaiming an Interest in an Estate

For most accountants and solicitors, the main thing to watch is the Stamp Duty on disclaimers of any interest in a deceased estate; many practitioners are ignorant of this impost.

In South Australia, where there is an instrument, whereby a person is, or may be, entitled to a share in the distribution of the estate of the deceased, if that person disclaims that interest in the estate, section 71AA *Stamp Duties Act* (1923) (SA) will apply. Such an instrument is taken to be a conveyance of property operating as a voluntary disposition *inter vivos* (whether or not consideration is given for the transaction).

71AA—Instruments disclaiming etc an interest in the estate of a deceased person

(1) This section applies to an instrument under which a person who is, or may be, entitled to share in the distribution of the estate of a deceased person—

(a) disclaims an interest in the estate; or

(b) assigns or transfers an interest in the estate to another.

(2) An instrument to which this section applies is taken to be a conveyance of property operating as a voluntary disposition inter vivos (whether or not consideration is given for the transaction).

(3) For the purpose of calculating ad valorem duty payable on an instrument to which this section applies, the value of the interest subject to the conveyance is to be determined as if the estate had been distributed and the interest were an interest in possession.

In calculating the *ad valorem* duty payable on such an instrument, the value of the interest subject to the conveyance is to be determined as if the estate had been distributed and the interest was an interest in possession. Otherwise, it would appear doubtful that a disclaimer is dutiable.

Section 71AA applies in two very different situations to an instrument which a person who is, or may be, entitled to share in the distribution of the estate of the deceased person.

It firstly applies to an instrument that disclaims such right. The nature and requirements for an effective disclaimer were recently described in *Ramsden v Federal Commissioner of Taxation*[6].

The Full Federal Court held that to be effective, a disclaimer must constitute an absolute rejection of the gift. In other words, a disclaimer has to be of the whole gift.

The second situation where the section arises is where there is an assignment or transfer of any interest in the estate. At any time up to the completion of the administration of the estate when the executor becomes a trustee, the interest of the beneficiary is to have due administration. Both such classes of instruments are taken to be a conveyance of property operating as a voluntary disposition *inter vivos* (whether or not consideration is given for the transaction). The exemptions in section 71(5) therefore are available.

So an effective disclaimer will not attract duty however a disclaimer made too late will have duty payable on it, and as discussed in, the introduction, it may therefore be necessary to draft the instrument evidencing the disclaimer to enable the stamp to be affixed.

[6] [2004] FCA 632

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Estate Trusts

Various seminar papers and presentations have been made over the years about the implementation and use of Testamentary Trusts in estate planning. There is no need to tread over well-trodden ground. The main objective by estate planners is the recognised income tax and asset protection they afford.

Transfers and gifts from deceased estates to beneficiaries under properly drawn and appointed Will clauses qualify for Stamp Duty exemption or concession.

Strategies where there is no Testamentary Trust in a Will

Of course the best approach is to always ensure a person's estate planning documentation achieves their objectives, most notably by including a Testamentary Trust. Death of a person is not the end of that possible path and it is still possible to establish a trust post death, such as a post death trust, superannuation proceeds trust, a special disability trust or child maintenance trust.

There may however, be Stamp Duty issues lurking when creating trusts and transferring assets to them post death, and consequently all practitioners and advisors need to be aware of.

Post Death Trusts

You can’t create a testamentary trust once someone has died, however you may be able to obtain some limited income tax benefits of allocation of income to minor beneficiaries by transferring property left in an estate to another.

Generally the post death trust is more restrictive than the ordinary testamentary trust established pursuant to the terms of a Will. The key difference is that the minor beneficiaries (those under 18 years 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. By contrast, under a Testamentary Trust the testator has complete flexibility when nominating the ultimate capital beneficiaries.

Certain Requirements

1. The gift of property from a testamentary beneficiary to the trustee of the post death trust must be within 3 years of the death of testator.

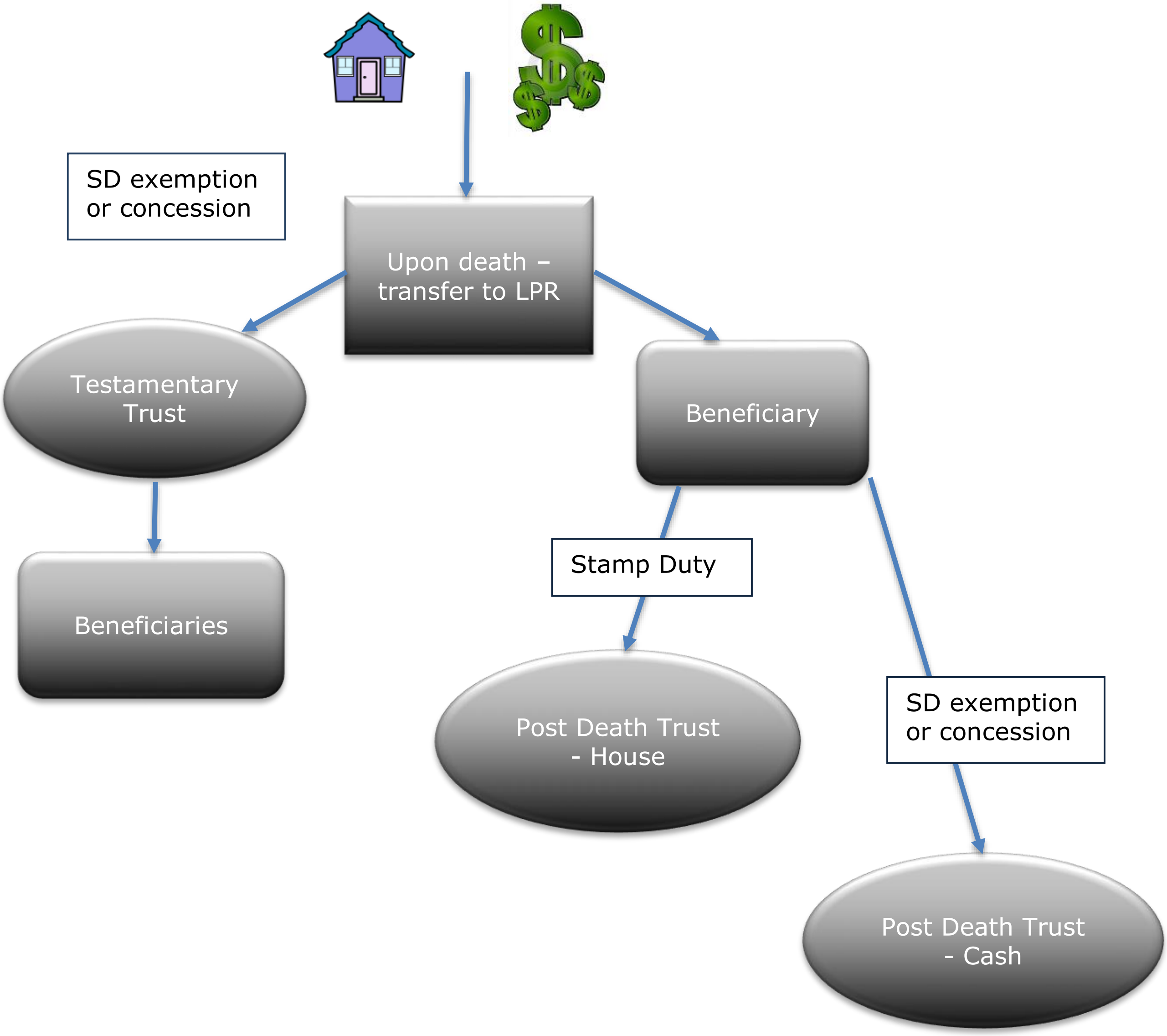
2. The person distributing the assets to the post death trust must have received them under the Will of the deceased.

3. It is done by transfer after inheritance and does not require and should not involve any variation to the Will or renunciation or disclaimer of interests.

4. While assets in excess of what the testator’s children might have received on an intestacy can be contributed to the post death trust, only the income generated by that portion of the capital which the testator’s children would have received on an intestacy, will be entitled to the concessional rates of tax.

5. There are CGT and Stamp Duty implications from this transfer of property to a trust.

No Stamp Duty exemption exists on such a transfer, assuming it is not simply cash moving into the post death trust.



Superannuation Proceeds Trust

A Superannuation Proceeds Trust is a trust that is established solely to receive superannuation proceeds on the death of a fund member. A Superannuation Proceeds Trust can be established by Will or by deed after the death of a testator.

As is commonly known superannuation proceeds do not automatically form part of the estate of a deceased. It may be necessary to ensure effective nominations are made by the member to direct that the superannuation death benefits are paid to the estate for distribution pursuant to the terms of the Will, and if appropriate, to any Superannuation Proceeds Trust established.

Establishment of a separate superannuation proceeds trust which includes a specific class of potential beneficiaries limited to the deceased's tax dependants is necessary to ensure no adverse taxation complications arise due to being unable to say for certain that tax dependants are to receive such superannuation proceeds.

If a Superannuation Proceeds Trust is not established pursuant to the terms of the deceased's Will, a Post Death Trust can be established subject to the limitations outlined above with sufficient terms limiting beneficiaries to ensure it maximises the taxation advantages. It is important to remember here, that the proceeds arising from superannuation must arrive in the estate for either of these strategies to apply.

Utilising the general exemptions and concessions that apply with all deceased estates, the transition of assets into a Superannuation Proceeds Trust does not attract the payment of any Stamp Duty and unlike the Stamp Duty possibility arising with the Post Death Trust, the movement of cash will not attract Stamp Duty.

Special Disability Trusts

The primary purpose of Special Disability Trusts is to encourage the private provision of accommodation and care for people with a severe disability or medical condition, through concessional taxation benefits.

Special Disability Trusts provide for the ability for benefits received from a deceased estate to be ignored for the purposes of calculating Centrelink pension entitlements of a very specific type of beneficiary. The rules relating to Centrelink and various trusts and their effect on pension entitlements changed radically in 2002 which meant that, subject to the terms of the trust, Centrelink was able to attribute all capital and income of a trust to a beneficiary, which in a great many circumstances meant an ineligibility to government income and all the associated benefits.

Despite these changes, if a beneficiary qualifies for a Special Disability Trust, assets up to $625,000 (and indexed each year) as at February 2015 will be ignored for pension calculation purposes. The Special Disability Trust must meet special requirements, which can be found in the publication '*Special Disability Trusts'*, by the Department of Families, Community Services & Indigenous Affairs.

Any individual can establish a Special Disability Trust during their lifetime or more commonly, as part of their Will and overall estate plan. The following strict requirements must be met however;

- it only has one beneficiary;
- the beneficiary must meet all 'eligibility' criteria set out in the relevant legislation;
- the primary purpose must be to provide for the accommodation and care needs of the beneficiary;
- it must have one professional trustee or at least two individual trustees;
- it must comply with the prescribed investment restrictions; and
- it must prepare annual financial statements and carry out independent audits when required.

The intended beneficiary's immediate family members who are at, or over, service pension age and are receiving a pension for example, age pension or carer payments, may be eligible for the gifting concession. Where there is more than one contributor to the Special Disability Trust, the combined concession first applies to those eligible family members who are receiving a pension after age or service pension age. That qualification does not arise if the gift is being made by a deceased pursuant to their Will.

An effective estate planning strategy would be to incorporate the Special Disability Trust into a testator's Will, so that any inheritance passing to a person who would qualify for a severe disability benefit does not impact on their ability to continue to receive the pension. However, where adequate planning has not occurred, it is possible to have the Special Disability Trust established post death by having the beneficiary gift their entitlements under the estate (subject to certain contribution limits) directly to a Special Disability Trust.

Similar to the establishment and funding of the Superannuation Proceeds Trust, utilising the general exemptions and concessions that apply with all deceased estates, the transition of assets into a Special Disability Trust does not attract the payment of any Stamp Duty. However, unlike the Stamp Duty consequences that might arise in transferring non-cash assets to a Post Death Trust, various exemptions exist specific to the Special Disability Trust.

An exemption from Stamp Duty on the transfer of an interest in land to the trustee of a Special Disability Trust or a declaration of a trust over land, where the land constitutes the principal place of residence of the principal beneficiary of the Special Disability Trust and the person declaring the trust or the transferor of the interest in the land must be an immediate family member of the principal beneficiary and there must be no consideration provided for the declaration of transfer.[7]

Child Maintenance Trusts

While a Child Maintenance Trust is not strictly a Post Death Trust, it is relevant to include a brief summary of Child Maintenance Trusts as they are a post-relationship structure regulated by essentially the same provisions of the tax legislation as Post Death Trusts and Superannuation Proceeds Trusts and thereby provide the ability for income of the trust to be treated as excepted trust income.

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[7] Section 71CAA of the Stamp Duties Act 1923 (SA) [this amendment to the Stamp Duties Act has not yet been assented to by the Governor, therefore, in the event that a property is transferred into a Special Disability Trust between 18 June 2015 and the date on which the Bill is assented to by the Governor, Stamp Duty will be paid by the Government on behalf of the taxpayer by way of ex gratia relief];

Duties Act 2000 - S 38A (Vic) – The distinguishing feature in Victoria is that the property value cannot exceed $500,000, if so, then *ad valorem* duty will apply to the amount the property exceeds that value.

In the Duties Act 2001 (Qld) s 126A and Duties Act 2001 (Tas) no duty is payable on a residential home that is or will be used as the principal place of residence by the beneficiary of the Special Disability Trust.

In WA, Duties Act 2008, s 111 no Stamp Duty is payable on a transfer of dutiable property.

It should be noted that only NSW and NT do not have any specific exemptions respective Acts in relation to a special disability trust.

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, is the Child Maintenance Trust structure.

A Child Maintenance Trust, 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 persons Will. Other requirements include:

- 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 beneficiaries as a result of a 'family breakdown';
- there is no set time frame in which a Child Maintenance Trust 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.

While there can be tax planning advantages to utilising a Child Maintenance Trust, there are also a number of potential pitfalls (in addition to the matters set out above), they include:

- The CGT relief afforded by Div 126-A of the ITAA 1997 due to a marriage breakdown does not extend to assets transferred to a Child Maintenance Trust;
- Similarly, in relation to non-capital assets (eg depreciating assets), there will generally be no roll-over relief available for asset transfers to the Child Maintenance Trust;
- Generally there will also be no Stamp Duty relief available for dutiable assets transferred to a Child Maintenance Trust.

Family Provision Orders & Deeds of Family Arrangement

An often overlooked area where Stamp Duty will arise in a contested estate is settlement by the execution of a deed of family arrangement.

Despite there being agreement between all of the affected parties, by their execution of a deed, the variation of beneficial interests outlined in the Will or by the operation of intestacy will <u>not</u> fall into any of the exemptions or concessions that apply to the distribution of deceased estates. As such, it is important to factor into the deed, when drafting, who should pay any Stamp Duty that is assessed against it. Perhaps more importantly, depending on which party you act for and their role, what advice is given concerning the likely duty assessable on the deed.

It is not uncommon for a pro-forma deed of family arrangement to state that the costs and any Stamp Duty assessed against it will be met by the estate however, if an unexpected result occurs, then once agreed, upon settlement, distribution of the estate becomes skewed. Therefore depending on the size of the estate, any failure to warn or advise, negligence claims may arise.

Many variations of interests in life estates are effected by Deeds of Family Arrangement. It is necessary in each case to examine the actual terms of the arrangement. These usually involve a transfer of a beneficial interest in property that attract *ad valorem* duty on the interest conveyed unless falling within one of the exemptions. A formal disclaimer of the life interest, which does not attract any duty, should be considered as a pre-cursor to the Deed of Family Arrangement.

If the duty is likely to be significant on the Deed of Family Arrangement, consider the possibility of an inheritance claim by one of the parties which promptly settles by a consent minutes, which are then made to be a Rule of Court. The order would take effect as a Will or codicil to the Will and as such, should be capable of utilising the exemptions and concessions available.

Many jurisdictions may frown upon actions that are akin to anti-avoidance or being a scheme or arrangement with the sole purpose of avoiding a tax or duty ordinarily payable.

Life Interests

A life interest is a trust, most commonly established under a Will, although not always, entitling a beneficiary (the life tenant) to use and enjoy specified assets or income deriving from certain specified assets during that beneficiary's lifetime. On the death of the life tenant, the assets are then distributed to the other specified beneficiaries (the remainder beneficiaries), if arising pursuant to a will, then in accordance with the terms of the will.

A life interest can be created in one or more assets and there can be successive life interests granted.

In the case of non-real estate assets, those assets can be varied within the trust over time by the trustee. In the case of real estate property, the terms of such a trust can be varied over time if the Will so permits and, it is usual for the life tenant to be responsible for the general maintenance and upkeep of the property (fair wear and tear usually excepted), as well as the payment of rates, taxes and insurance. Major repairs are usually paid for out of the deceased's residuary estate, but it depends on the actual Will terms.

A failure in many life interest Wills, particularly non-income producing real estate, is that adequate funds need to be set aside to meet future costs of repair and other contingencies which may subsequently affect the property. Life interests can last for many years and if major repairs are required the remainder beneficiaries are loathe to *put in* to an asset they may not realise for many years to come.

A well-constructed life interest Will clause, will often include a right to the life tenant of a residence to have it sold and to purchase a new or substitute residence that better suits the life tenant or even contemplate its sale to fund his/her entry into a retirement village or nursing home.

The creation of the life interest in a Will upon the death of the asset owner does not raise any Stamp Duty issues as, the usual exemptions and concessions will apply.

Of course, a life interest can be created during the lifetime of the asset-owner which may provide some advantages however, there are some disadvantages.

If a person transfers an interest to another for life and remainder to others, there will be a conveyance, where that conveyance is for a consideration and creates legal estates, Stamp Duty will be payable at *ad valorem* conveyance rates on the conveyances based on the market value of the property, unless the consideration is determined to be the market value.

Where the conveyance is of legal estates other than for a consideration, (which is usually the case as no money actually changes hands), the instrument will be dutiable as a conveyance operating as a voluntary disposition *inter vivos* at *ad valorem* conveyance rates.

Varying, Disclaiming or Terminating Life Estates

On the death of a life tenant with a legal estate, an application to note death is usually lodged at the Lands Titles Office. There is no Stamp Duty consequences.

On the creation or a dealing with a life interest or remainder interest, for Stamp Duty purposes it will, be necessary to evaluate. The value is dependent on the age and sex of the life tenant. This valuation may be made in accordance with Australian life tables.

http://www.aga.gov.au/publications/#life_tables

In South Australia the life tenant factors have been calculated by the Australian Government Actuary, on behalf of Revenue SA, based on the Australian Life Tables 2010-12 using a discount rate of 5% per annum. The table indicates the life tenant factors to be used in situations where a life estate or a remainder estate is to be determined for Stamp Duty purposes. It is understood the Australian Life Tables are expected to be updated in mid-2019.

LIFE TENANT FACTORS BASED ON AUSTRALIAN LIFE TABLES 2010-12 AT 5% PER ANNUM

Age	Male Factor	Female Factor
0	0.96781	0.97497
1	0.97030	0.97707
2	0.96915	0.97619
3	0.96782	0.97517
4	0.96634	0.97404
5	0.96478	0.97286
6	0.96314	0.97160
7	0.96141	0.97027
8	0.95958	0.96887
9	0.95766	0.96740
10	0.95563	0.96583
11	0.95350	0.96420
12	0.95126	0.96248
13	0.94892	0.96068
14	0.94649	0.95880
15	0.94397	0.95686
16	0.94137	0.95486
17	0.93873	0.95282
18	0.93611	0.95071
19	0.93346	0.94849
20	0.93072	0.94617
21	0.92785	0.94374
22	0.92482	0.94117
23	0.92165	0.93849
24	0.91832	0.93566
25	0.91484	0.93269
26	0.91121	0.92959
27	0.90741	0.92633
28	0.90345	0.92292
29	0.89932	0.91935
30	0.89501	0.91562
31	0.89051	0.91174
32	0.88582	0.90767
33	0.88093	0.90343
34	0.87583	0.89900
35	0.87051	0.89439
36	0.86495	0.88958
37	0.85916	0.88456
38	0.85311	0.87934
39	0.84681	0.87390
40	0.84024	0.86823
41	0.83340	0.86233
42	0.82628	0.85619
43	0.81888	0.84981
44	0.81119	0.84317
45	0.80320	0.83627
46	0.79492	0.82910
47	0.78633	0.82165
48	0.77744	0.81391
49	0.76823	0.80587
50	0.75871	0.79752
51	0.74886	0.78886
52	0.73869	0.77986
53	0.72818	0.77053
54	0.71735	0.76084
55	0.70617	0.75077
56	0.69463	0.74032
57	0.68271	0.72949
58	0.67041	0.71826
59	0.65773	0.70663
60	0.64466	0.69459
61	0.63123	0.68216
62	0.61742	0.66931
63	0.60327	0.65601
64	0.58877	0.64228
65	0.57393	0.62809
66	0.55876	0.61346
67	0.54323	0.59838
68	0.52736	0.58287
69	0.51113	0.56694
70	0.49457	0.55062
71	0.47772	0.53390
72	0.46060	0.51682
73	0.44328	0.49942
74	0.42581	0.48169
75	0.40825	0.46365
76	0.39066	0.44533
77	0.37310	0.42674
78	0.35563	0.40792
79	0.33830	0.38893
80	0.32117	0.36985
81	0.30431	0.35080
82	0.28779	0.33188
83	0.27167	0.31322
84	0.25603	0.29492
85	0.24095	0.27709
86	0.22649	0.25984
87	0.21268	0.24325
88	0.19956	0.22742
89	0.18726	0.21240
90	0.17573	0.19825
91	0.16518	0.18507
92	0.15553	0.17288
93	0.14693	0.16176
94	0.13934	0.15174
95	0.13282	0.14279
96	0.12711	0.13486
97	0.12216	0.12776
98	0.11753	0.12170
99	0.11348	0.11609

Example

Doris and David Day married in 1975 at the age of 30.

Later in 1975 Doris and David purchased a large 3 bedroom home on an ample block size of 800m2 at Ingle Farm in the Northern suburbs of Adelaide for $45,000. The home was purchased as joint tenants.

To cap off a big year for the Days, late in 1975 their only child was born Xanthia, who became known as X.

Doris, in 1980, left the family home and took a young X with her.

A year later the divorce was finalised and the property settlement included a transfer of the Ingle Farm house to David.

The Sun would smile upon David again soon after when he bumped into his High School sweetheart Diana who soon after moved into the Ingle Farm property.

In 1982 David and Diana married and by the end of that year had twins with Diana, they were named Yvonne, who became known as Y and Zoe, who affectionately became known as Z.

David had learnt a thing or two as a result of his divorce and despite finding the love of his life, so in 1985 went to see a lawyer to draft a Will for he and Diana. David was hesitant to transfer the home to anyone and prepared a Will which gave everything to Diana upon his death or if she had failed to survive him them to his children Y and Z.

The lawyer in 1985 did not ask David if he had any other children than Y and Z, after all he had not seen X for 5 years and thought that drafting a Will giving his estate to Y and Z if his partner had died would be enough.

In 2000 Diana was killed that year in a car accident on the Gallipoli Underpass on South Road in Adelaide.

David saw a lawyer later that year and despite being told there was no estate to administer, the lawyer asked David about his current Will and after further questioning, informed the lawyer about X.

David was told that under his current Will, X might mount an Inheritance Claim against his estate (and the house) if he died. David asked what he could do gift the house to Y and Z, in order to defeat an inheritance claim by X and be confident he would have a place to live for the rest of his life.

In December 2000 David, now aged 55, executed a transfer of the house and created a legal life interest to himself and the remainder interest to both X and Y for no value. The Valuer General's value of the house is $245,000.

What issues arise as a result of the creation of the life interest in 2000?
The transfer of a legal interest thereby creating the legal life interest is a dutiable event and Stamp Duty applies.

Using David's life tenant factor (I will use the South Australia 2010-12 table) at age 55 it is 0.70617.

As the property is valued at $245,000 the value of the life interest is $173,011. That means the remainder interest is valued at $71,989 and Stamp Duty is payable on that amount[8]. That is $1,850 (using today's calculation) plus a registration fee at the Lands Titles Office.

The creation of the life interest is also considered to be a CGT event A1 – disposal. The house is a pre-CGT asset having been purchased before 20 September 1985 and thus is disregarded. In any event, even if it was a post 1985 purchase this A1 event will still be disregarded as it was David's principal place of residence.

The creation of the life interest and remainder interest also creates a CGT cost base calculation for both parties, the apportionment rules will apply and each of the life tenant and remainder interest owners will acquire their cost base at this time, the year 2000. That will have consequences much later on.

What issues arise when David dies in 2015?

In 2015 David will be aged 70 and the house is valued at $345,000.

Strictly speaking, there is a CGT event C1 for David, that event occurring as a result of the life tenancy coming to an end however, as the life of the legal interest is measured by the life of it's owner, upon their death coming to a legal conclusion, any CGT is disregarded as a result of section 128-10 of the Tax Act, (disregarded as a result of his death).

There is actually no CGT consequence for the remainder owners, as the proprietors of the remainder interest do not acquire any asset, their existing interest in the property is simply enlarged. The cost base of the remainder interest owners, who now own the freehold, has not altered from the calculation that took place in the year 2000 when their original interest was created (however this, will of course become relevant when/if they then sell the property).

If the remainder interest owners decide to sell the property at that time, CGT event A1 occurs, (simple disposal). If they sold for $345,000 and their cost base, calculated in 2000 under the apportionment rule was, for example, $71,898 then their gain will be valued at $273,102 (less sales and associated costs of course).

In this instance, there are 2 remainder beneficiaries who would likely split that gain. On 50% deduction available they would EACH be seen to have made a gain of $68,275.50 which would be taxable at their individual marginal tax rate.

The calculation becomes even more complicated if Y & Z, or one of them, desired to reside in the property for a number of years after David's death and then Y & Z sold the property. It is likely a further calculation and apportionment would occur noting that one of the freehold interest owners used the property/asset as their main residence.

The biggest issues arise however when David, in these circumstances, instead of making things easy and dies, decides he wants to surrender his life interest early and provide the property to Y and Z. What are the consequences that arise in this situation?

[8] Section 60 Stamp Duty Act (SA)

David, still aged 70 in 2015, upon surrendering his life interest will be caught by a further Stamp Duty event. Duty will be payable upon the value of the life interest being transferred (again using the relevant life tables). In this instance the life tenant factor for David is now 0.49457.

The value of the property is now $345,000 hence the value of the life interest being surrendered is $170,626 which equates to the payment of Stamp Duty $5,658. David receives no benefit for the surrender of his life interest and a CGT event A1 occurs, the market value substitution rule applies to determine the gain.

There is still a question as to whether the property, being used as David's main residence, the then life tenant owner, still qualifies for a main residence exemption thereby absolving David from any CGT consequences.

There will also be additional CGT consequences for the remainder interest owners. Unlike in the situation when David has died and Y and Z acquire the whole of the land without an additional cost base, when David surrenders his interest, usually for no value, the remainder interest owners will have a cost base in 2000 AND a cost base for an additional portion in 2015. If Y and Z then sell the property, (CGT event A1), the CGT consequences for them will be less significant than if David simply died.

Another option?

In 1985 there was an option for David to transfer his entire interest in the property to Diana (assuming that is in 1985 the transfer of main residence between spouses or domestic partners free of Stamp Duty existed[9]). Then Diana's Will would set-up a life interest in the property if she ever pre-deceased David (which is what occurred), and then the remainder interest to Y and Z on David's death.

There is no CGT event with Diana passing away and the creation of the life interest and remainder interests. The Legal Personal Representative acquires the asset via the Will at the date of her death in 2000 when the property is valued at $245,000 (market rate) and hence the exemptions or concessions for Stamp Duty arise. CGT events E6 and E7 do not occur where the Legal Personal Representative transfers the life and remainder interests because of the general exception in Div 128.

The main residence exemption continues to apply in this case to David because he was entitled to reside in the property by virtue of the terms of a Will, so if he surrenders his interest in 2015, despite Stamp Duty being payable, as seen previously, the main residence exemption would negate any gain made by David.

There is a risk of triggering a CGT event if the trustees transfer title other than in accordance with the will, akin to a surrender of life interest situation. In addition, if the recipient of the life interest pursuant to the Will, properly disclaims that interest (during the administration of the estate and prior to being absolutely entitled to it) then no CGT event occurs.

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[9] Section 97 Duties Act 2008 (WA), section 55 of the Duties Act 2001 (Tas), section 151 Duties Act 2001 (Qld) and section 104B Duties Act 1997 (NSW) are all similar in that the exemption exists and must relate to the principle place of residence and the transfer must be to a joint tenancy situation or equal tenants in common, however, section 43 Duties Act 2000 (Vic) there appears no limitation concerning joint tenants or tenants in common also appears to NOT be restricted to the principal place of residence whilst section 71CB(5) of the Stamp Duties Act 1923 (SA) has no restriction concerning the mode of holding but is limited to the principle place of residence.

Partition or Division

A concessional basis for assessing duty on a dutiable transaction that constitutes a partition of property comprised of land appears in New South Wales[10] and South Australia[11] and other legislation[12].

In New South Wales where there is a partition of land involving one parcel of land or adjoining parcels of land (or land that is held by partners in a partnership – the partnership factor is ignored for the purposes of partition. The dutiable value of the partition is the greater of the sum of the amounts by which the unencumbered value of the dutiable property transferred, or agreed to be transferred, to a person by the partition exceeds the unencumbered value of the interest held by the person in the dutiable property transferred, or agreed to be transferred, to each person by the partition immediately before the partition, and, the sum of any consideration for the partition paid by any of the parties.

If the unencumbered value of the undivided share of each partitioner in all the land being partitioned is equal to the unencumbered value of the divided part taken by that person, the partition is equalised and as the excess value is zero, the minimum duty of $10 will apply pursuant to section 30(4).

As land which is the subject of a partition is required to be held jointly, any partitioning of estate land which is held by a trustee or executor does not fall within section 30 and a transfer to the beneficiaries should be stamped under section 63 of the Duties Act 1997 (NSW) prior to partitioning.

The position in South Australia is that section 71B provides that where upon a partition or division of any property any consideration exceeding in amount or value $200 is paid or given, or agreed to be paid or given, for equality, the instrument by which the partition or division is effected shall be charged with duty as if it were a conveyance on sale and that consideration were equal to the value of the property. A partition or division is not otherwise a conveyance on sale.

The exemption is limited to a partition or division between members of a family group and no duty is now payable, as the nominal stamp duties have been abolished in South Australia, where the payment by way of inequity does not exceed $200. A family group means a group of persons connected by an unbroken series of relationships of consanguinity or affinity. If companies or trusts are involved there may be difficulties in satisfying the family requirement.

It would appear that, similarly to New South Wales, the legal ownership of businesses partners in a partnership would also qualify for the relief in section 71B.

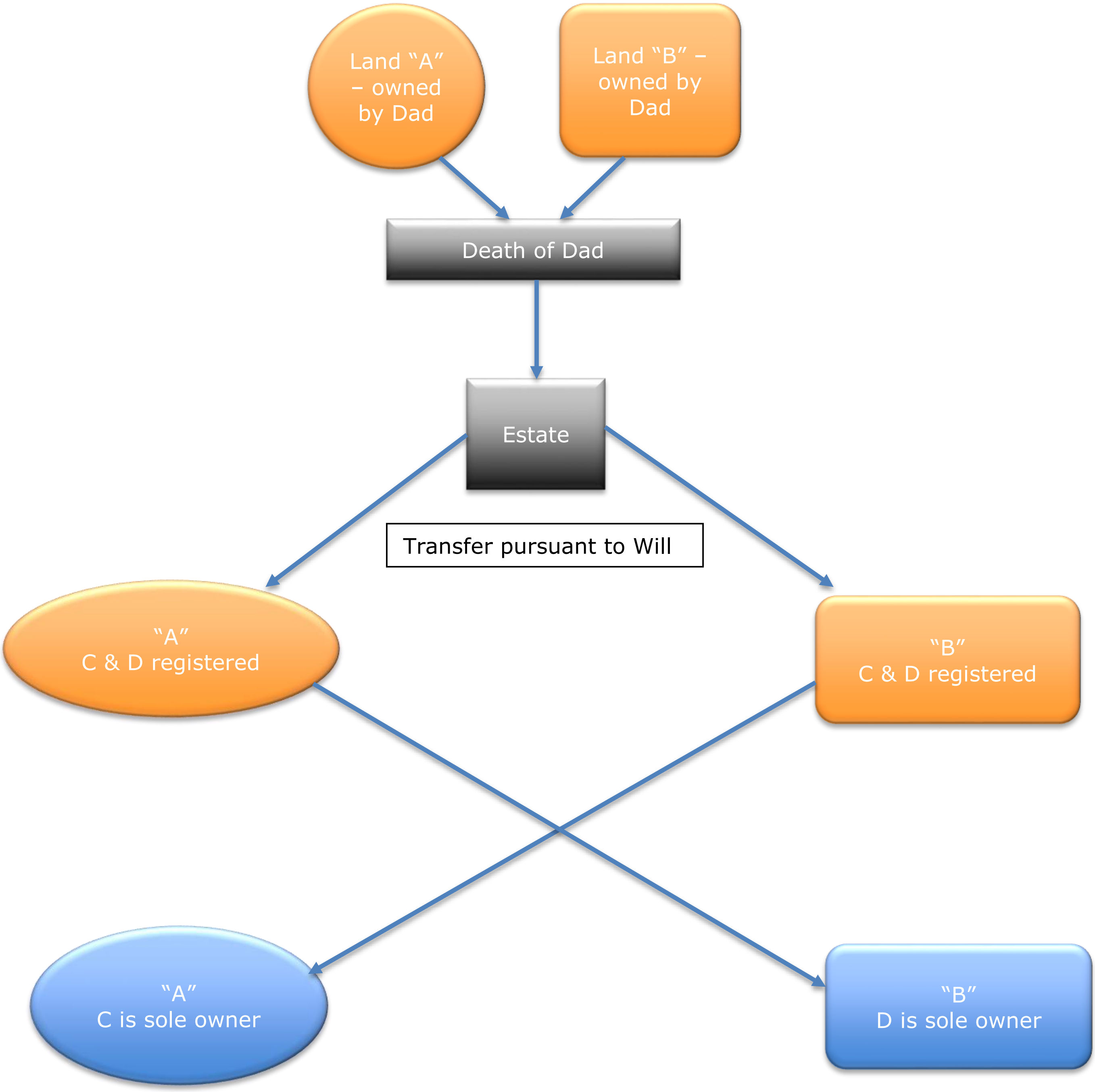
If more than $200 is paid or given by way of inequality then the duty is assessed at usual *ad valorem* conveyance rates on the consideration paid or given in excess of the $200.

Interestingly, the legislation and rulings in New South Wales make it clear the concession is only available to land in New South Wales. The definition of *property* in

[10] Section 30 Duties Act 1997 (NSW)
[11] Section 71B Stamp Duties Act 1923 (SA)
[12] Duties Act 2001 (Qld) s 31, Duties Act 2000 (Vic) s 27, Duties Act 1999 (ACT) s 29, Duties Act 2001 (TAS) s 26, Stamp Act (1921) (WA) s 75AD, Stamp Duty Act 1978 (NT) Division 3A

South Australia is much wider Pursuant to section 71B, a division can be effected of bank accounts, interests in land, cars, debts, shares, life insurance policies and choses in action (all of which must be in South Australia).

An example of where it is useful is where two brothers under their father's Will, have been given as tenants in common two farming properties. They do not wish to operate them jointly and each wishes to go his own way. They agree to divide those properties by way of partition between them with there being equality between them. The concession and exemption will therefore apply.



Business Succession

Business Succession planning encompasses a very broad arena involving numerous strategies for the transfer of the ownership and management and/or the control of a business on retirement and intergenerational transfers of the family business.

The fate of a business on the death of an owner is usually determined by, gifting the business through a will, transferring the business through a pre agreed contract whether it is a partnership agreement of share/Unitholder agreement, the heirs continuing the business or the liquidation and asset sell off if a purchaser cannot be found.

Transfer of control on Death

The Will can serve as an effective buy/sell arrangement where the parties are closely related and can be trusted not to change their wills without notifying each other. The restriction is that ownership changes only in the case of death and assumes that the deceased owns the business interest - and not a trust or company as is often the case.

An effective transfer of business control and value can occur if the testator was the owner of the shares that comprised a business operated by a company and a devise of those shares occurs in the Will of the deceased.

In New South Wales, a minimum of $2 and a maximum of $10 Stamp Duty is payable on the transfer of shares pursuant to the terms of a Will. Care should be taken if utilising this strategy to transfer control and wealth of a business to ensure the Will is properly drawn with an appropriation clause. However, in those circumstances, Stamp Duty may be payable without a maximum.

Corporate Reconstruction

Pursuant to section 273B of the Duties Act 1997 (NSW), no Stamp Duty is payable if the Commissioner is satisfied that what is being contemplated is a *corporate reconstruction transaction* and the transaction is undertaken for the purpose of either changing the structure of a corporate group or changing the holding of assets within a corporate group. The transaction cannot be undertaken for the purpose of avoiding or reducing duty or another tax under a law of an Australian jurisdiction (presumably Capital Gains Tax).

Corporate Reconstructions Transaction means a transfer or agreement for sale of dutiable property between corporations that are members of the same corporate group, which in turn means a parent corporation and its subsidiaries (holding at least 90% shares in the other or holds voting control, 90%, over the other corporation).

In Western Australia, Chapter 6 of the Duties Act 2008 provides an exemption from duty on transactions that occur in relation to entity restructuring to facilitate more efficient business structures and is not intended to apply to arrangements that are for the purpose of avoiding duty or other taxes.

The entity restructuring exemption applies to certain transactions involving related entities, referred to as a *family*. The entities involved however may be corporations and/or unit trusts.

In South Australia Stamp Duty on the transfer of property from one corporation to another may now receive *ex gratia* relief from the payment of duty for transactions that occur from 18 June 2015, (announced in the most recent South Australian State Budget on 6 June 2015). It has not yet been assented to and as such an application for relief must be made to the Commissioner.

Transfer of Farming Business between family members.

Section 274 Duties Act 1997 (NSW) provides an exemption from the payment of Stamp Duty in respect of a transfer of land, or lease of land used for primary production *together with any property that is an integral part of the business of primary production* if the Commissioner is satisfied that the transferor *or person directing the transferor* is a member of the family of the transferee (carrying its usual meaning) and the land was used for primary production with that business continuing thereafter.

the "person directing" a transferor, lessor or assignor is:

(a) in the case of a transferor, lessor or assignor who is acting in the capacity of executor of a deceased estate-the deceased person, or

(b) in the case of a transferor, lessor or assignor which is a proprietary limited company-a shareholder or shareholders in the company who:

(i) are beneficially entitled to those shares, and

(ii) are entitled to vote at meetings of the company, and

(iii) are entitled as shareholders to not less than 25% of the assets of the company on winding up, being an entitlement that existed for at least 3 years prior to the date of the transfer, lease or assignment or that existed from the date of incorporation of the company, or

(c) in the case of a transferor, lessor or assignor acting in the capacity of trustee of a bare trust-a person who is a named beneficiary of the trust, or

(d) in the case of a transferor, lessor or assignor acting in the capacity of trustee of a discretionary trust-a person or persons who are entitled (as takers in default of appointment) to not less than a 25% interest in the capital of the trust, being an entitlement that existed for at least 3 years prior to the date of the transfer, lease or assignment, or that existed from the date of establishment of the trust, or

(e) in the case of a transferor, lessor or assignor acting in the capacity of trustee of a private unit trust scheme-a unit holder or unit holders in the unit trust scheme who:

(i) hold the units beneficially, and

(ii) are entitled (as unit holders) to not less than 25% of the assets of the unit trust scheme on winding up, being an entitlement that existed for at least 3 years prior to the date of the transfer, lease or assignment, or from the date of establishment of the trust.

The position in Western Australia is governed by sections 99 – 106 of the Duties Act 2008 (WA) and similarly exempts a transfer from the payment of duty if it is a transfer of farming property, or other dutiable property used in the business or primary production, if transferred between family members and used solely or predominantly in primary production. The transfer of shares in a company that owns the farm land maybe exempt if transferred between family members also[13]. The exemption may extend and apply to partnerships, unit trusts and discretionary trusts.

An addition, in Western Australia a subsequent family farm transaction that would otherwise be exempt, will attract Stamp Duty if it occurs within 5 years of a previous exempt transaction. This feature does not appear in other legislation.

In Queensland, a concession applies rather than an exemption where there is a transfer or gift of dutiable property used to carry on a business of primary production[14], but still includes reference to transfers including discretionary trusts, unit trusts and corporations. The concession will likely result in a nil duty position.

In Victoria, pursuant to section 56 of the Duties Act 2000 (Vic) no duty is payable on the transfer of dutiable property defined in sections 65, 66 or 67 of the Land Tax Act 2005 (Vic) (land used for primary production outside greater Melbourne). Victoria also extends leniency on transfers from and to various discretionary or fixed (unit) trusts where capital beneficiaries are family members.

In South Australia, section 71CC Stamp Duties Act 1923 (SA) provides an exemption from *ad valorem* duty for a transfer of an interest in land or land and goods used for the business of primary production by a person or a trustee for the natural person to a relative (as defined) or a trustee for the relative and the Commissioner is satisfied of certain matters.

The provision only applies to a transfer and not a conveyance, and the land must be used for the business of primary production. The transfer must be from a natural person or a trustee for a natural person to a relative of a natural person or a trustee for a relative of a natural person, and the Commissioner must be satisfied of certain further matters.

The Commissioner must be satisfied that the land is used wholly or mainly for the business of primary production, the area of land is not less than 0.8 ha in area, that the sole or principal business of the natural person who, or whose trustee, is the transferor is (immediately before the instrument) the business of primary production and that for a period of 12 months before the execution of the instrument there was a business relationship between the natural person whose interest is passing or the trustee for that person with the natural person receiving the benefit of the interest or the trustee for that person or a lineal ancestor, spouse or domestic partner. The relationship must be in respect of the use of the property to be transferred, the transferor and transferee may be trustees of trusts that have the required limitations as to their beneficiaries, and it apparently cannot be a relationship arising solely by reason of the transfer of the property.

In deciding whether there is a necessary business relationship, the Commissioner may take into account a past employment relationship regardless of the amount or form of remuneration (query if there is ever and employment relationship without

[13] Sections 171-174 of the Duties Act 2008 (WA)
[14] Section 97(1)(a)-(e) of the Duties Act 2001 (Qld)

remuneration), share farming arrangements, assistance in running the business, a partnership arrangement and, such other matters as the commissioner thinks fit.

Where the transfer is to or from a trustee or both, no person is a beneficiary of the trust or trusts other than a natural person and his relative or relatives. Relative is in turn defined to mean a child or remoter lineal descendant of the person or the spouse or domestic partner of the person, a parent or lineal ancestor of the person or the spouse or domestic partner of the person, a brother or sister of the person or the spouse or domestic partner of the person, a child or remoter lineal descendant of the brother or sister of the person or of the spouse or domestic partner of the person, the spouse or domestic partner of the person or spouse or domestic partner of any person named hearing.

The goods must comprise livestock, machinery, implements and other goods used or acquired for the business of primary production conducted on the land the subject of the transfer.

Trust Cloning & Splitting

Where assets have been built up in one trust, there is often a desire for the assets to be divided among different trusts. This may be for a number of reasons, including to allow some assets to be controlled by certain family members and other assets to be controlled by different family members or to separate multiple business activities and isolate the risks associated with them.

Transactions of this nature can have a number of revenue related consequences, including CGT, Stamp Duty and possible trust resettlement issues due to variations of the trust deed which lead to both CGT and Stamp Duty issues (of the significant variety).

'*Splitting*' means maintaining the one trust relationship, but appointing separate trustees for different assets of that one trust. The trust obligations are undertaken according to the trust relationship spelled out in the trust deed establishing the trust.

'*Cloning*' involves the establishment of a new trust relationship in respect of assets held by the trustee. That trust relationship may come about by settling the asset on the new trustee or bringing into existence a new trust relationship and transferring the asset to the trustee of that new trust relationship.

For both cloning and splitting, care must be taken to identify the location of each asset of the trust for duty purposes, as different States have different requirements for each potential exemption.

CLONING TRUSTS

Cloning of trusts involves establishing a new trust relationship (the replica trust), which has the same terms and beneficiaries as an existing trust relationship (the original trust).

While the heyday of trust cloning ended with the abolition of the CGT 'cloning' exemption (other than in relation to certain forms of fixed trusts) in 2008, trust cloning is still potentially relevant for all forms of trusts. Ordinarily, when an asset is transferred from one trust to another, a capital gains tax event occurs and capital gains tax may be payable. However, the "trust cloning exemption" contained in sections 104-55(b) and 104-60(b) of the *Income Tax Assessment Act 1997* (Cth) means there is no capital gains tax event, if an asset is transferred from one trust to another trust and "*the beneficiaries and terms of both trusts are the same*".

One example used by the ATO shows how careful you may have to be in '*cloning*' trusts that exclude a particular office holder from benefiting under the trust. For example, if the original trust excludes the trustee from benefiting and the new or cloned trust does likewise, but the two trusts have different trustees, then the two trusts are not the same and therefore the exception does not apply.

Another example shows the difficulties of '*cloning*' a discretionary trust with a widely-drawn beneficiary clause. For example, it may not be possible to clone a trust with named beneficiaries and a clause that also includes as a beneficiary any trust in which a named beneficiary has an interest (including as a potential object). Including this same clause in both trusts will result in the trustee of the new or 'cloned' trust being a beneficiary of the original trust, and the trustee of the original trust being a beneficiary of the new trust. Therefore, the beneficiaries of the original trust will be the named beneficiaries and trustee of the new trust, and the beneficiaries of the new trust will be the named beneficiaries and the trustee of the original trust. However, because it is not possible for a trust to be a beneficiary of itself, the two trusts do not have exactly the same beneficiaries and the exception therefore would not apply.

Cloning was (and to some extent still is) an effective tool regularly used in succession planning, asset protection and for arranging finance. A properly crafted trust clone arrangement can still be effective. Cloning may therefore be worth considering if the tax consequences of the transfer can be otherwise managed, perhaps some small business concessions may apply.

By way of example, a discretionary trust established during Mum and Dad's lifetime included the couple, their children, lineal descendants and associated entities as beneficiaries. The assets mainly comprise of 3 commercial properties and businesses, of similar value, but in different locations. It was always the intention that the assets in the trust be used to benefit the immediate family. Mum and Dad both pass away leaving control of the trust to their three adult children jointly. The children all have their own families and competing priorities when it comes to making decisions about investments, cash flow requirements, financing and so on. By cloning the original trust and transferring some of the CGT assets to one or more new trusts would enable Mum & Dad's succession planning objectives to be met.

Each of the replica trusts can have independent trustees, have separate accountants, enter financing arrangements independent of the other replica trusts and take on risk without exposing the assets in the other replica trusts.

Same terms and beneficiaries

One of the requirements for cloning to be successful is for the cloned trusts to have the same terms and beneficiaries as the original trust.

The Commissioner's view on what it means to have the same terms and beneficiaries is outlined in income tax ruling (TR 2006/4). In the ruling the Commissioner states that the following matters **do not** need to be the same:

- the trust name;
- the commencement or establishment date of the trust;
- the identity of the settlor;
- the identity of the trustee; and
- the identity and nature of the trust property.

However, the following matters **do** need to be the same:

- the meaning and effect of the two deeds;
- the identity of beneficiaries;
- the vesting and termination dates;
- the identity of the appointor;
- the applicable state laws; and

- the family trust or interposed entity election for a particular "family group".

Difficulties may also be experienced in ensuring that the vesting date of the replica trust is the same as the original trust. Merely photocopying the original trust may result in the vesting date being a date 80 years from the date of establishment of the replica trust if the deed of the original trust defined the vesting date in such a manner. Again, careful drafting may be required to clarify that the vesting date is the same as the original trust. Of course a similar problem would not exist in South Australia which does not have an abolition against perpetuity.

Stamp Duty implications

The transfer of assets between the original and cloned trusts may also result in a dutiable transaction and as such, a liability to Stamp Duty. State legislation and also the current interpretation of that legislation by the relevant State Revenue authority must be considered on each occasion of trust cloning. The very great difficulty in addressing this topic is a result of each of the eight jurisdiction having different approaches.

A transfer of property to a cloned trust is liable to *ad valorem* duty pursuant to section 71(3)(a)(i) of the Stamp Duties Act 1923 (SA). Section 71(5)(d) of that Act does not apply to exempt from Stamp Duty a transfer of property to a cloned trust as it might in a split trust.

SPLITTING TRUSTS

Trust cloning involves establishing a separate, discrete trust and transferring assets between the two trusts. Trust splitting, on the other hand, involves establishing a 'sub-trust' within the original trust, so there is still only one trust, but different trustees are appointed for different assets held within that trust. The splitting of a trust does not involve a change to the beneficiaries or to the powers conferred on the trustee.

The ability to split a trust will depend on the powers provided in the trust deed to appoint a separate trustee in respect of those assets which have been split.

As the assets are still held in the same trust, albeit with different trustees appointed, this effectively limits the CGT consequences of trust splitting. In particular, while there is a change of legal owner when a new trustee is appointed, the exception under the CGT rules regarding a change of trustee should be available.

For trusts established outside a Will, generally, it should be possible to insert the required powers into an existing trust deed without triggering a resettlement. This issue needs to be considered as part of a careful review of the trust deed and in the context of the Tax Office's position following the withdrawal of its Statement of Principles on creation of a new trust.

For trusts established by a Will it is often difficult to vary or create a sub-trust unless such power to do so existed within the Will terms; it is unlikely a simple power to vary will be sufficient. Many testamentary trusts have no variation power or even if there is a variation power, use of it for any purpose may be invalid as it allows a will maker's directions to be changed after death.

When structuring a splitting transaction, with reference to the resettlement risks, it is arguably still the case that the trustee indemnity provisions should be retained. No steps should be taken towards limiting the range of beneficiaries entitled to the assets of the trust and in particular, no steps should be taken by particular beneficiaries to renounce their entitlements in respect of the assets held in the split trust or the original trust. No agreements should be made in respect of future distributions from the split trust or the original trust.

Where Stamp Duty is not a concern, the *cloning* of a trust (the transfer of an asset from one trust to another trust where the beneficiaries and terms of the trust deeds are the same) is to be preferred to the *splitting* of a trust. This view is based on a desire to avoid the question of whether a right of indemnity in a trust can be effectively split so that it is only held by a trustee in respect of the specific assets held by the trustee.

Stamp Duty concerns

It should not be assumed that the splitting of a trust by the appointment of a new trustee to hold some of the assets of the trust, and the division or variation of the right of indemnity so that each trustee only has a right of indemnity in respect of the assets of the trust which that trustee holds, will not incur a liability to Stamp Duty.

Under specific exemptions, the appointment of a new trustee of a trust does not of itself attract liability to *ad valorem* duty in any of the States or Territories.[15]

To avoid an unexpected Stamp Duty assessment, the opinion of the relevant Commissioner should be sought before the proposed transaction is entered into.

[15] Duties Act (Vic) section 33; Duties Act (Tas) section 37; Stamp Act (WA) sub-section 73AA(1)(a) and Schedule 6. Under section 54 of the Duties Act (NSW) and the Duties Act (ACT) an exemption for duty will apply if the Commissioner is satisfied that none of the continuing trustees remaining after retirement of a trustee is or can become a beneficiary under the trust, none of the trustees of the trust after the appointment of a new trustee is or can become a beneficiary under the trust and that the transfer is not part of a scheme to confer an interest in relation to the trust property to the detriment of the beneficial interest or potential beneficial interest of any person. Under paragraph (d) of sub-section 71(5) of the Stamp Duties Act (SA) an exemption for duty will apply if the Commissioner for State Revenue is satisfied that any transfer pursuant to the appointment of a new trustee is not part of a scheme to confer a benefit to the detriment of the beneficial interest of any person. The Duties Act (Qld) section 117 includes an exemption which applies if the transaction is not part of an arrangement which terminates the trust or involves a change in the rights or interest of a beneficiary of the trust and the trustee has previously paid all duty charged in respect of any trust acquisition before the date of the current dutiable transaction. The Stamp Duty Act (NT) section 6A and Schedule 2 Item 9A includes an exemption which applies if there is no change of control of the trustee and the beneficiaries of the trust, no beneficial interest passes in the property conveyed, and the original trustee originally acquired the dutiable property in its capacity as trustee of the trust and paid duty (or was validly exempt from the requirement to pay duty) the Stamp Duty problems with the premature ending of life interests.

Resettlement

Trust resettlement is an area that continues to be important for trust splitting, especially where the original trust needs to be varied before the splitting takes place.

The consequences of a resettlement include all assets are treated as having been disposed of by the original trust and settled on the new trust and any losses in the trust are trapped and cannot be carried forward to offset income in the 'new' trust.

This subject can be described in this way — can a transfer of assets to another trustee, but subject to the precise terms of the trust instrument, bring into existence a different trust relationship? The argument that this is a new trust derives out of the rationale that a trust is a personal relationship in regard to property subject of the trust instrument between the trustee, the settlor and the beneficiaries. It follows in this argument that, if there is a new trustee, there must be a new trust relationship. Whether or not there is a resettlement turns on the question whether there is an alteration to the bedrock of the trust sufficient to constitute a new trust relationship.

The question is whether the changes, which have been made, constitute '*a new charter of future rights and obligations'*.

In *Roome v Edwards* (Inspector of Taxes)[16] it was said:

> *There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another settlement exists. One might expect to find separate and defined property, separate trusts and separate trustees. One might also expect to find a separate disposition bring the separate settlement into existence. These indicia may be helpful, but they are not decisive*.

In many jurisdictions the particular provision in the Trustee Act allowing appointment of separate trustees prima facie contemplates that the trust property will be held on separate and distinct trusts, by way of example;

In New South Wales subsect 6 of the *Trustee Act 1925* (NSW) provides:

> *(1) A new trustee may by registered deed be appointed in place of a trustee, either original or substituted and whether appointed by the Court or otherwise.*
>
> *…*
>
> *(5) The appointment may be made for the whole or any part of the trust property, and on the appointment:*
>
> *(a) two or more trustees may be appointed concurrently;*
>
> *(b) the number of trustees may be increased, but not beyond four;*
>
> *(c) a separate set of trustees may be appointed for any distinct part of the trust property, that is to say, for any part for the time being held on trusts distinct from those relating to any other part or parts, notwithstanding that no new trustees or trustee are or is to be*

[16] [1982] AC 279 at 292-293 per Lord Wilberforce.

appointed for other parts, provided that the number of trustees in any separate set shall not exceed four;

(d) any existing trustee may be appointed or remain one of the separate set of trustees.

…

(8) Every new trustee appointed under this section as well before as after all the trust property becomes by law or by conveyance or otherwise vested in the new trustee, shall have the same powers, authorities and discretions, and may in all respects act as if the new trustee had been originally appointed a trustee by the instrument, if any, creating the trust.

Section 12(2) *Trusts Act 1973 (QLD)* provides:

On the appointment of a trustee or trustees for the whole or any part of the trust property:

…

(b) a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part and whether or not new trustees are or are to be appointed for any other part of the trust property; and any existing trustee may be appointed or remain 1 of the separate set of trustees or if only 1 trustee were originally appointed then 1 separate trustee may be so appointed for the part of the trust first in this paragraph mentioned.

Section 42 of the *Trustee Act 1958 (Vic)* provides:

On the appointment of a trustee for the whole or any part of trust property:

(a) the number of trustees may, subject to the restrictions imposed by this Act on the number of trustees, be increased; and

(b) a separate set of trustees, not exceeding four, may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees, or, if only one trustee was originally appointed, then, save as hereinafter provided, one separate trustee may be so appointed.

There is no specific exclusion in Victoria and Queensland. Those in pursuit of an effective split will want to make sure that the trust deed specifically allows a separate trustee to be appointed in respect of specific assets held subject to the trusts. The legislation in Northern Territory and Western Australia is similar. It should be noted that in all States and Territories except NT, SA and TAS the number of trustees for a private unit trust is limited to four.

WELDEN & COLUCCIO lawyers

Schedule 1

DUTIES ACT 1997 - SECT 63 (NSW)

63 Deceased estates

(1) Duty of $50 is chargeable in respect of:

(a) a transfer of dutiable property by the legal personal representative of a deceased person to a beneficiary, being:

(i) a transfer made under and in conformity with the trusts contained in the will of the deceased person or arising on an intestacy, or

(ii) a transfer of property the subject of a trust for sale contained in the will of the deceased person, or

(iii) an appropriation of the property of the deceased person (as referred to in section 46 of the Trustee Act 1925) in or towards satisfaction of the beneficiary's entitlement under the trusts contained in the will of the deceased person or arising on intestacy, and

(c) a transmission application by a devisee who is also the sole legal personal representative, and

(d) a declaration by an executor of a will under section 11 of the Trustee Act 1925 if the Chief Commissioner is satisfied that the declaration is consistent with the entitlements of beneficiaries under the trusts contained in the will.

(2) If a transfer of dutiable property is made by a legal personal representative of a deceased person to a beneficiary under an agreement (whether or not in writing) between the beneficiary and one or more other beneficiaries to vary the trusts contained in a will of the deceased person or arising on intestacy, the dutiable value of the dutiable property is to be reduced by the portion of the dutiable value that is referable to the dutiable property to which the beneficiary had an entitlement arising under the trusts contained in the will or arising on intestacy.

(2A) A transmission application made by a beneficiary under a will, with the consent of the legal personal representative of a deceased person, is taken, for the purposes of this section, to be a transfer of dutiable property by the legal personal representative to the beneficiary.

(3) Section 25 does not apply to a dutiable transaction to which subsection (2) applies.

(4) If the duty chargeable in respect of a transfer or transmission application referred to in subsection (1) would, but for that subsection, be less than $50, the duty chargeable is that lesser amount.

(5) This section is subject to section 273, which provides for a minimum duty of $10.

DUTIES ACT 2000 - SECT 42 (VIC)

Deceased estates

(1) No duty is chargeable under this Chapter in respect of a transfer of dutiable property not made for valuable consideration by the legal personal representative of a deceased person to a beneficiary, being—

- (a) a transfer made under and in conformity with the trusts contained in the will of the deceased person or arising on an intestacy; or
- (b) a transfer of property the subject of a trust for sale contained in the will of the deceased person.

(2) No duty is chargeable under this Chapter in respect of the vesting of any dutiable property by virtue of section 13 of the Administration and Probate Act 1958.

(3) No duty is chargeable under this Chapter in respect of a transfer of dutiable property not made for valuable consideration by a legal personal representative of a deceased person to a beneficiary to the extent that the transfer is made in satisfaction of the beneficiary's entitlement arising under the will of the deceased person or arising on an intestacy.

DUTIES ACT 1999 - SECT 69 (ACT)

Deceased estates

Duty of $20 is chargeable in respect of—

(a) a transfer of dutiable property not made for valuable consideration by the legal personal representative of a deceased person to a beneficiary if the transfer is—

  (i) a transfer made under and in conformity with the trusts contained in the will of the deceased person or arising on an intestacy; or

  (ii) a transfer of property the subject of a trust for sale contained in the will of the deceased person; and

(b) a consent by a legal personal representative of a deceased person to a transmission application by a beneficiary; and

(c) a transmission application to a devisee who is also the sole legal personal representative.

DUTIES ACT 2001 - SECT 47 (TAS)

47. Deceased estates

(1) Subject to section 53(j), duty of $50 is chargeable in respect of a transfer of dutiable property not made for valuable consideration by the legal personal representative of a deceased person to a beneficiary, being –

(a) a transfer made under and in conformity with the trusts contained in the will of the deceased person or arising on an intestacy; or

(b) a transfer of property the subject of a trust for sale contained in the will of the deceased person; or

(c) a transfer of property in accordance with an order made under the Testator's Family Maintenance Act 1912.

(1A) Subject to section 53(j), if –

(a) a transfer of dutiable property is made to a beneficiary by the legal personal representative of a deceased person; and

(b) the transfer is made under, but only partially in conformity with, a trust contained in the will of the deceased person –

the dutiable value of the dutiable property is to be reduced by the value of so much of the transfer as is made in conformity with the trust and is not made for valuable consideration.

(1B) Despite subsection (1A), the minimum amount payable on a transfer to which the subsection applies is $50.

(2) No duty is payable in respect of –

(a) a consent by a legal personal representative of a deceased person to a transmission application by a beneficiary; or

(b) a transmission application to a devisee who is also the sole legal personal representative.

DUTIES ACT 2001 - SECT 124 (QLD)

124 Exemption—deceased person's estate

Transfer duty is not imposed on the following dutiable transactions—

(a) a transfer, or agreement for the transfer, of dutiable property to the extent that it gives effect to a distribution in the estate of a deceased person;

(b) the creation of a trust of dutiable property to the extent that it gives effect to a distribution in the estate of a deceased person;

(c) a transfer, or agreement for the transfer, of dutiable property to the extent that it gives effect to a court order under the Succession Act 1981, part 4.

STAMP ACT 1921 - SECT 73AA (WA)

73AA Duty on conveyance not passing a beneficial interest

(1) A conveyance or transfer —

- (a) made for effectuating the appointment of a new trustee, or the retirement of a trustee, whether the trust is expressed or implied;
- (b) made to a beneficiary by a trustee or by another person in a fiduciary capacity, except a discretionary trustee or a unit trustee, under any trust whether express or implied;
- (c) made to a beneficiary by a discretionary trustee under any trust whether express or implied otherwise than in the exercise of any power of appointment;
- (d) made by a discretionary trustee, in the exercise of a power of appointment over the property conveyed or transferred, to a beneficiary who is an individual for his own use and benefit, if —
    - (i) at the time when the discretionary trustee acquired the property conveyed or transferred the beneficiary was named or described in the instrument which created the power of appointment as a beneficiary or as a member of a class of beneficiaries in whose favour the discretionary trustee was empowered by that instrument to appoint the property; and
    - (ii) evidence of the acquisition by the discretionary trustee, as such trustee, of the property conveyed or transferred is produced to the Commissioner with that conveyance or transfer;
- (e) made to the holder of a unit in a unit trust scheme by a unit trustee if —
    - (i) evidence of the acquisition by the unit trustee, as trustee of that unit trust scheme, of the property conveyed or transferred is produced to the Commissioner with that conveyance or transfer; and
    - (ii) the Commissioner is satisfied that —
        - (I) the conveyance or transfer has the effect of reducing the rights of the holder of the unit in respect of the property held by the unit trustee to the extent of the property, or the value of the property, conveyed or transferred; and
        - (II) the conveyance or transfer does not have the effect of varying, abrogating or altering the rights of the holder or holders of other units under the unit trust scheme in respect of the remaining property held by the unit trustee;

  or
- (f) not otherwise coming within this section but which the Commissioner is satisfied —
    - (i) does not pass a beneficial interest in the property conveyed or transferred;
    - (ii) is not made in contemplation of the passing of a beneficial interest therein; and
    - (iii) is not part of, or made pursuant to, a scheme whereby any beneficial interest in the property conveyed or transferred, whether vested or contingent, has passed or will or may pass,

shall be charged with duty in accordance with item 6 of the Second Schedule.

(2) A conveyance or transfer that is —

- (a) made by any trustee or other person in a fiduciary capacity to a beneficiary; or
- (b) made by a unit trustee to the holder of a unit in a unit trust scheme,

and that does not conform to subsection (1)(b), (c), (d) or (e), and a conveyance or transfer in respect of which the Commissioner is not satisfied as mentioned in subsection (1)(f), shall be deemed to operate as a voluntary disposition and is chargeable with duty under section 75(1).

STAMP DUTIES ACT 1923 - SECT 71 (SA)

71—Instruments chargeable as conveyances

(1) The value for the purposes of this Act of the property conveyed by any conveyance operating as a voluntary disposition *inter vivos* shall be declared in the conveyance.

(3) For the purposes of this Act, the following instruments shall, subject to this section, be deemed to be conveyances operating as voluntary dispositions *inter vivos*:

(a) an instrument to which subsection (4) applies effecting or acknowledging, evidencing or recording, any of the following transactions:

(i) a transfer of property to a person who takes as trustee; or

(ii) a declaration of trust; or

(iii) the creation of an interest in property subject to a trust; or

(iv) a transfer of an interest in property subject to a trust; or

(v) the surrender or renunciation of an interest in property subject to a trust; or

(vi) the redemption, cancellation or extinguishment of an interest in property subject to a trust,

whether or not any consideration is given for the transaction; or

(b) an instrument to which paragraph (a)

does not apply, being a conveyance that is not chargeable with duty as a conveyance on sale.

(4) This subsection applies to any instrument that relates to land, a financial product or a unit under a unit trust scheme, or an interest in land, a financial product or a unit under a unit trust scheme.

(4a) A reference in subsection (4) to a unit trust scheme does not include—

(a) an arrangement under the constitution of a registered managed investment scheme; or

(b) an approved deposit fund or a pooled superannuation trust within the meaning of the *Superannuation Industry (Supervision) Act 1993* (Cwlth).

(4b) For the purposes of this Act (other than Part 4)—

(a) property is taken to be held beneficially by a unit trust scheme if it is held by the trustees of the scheme in trust for the unitholders; and

(b) the holder of a unit in a unit trust scheme that is taken under paragraph (a) to hold property beneficially is taken to have a beneficial interest in that property; and

(c) the transfer, creation, surrender, renunciation, redemption, cancellation or extinguishment of a unit in a unit trust scheme that is taken under paragraph (a) to hold property beneficially is taken to be a transfer, creation, surrender, renunciation, redemption, cancellation or extinguishment (as appropriate) of a beneficial interest in that property.

(5) Subject to subsection (6), an instrument effecting or acknowledging, evidencing or recording, any of the following transactions shall be deemed not to be a conveyance operating as a voluntary disposition *inter vivos*:

(b) a transfer *in specie* of property of a company in liquidation made by the liquidator to a shareholder of the company;

(c) a transfer of any financial product issued by a public company to a person who takes as trustee, where—

(i) the beneficial interest in the property is, upon the transfer, vested in the transferor; and

(ii) the transfer is not in pursuance of a sale;

(d) a transfer of property for the purpose of effectuating the retirement of a trustee or the appointment of a new trustee, where the Commissioner is satisfied that the transfer is not part of a scheme for conferring a benefit, in relation to the trust property, upon the new trustee or any other person, whether as a beneficiary or otherwise, to the detriment of the beneficial interest of any person;

(da) a transfer of property subject to a registered managed investment scheme if the transfer is—

(i) from the responsible entity of the scheme to a person as primary custodian for the responsible entity; or

(ii) from a person as primary custodian for the responsible entity of the scheme to the responsible entity;

Exception to paragraph (da)—

Paragraph (da) does not apply to a transfer of property that is part of an arrangement under which—

(a) the property ceases to be subject to the scheme; or

(b) the persons who are members of the scheme do not have the same interest in the property after the property is transferred as they had immediately before the arrangement was entered into.

(e) a transfer of property by a trustee to a person who has a beneficial interest in the property in the following circumstances:

(i) the person has a beneficial interest in the property (other than a potential beneficial interest) by virtue of an instrument that is duly stamped; and

(ii) the property was acquired for the trust, or became subject to the trust—

(A) by virtue of an instrument duly stamped with *ad valorem* duty; or

(B) as a result of a transaction to which section 71E;

applies in relation to which a statement under that section has been lodged and *ad valorem* duty paid; or

(C) under 1 of the other paragraphs of this subsection (except paragraph (d)); and

(iii) if the trust is a discretionary trust (other than a superannuation fund or a unit trust)—the person acquired the beneficial interest by virtue of a duly stamped instrument that is separate from the instrument under which he or she became an object of the trust;

Exception to paragraph (e)—

If $v_1$exceeds [v_2- v_3], then the instrument is liable to *ad valorem* duty as if it were a transfer of property with a value equivalent to the excess. In this exception—

v1 is the net value of the property transferred;

v2 is the value of the beneficiary's interest in the trust immediately before the transfer takes effect;

v3 is the value of the beneficiary's interest in the trust immediately after the transfer takes effect.

(f) a transfer to a natural person who is an object of a discretionary trust of property or a beneficial interest in property subject to the discretionary trust, where—

(i) the discretionary trust was created by an instrument that is duly stamped; and

(ii) the Commissioner is satisfied that the discretionary trust was created wholly or principally for the benefit of that person or a family group of which that person is a member;

(g) a transfer of a potential beneficial interest in property subject to a discretionary trust, where—

(i) the discretionary trust was created by an instrument that is duly stamped wholly or principally for the benefit of a family group; and

(ii) the transfer is made by one member of the family group to another member of the family group, or by a member of the family group by way of surrender or renunciation of the potential beneficial interest and another member of the family group is to continue as an object or beneficiary under the trust;

(h) a transfer to or by a person in his capacity as the personal representative of a deceased person or the trustee of the estate of a deceased person, being a transfer made in pursuance of the provisions of the will of the deceased person or the laws of intestacy and not being a transfer in pursuance of a sale;

(i) any variation of the terms of a trust, where the trust was created by an instrument that is duly stamped and the variation does not involve the creation or variation of any beneficial interest in property subject to the trust;

(ia) a transaction under which there is a *pro rata* increase or diminution of the number of units held by the unitholders in a unit trust so that each unitholder's holding, expressed as a proportion of the aggregate number of units, remains unaffected by the transaction;

(j) a voluntary disposition of property that is wholly for charitable or religious purposes;

(k) a transfer of a prescribed class.

(6) Subsection (5) does not apply in relation to a transfer of property or a beneficial interest in property to a person who has, prior to the transfer, a beneficial interest in the property but who takes the property or interest transferred to him as trustee under a further trust.

(7) The following provisions apply for the purposes of subsection (5)(e) (including the exception to paragraph (e)):

(a) the net value of property is calculated by subtracting from its unencumbered value the amount of any liability subject to which the property is transferred (other than a liability that is to be discharged after the transfer takes effect by the trustee or for some other reason is not finally assumed by the transferee);

(b) in calculating the value of a beneficiary's interest in a trust, all assets and liabilities of the trust are to be taken into account;

(c) a member of a superannuation fund is to be taken to have a beneficial interest in the property of the fund equivalent to the amount to which the member would be entitled on transfer of membership to another fund;

(d) if—

(i) property of a trust consisting of land is divided by community plan under the *Community Titles Act 1996* (including by strata plan under that Act); and

(ii) land subject to the division is subsequently transferred to a beneficiary of the trust; and

(iii) the Commissioner is satisfied that the land the subject of the transfer was transferred to the beneficiary pursuant to the trust and is identifiable as property in which the beneficiary had a fixed beneficial interest contingent on, and arising from, the division,

the transfer will be taken to have been a transfer to the beneficiary of property in which the beneficiary had a beneficial interest.

(7a) ………….

STAMP DUTY ACT - SCHEDULE 2 (NT)

Schedule 2 Exemptions from duty

section 4(1)

definition ***exempt instrument or transaction***

Conveyances

1 Conveyance to the Territory, to a Government Business Division declared by regulation to be a Government Business Division to which this exemption applies or to an authority of the Territory other than a Government Business Division. (If a conveyance falls partially within and partially outside the terms of this exemption, duty is to be calculated as if the conveyance were not exempt and then proportionately reduced to reflect the extent of the exemption.)

2 Conveyance to the Commonwealth or to an authority of the Commonwealth.

3 Conveyance for the purposes of a compulsory transfer of business under Part 4 of the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (Cth).

4 Statutory vesting:

(a) by which property vests in a company only because of its registration under Part 5B.1 of the Corporations Act 2001; or

(b) by which property held by a person for or on behalf of an association vests in the association under section 12 of the *Associations Act* only because of its incorporation under that Act; or

(c) by which property vests in the executor or administrator of a deceased person's estate under section 52 of the *Administration and Probate Act* .

5 Conveyance during the winding-up of a company of its property to a shareholder of the company where the shareholder is entitled to the property on a distribution in specie unless the conveyance is or is part of a tax avoidance scheme.

6 Conveyance:

(a) that the Commissioner is satisfied is made solely for the purpose of effecting the appointment of a new trustee on the retirement of a trustee or as an additional trustee, if:

(i) no beneficial interest passes in the property conveyed; and

(ii) the trust is a discretionary trust – no change of potential beneficial interest occurs as a result of the transaction; and

(iii) the property conveyed was acquired by the retiring trustee or existing trustee in the capacity of trustee by virtue of an instrument that was duly stamped, was exempt from duty under this Schedule (or a corresponding previous enactment) or was for some other reason not liable to duty; or

(b) made by a trustee of a non-discretionary trust to a beneficiary where:

(i) the conveyance is made in accordance with the terms of the trust (but not for valuable consideration); and

(ii) the property conveyed was acquired by the trustee by virtue of an instrument that was duly stamped, was exempt from duty under this Schedule (or a corresponding previous enactment) or was for some other reason not liable to duty; or

(c) made by a trustee of a discretionary trust to a beneficiary where:

(i) the beneficiary is an individual and, as a result of the conveyance, becomes absolute owner of the property conveyed; and

(ii) the conveyance is not made for valuable consideration (which may take any form including the forgiveness of or release from a debt or obligation) given or to be given by the beneficiary or anyone else; and

(iii) the conveyance is in accordance with the terms of the trust and the property conveyed was acquired by the trustee by virtue of an instrument that was duly stamped, was exempt from duty under this Schedule (or a corresponding previous enactment) or was for some other reason not liable to duty; or

(d) made by a trustee as executor of the will, or administrator of the estate, of a deceased person, to a beneficiary of the deceased person's estate in accordance with the provisions of the will or the rules of intestate distribution; or

(e) in relation to which the Commissioner is satisfied of both of the following:

(i) no valuable consideration is given for the conveyance;
(ii) the conveyance is made to a Special Disability Trust as defined in the *Social Security Act 1991* (Cth) or *Veterans Entitlement Act 1986* (Cth).

7 Conveyance where the Commissioner is satisfied that:

(a) there are 2 parties to the conveyance and each is the spouse of the other; and

(b) the property subject to the conveyance is the principal place of residence of the parties to the conveyance; and

(c) no consideration is given for the conveyance; and

(d) the effect of the conveyance is that both parties to the conveyance will own the place of residence to which the conveyance relates in equal shares; and

(e) no other person takes an interest under the conveyance.