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Let's chat

Estate planning case studies – September 2022

With:

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Information provided is general in nature; precise application depends on specific circumstances

Not so simple – 10 things (at least) to consider



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- Jointly held assets
- Superannuation
- Trust assets
- Company assets
- Overseas assets and beneficiaries
- Business assets
- Estate challenges
- Testamentary trusts
- Enduring power of attorney documents
- Memo of directions



Jointly held assets

- Joint tenants v tenants in common
- Survivorship v passing interest into Will
- Relevant:
 - Estate challenges
 - Assets forming part of Will can be challenged
 - Use of testamentary trust
 - Assets forming part of Will can pass into testamentary trust
- Short example:
 - Client bought house as joint tenants with ex-partner
 - Separated over 8 years ago but never obtained property settlement
 - Client wants to buy out ex-partner when she 'gets enough money'



Superannuation

- Can only pass directly to 'spouse', 'child', 'dependent' or 'legal personal representative'
- Tax applies to people not classified as a 'tax dependent', being a spouse, child under 18 or person financially dependent on deceased.
- Relevant:
 - Non-valid recipients
 - Estate challenges



Trust assets

- Does not form part of estate
- Assets remain in trusts
- Unit trust v discretionary trust
 - Specific interest v control
- Trustee – decision maker
- Appointor/Principal (optional) – has power to remove Trustee



Company assets

- Does not form part of estate
- Assets remain in company
- Director v member
 - Individual member v trust member

Overseas assets and beneficiaries



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- Overseas assets:
 - Governed under other laws
- Overseas beneficiaries:
 - CGT event K3
 - Applies to an asset not 'Taxable Australian Property' (i.e. share portfolio/managed investments)
 - Relevant if above asset passes to a non-Australian tax resident
 - Estate pays tax on unrealised capital gain on beneficiary inheriting



Other

- Business assets
 - Sole owner v multiple business owners
- Estate challenges
 - Eligible person
 - Why provision should be made
 - Financial position of person and needs now and into the future
 - Physical, intellectual or mental disability of eligible person
 - Size of estate
 - Contributions made by eligible person to deceased's estate or deceased's welfare
 - Competing claims from other beneficiaries
 - Standard of living of the eligible person during deceased's lifetime
 - Relationship between deceased and the eligible person
 - Wishes of the deceased



Testamentary trusts

- Trust established on death
- Common estate planning tool which includes the following trait:
 - Trustee – manages the trust
 - Beneficiaries – includes a named person (defined as **Primary Beneficiary**) and includes a group of related persons to the Primary Beneficiary:
 - Example 1: Primary Beneficiary, their children and grandchildren, their parents, their brothers, sisters, trusts, companies and charities
 - Example 2 (our approach): Primary Beneficiary and their children and grandchildren and charities
 - Includes general discretionary trust terms (some firms are more comprehensive than others)
 - Trustee discretion to determine how to distribute income/capital
 - Trustee discretion to make loans/borrow/invest



Testamentary trusts

- Advantages:
 - Ensure beneficiary does not receive inheritance in own name (in event of bankruptcy)
 - Ensure beneficiary does not control inheritance (in event of relationship breakdown)
 - Allow beneficiaries to split income in a tax effective manner (for tax planning)
- Disadvantages:
 - Complex to understand
 - Need to have appropriate persons as Trustee for the trust (to avoid misuse of trust assets)
 - Need to be structured appropriately to be effective for bankruptcy/relationship breakdown advantages
 - Ongoing accounting fees once established (post death)



Trusted persons

- Spouse (on their own)
- Spouse and trusted person (jointly)
- 1 trusted person
- 2 trusted persons
 - If a couple – one from each side of the family
- Use of:
 - Friends
 - Independent advisors

Estate administration v trust administration



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- Executor/trustee of Will:
 - More rules
 - Must administer estate pursuant to Will
 - Determines how to distribute assets (in a manner consistent with the Will)
- Trustee of testamentary trust
 - More flexibility due to discretionary nature of testamentary trust



Will drafting issues

- Specific gifts of personal property:
 - Jewellery
 - Pets
- Specify who receives each substantive asset – e.g.
 - PPR to Child 1
 - QLD IP plus shares to Child 2
 - WA IP 1 and WA IP 2 plus shares to Child 3
 - Everything else equally between Child 1, Child 2 and Child 3
- See later case studies



Memo of directions

- Non-legally binding document
 - Provides guidance on assets holdings
 - Can contain directions on how to split assets
 - May include other directions and comments to assist family and friends on where to find important documentation as well as other investment/carrying tips
- Ensures intentions and wishes are known but not in a legally binding document that requires careful drafting and foresight
- Due to non-binding nature of the document, lawyer is not required



Memo of directions

- Personal items – compare and contrast:
 - List of specific gifts in Will
 - Personal property being gifted to one or more persons with some broad comments on how Willmaker wishes the items to be gifted
- Personal items – compare and contrast:
 - Drafting a clause in a Will about drawing lots (1,2,3,2,3,1,3,1,2,1,2,3 etc)
 - Providing general direction in memo of directions
- Substantive assets:
 - Specific gifts in Will
 - Broad comments in memo of directions
 - Depends on level of trust with executor/trustees of the Will in considering comments
- NB: *Callus v KB Investments [2020] VCC 135*; *Monaghan v Monaghan [2016] NSW 1316* on legal standing of memo



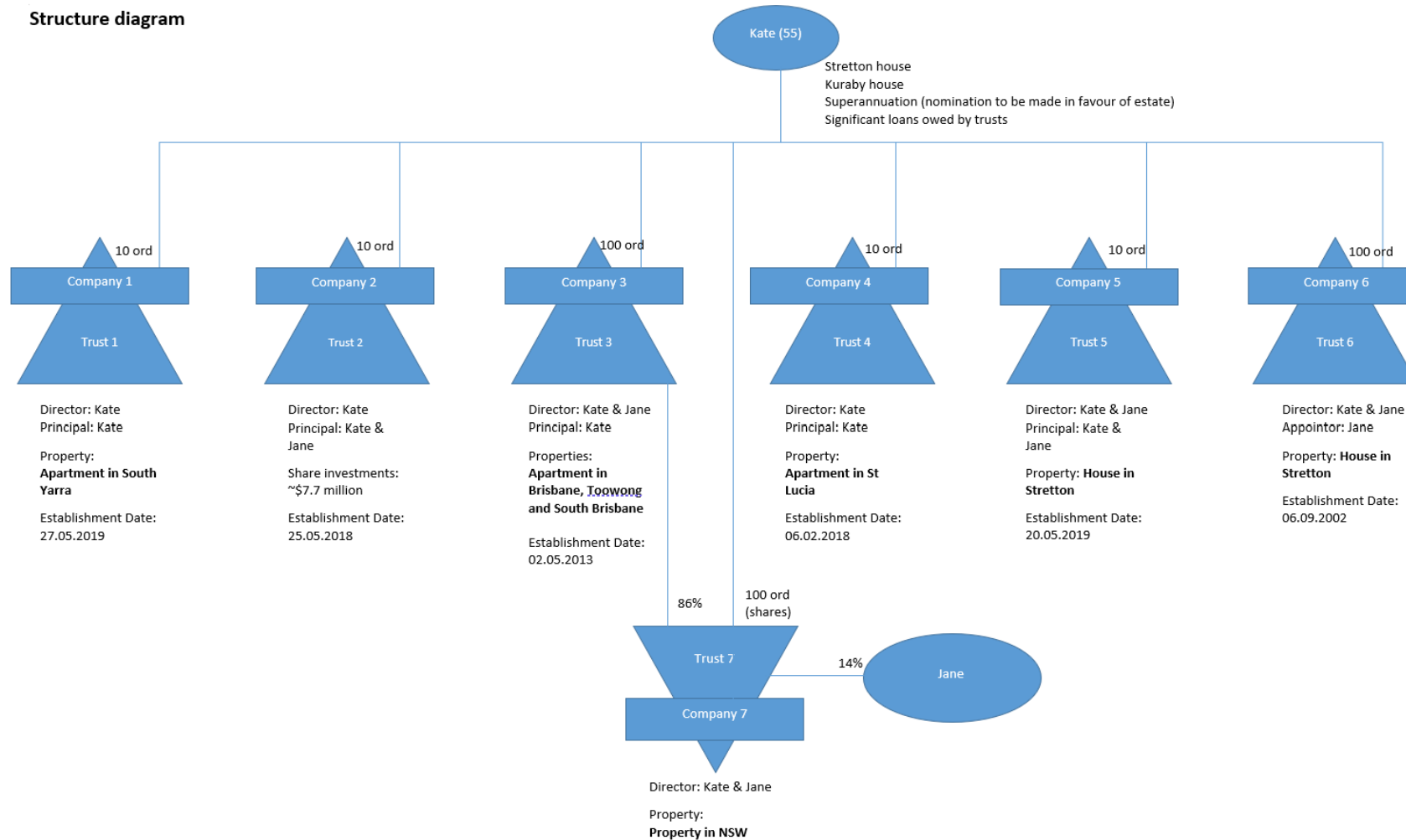
Example 1

- Kate (55) has two daughters: Amy (24) and Beth (22)
- Kate is divorced and her ex-spouse lives in Singapore
- Kate's mother (Jane) is still alive (80) and she has a trusted friend (Sam)
- Kate's objective is to protect her assets for her two daughters and to reduce any ability for a future relationship breakdown to 'take away' the inheritance
- Kate is considering whether to specifically give assets to each daughter or not



Example 1

Structure diagram





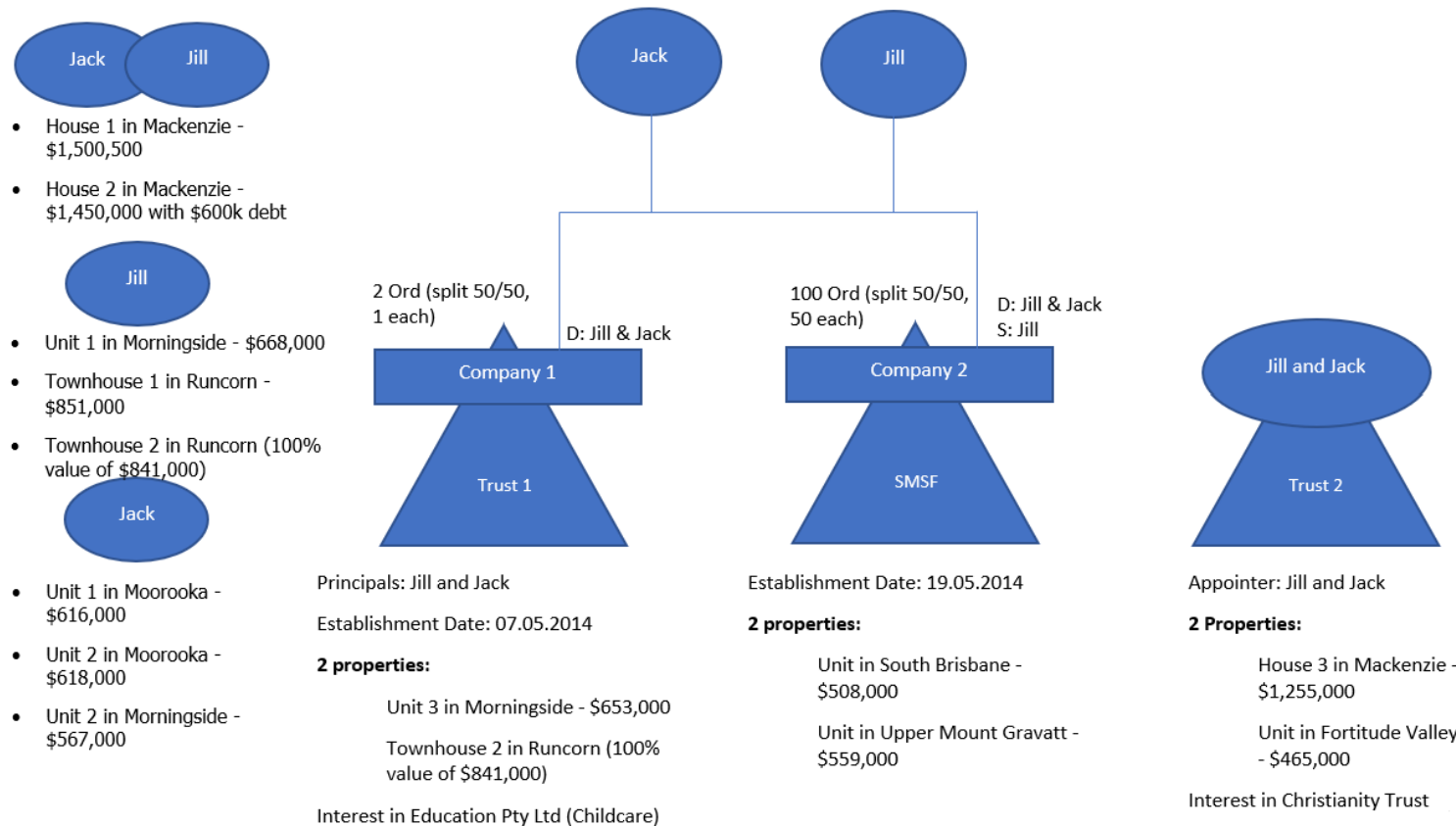
Example 2

- Jack and Jill have three children:
 - Mandy (single)
 - Neil (single)
 - Olivia (married with two minor children)
- They want their three children to benefit equally and have decided how they would like their properties (all 13 of them) to pass



Example 2

Structure diagram | Jack and Jill



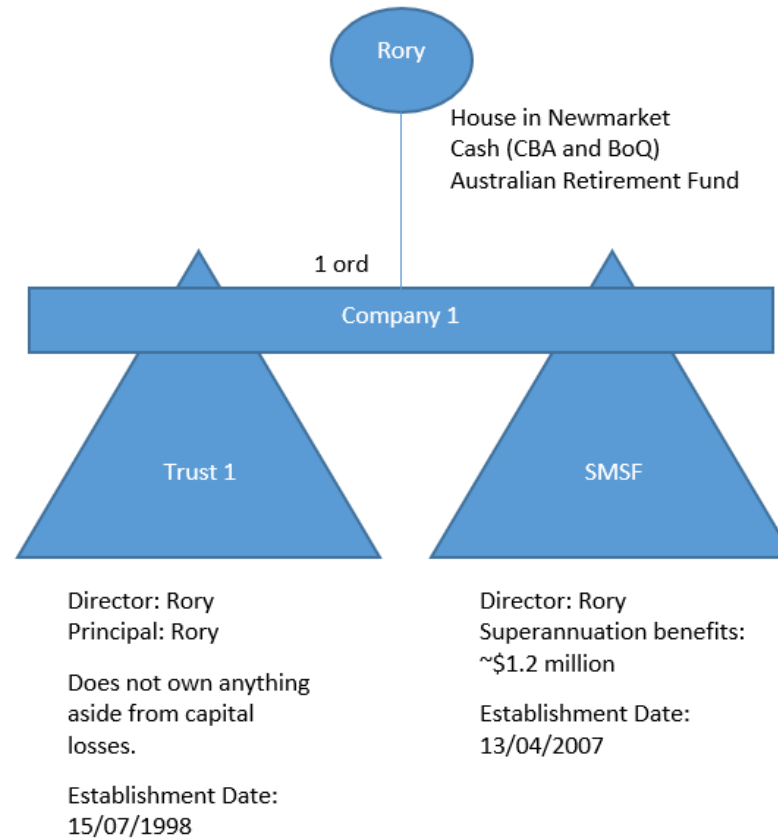


Example 3

- Rory has three sons and has been divorced for over 20 years:
 - Julian (single, lives in South Australia and has a 'disability')
 - Samuel (married with two children who lives in South Australia)
 - Liam (married with one child who lives in London)
- Rory would like his three sons to benefit equally from his assets
- Whilst not disclosed initially, Rory mentioned during the initial meeting that he has a 'dancing friend' who stays over 2/3 times a week
- Rory has given his 'dancing friend' a written unsecured loan of \$50,000 and would like her to benefit under his Will through specific gifts



Example 3



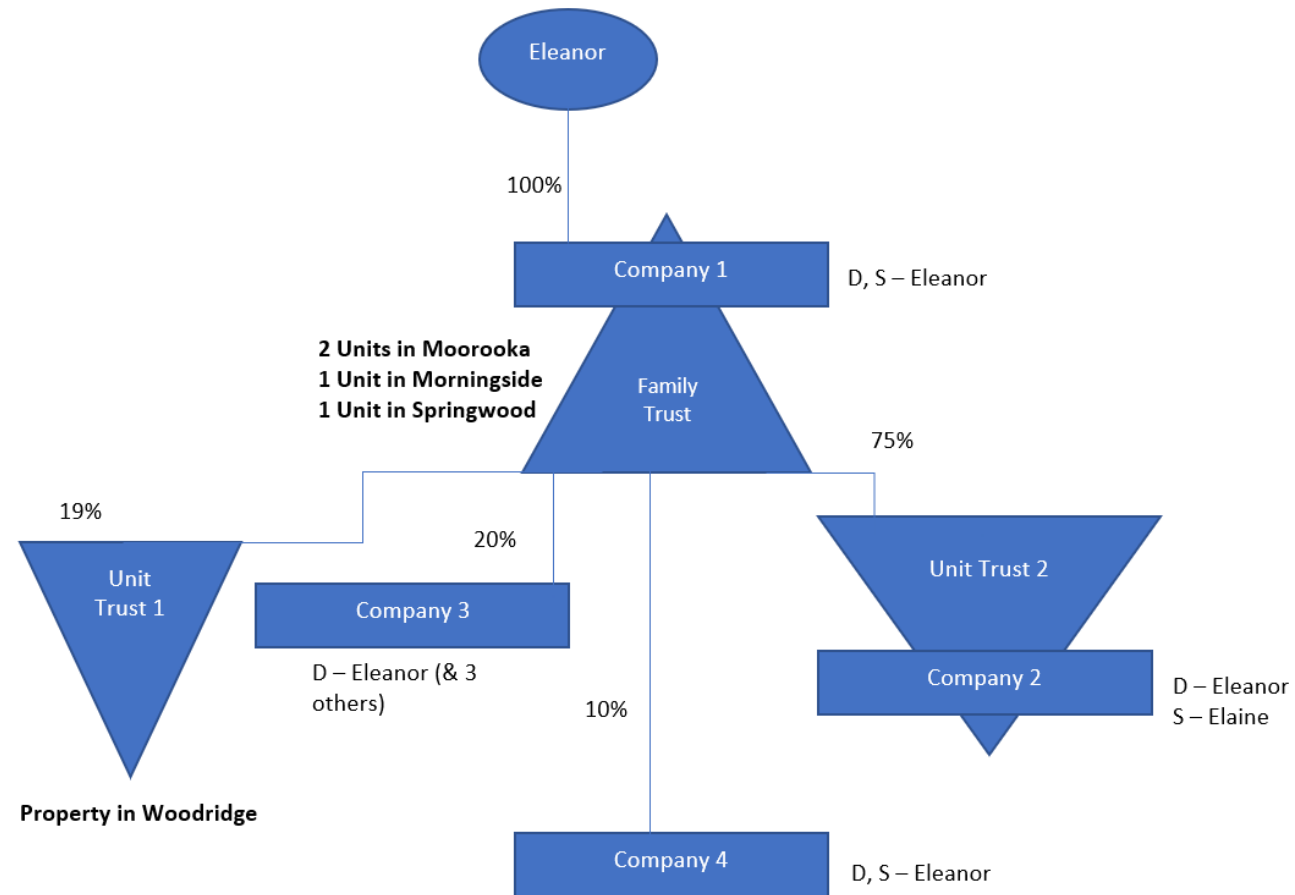


Example 4

- Eleanor is single and not likely to have children (no ex-spouses also)
- Her parents live in Australia half the year and her two brothers live interstate
- She has a close group of friends who she has investments with and are involved with at the local Church
- She wants her assets to be for the benefit of her family and friends in a particular manner



Example 4





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Spare example



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Spare example 2

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