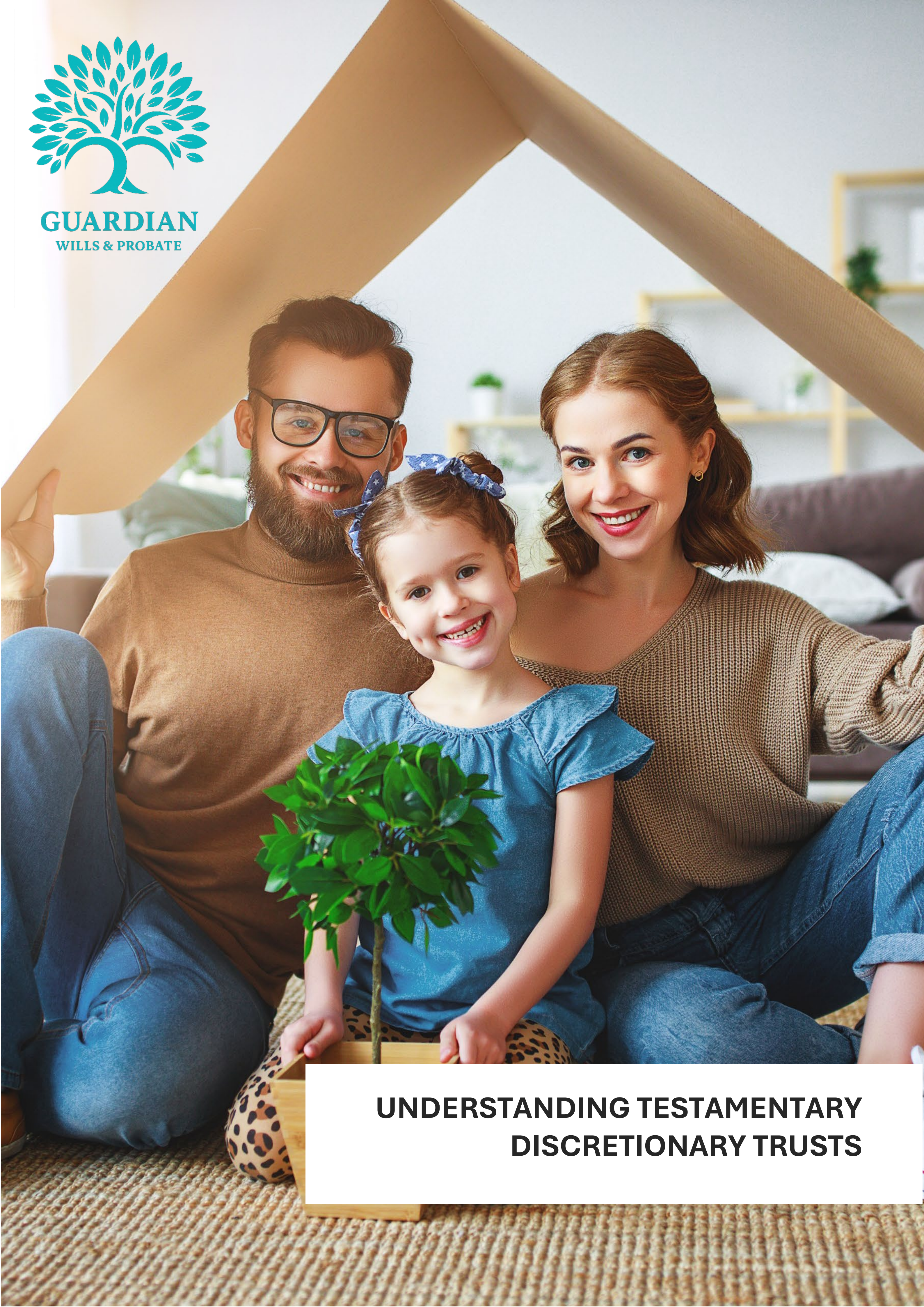

GUARDIAN
WILLS & PROBATE

UNDERSTANDING TESTAMENTARY DISCRETIONARY TRUSTS

PART I

OVERVIEW OF THE WILL

KEY BENEFITS OF THIS WILL — GIVING BENEFICIARIES THE CHOICE OF TAKING THEIR INHERITANCE DIRECTLY AND ABSOLUTELY OR IN TRUST FORM; ASSET PROTECTION; TAX EFFECTIVENESS

The key benefits of this will, and its difference from a standard type of will offering outright or simple gifts, is that it offers beneficiaries of the will who have reached the 'preservation age' (25 years is suggested in the definition of 'preservation age' in the clause ***Interpretation,*** but the testator may choose some other age) the opportunity to choose whether to take their benefits directly and absolutely on the death of the testator, or to have those benefits held in trust for them. The precedent also offers asset protection. A further benefit which flows from using the precedent is tax effectiveness.

A testator is entitled to keep the provisions of her or his will confidential. However, the testator who is considering setting up a trust of this kind might do well to discuss it with members of the family in advance, so that their views and input can be obtained.

THE MEANING OF 'PRIMARY BENEFICIARY' AND 'POTENTIAL BENEFICIARY'

In what follows the 'primary beneficiary' of each trust is the individual for whom the particular trust is created. The testator's spouse will be a primary beneficiary. If the testator's spouse has not survived the testator, each of the testator's surviving children will be a primary beneficiary. If a child of the testator has not survived the testator but has left a child or children who do survive the testator, each of those surviving children (being a grandchild of the testator) will be a primary beneficiary. This will allows separate testamentary discretionary family trusts to be set up for each primary beneficiary.

'Potential beneficiaries' of each trust are those members of the family of the primary beneficiary who might possibly be chosen by the primary beneficiary as persons with whom to share the income (or capital) of the primary beneficiary's trust. They include the primary beneficiary's spouse, children, and grandchildren, amongst a wide range of others.

TAX EFFECTIVENESS IS A BENEFIT RESULTING FROM USING THIS TYPE OF WILL

An appropriately drafted testamentary trust can save a beneficiary significant amounts of tax (as well as offering asset protection from loss through divorce, waste or other disasters: the asset protection aspects of the trust are described below).

The testamentary trusts offered in this will enable each primary beneficiary to allocate the income which he or she receives from the inherited assets between any one or more of the primary beneficiary, and the potential beneficiaries of the trust for that primary beneficiary. The potential beneficiaries include the children and a wide range of other categories of relatives of the primary beneficiary, and charities.

The power to allocate (or 'split') income allows a primary beneficiary (acting as trustee) to distribute income from an inheritance to none, or any one or more of the primary beneficiary and the potential beneficiaries at the primary beneficiary's complete discretion, and the existence of the power can produce a tax advantage which would not be present if the trust had been created during the lifetime of the person setting up the trust. If, for instance, the primary beneficiary distributes to her or his children (who are potential beneficiaries), the primary beneficiary will have the income so distributed taxed in the primary beneficiary's own hands at adult rates. Even though such potential beneficiaries are minors, distributions to them will be taxed at adult rates because the trust is testamentary in nature. Distributions from a trust created inter vivos (that is, in the settlor's lifetime) are much less generously treated by the tax law than distributions from a testamentary trust (because such distributions are considered unearned income for such a minor, and are taxed with a reduced tax-free threshold).

Summing up, the trusts in this will give each of the primary beneficiaries discretionary power to distribute income and/or capital among a wide range of potential beneficiaries, and this discretionary power to allocate income can result in considerable, and continuing, annual tax savings following the death of the testator.

In all jurisdictions except South Australia such trusts can be run for up to 80 years. In South Australia they can continue indefinitely.

THE TRUST IS OPTIONAL FOR BENEFICIARIES OVER THE 'PRESERVATION AGE' (THE DEFAULT AGE IS 25)

The default 'preservation age' is 25; however, the testator can vary it.

For beneficiaries who are over the preservation age, participation in the trust structure is optional and they may choose to disregard that option and never use the trust: they can take their share in the estate absolutely. Moreover, a primary beneficiary over the preservation age who decides to participate in the trust structure is not forever bound to continue participation: he or she can resile from the trust structure at any time.

For beneficiaries who are under the preservation age, the trust is mandatory: they are forced to have their inheritance held in trust at least until they have attained the preservation age. Prior to reaching that age, the testator's executor will appoint the trustees of the trust for that beneficiary, and those trustees will look after the trust for that beneficiary until he or she has attained the preservation age. Until the beneficiary attains the preservation age the trustees will, in the trustees' discretion, make distributions of income, and the trustees have the discretion to return capital for certain purposes such as the reasonable maintenance and welfare, medical and educational costs of the beneficiary. Upon attaining the preservation age, the beneficiary will gain control of the trust and can decide to continue in the trust structure or resile from it.

If the testator's purpose is to give strong asset protection, the optionality offered by this trust will have to be restricted or sacrificed.

THE IMPORTANCE OF OFFERING THE CHOICE OF ENTERING OR NOT ENTERING THE TRUST

The significance of offering beneficiaries who have attained the preservation age the choice of entering or declining to enter the trust structure is this: if the beneficiary chooses to enter the trust structure being offered, the beneficiary is a beneficiary in a testamentary trust, complete with the tax advantage previously outlined. If a beneficiary is simply given her or his inheritance direct under a simple will with no trust, the beneficiary has no opportunity to participate in a testamentary trust. It is not sufficient to say that the beneficiary can himself or herself create a trust, because the trust so created will be an inter vivos trust, and distributions to minor beneficiaries will, as noted above, be at the reduced tax-free threshold. Again, if a beneficiary offered participation in a trust under this will declines the offer, the beneficiary takes her or his inheritance absolutely, as if it were an absolute gift, and no testamentary trust advantages accrue to her or him.

This trust will give very little asset protection if the choice not to remain within the trust structure comes after bankruptcy, relationship breakdown or another third party creditor claim.

TAX EFFECTIVENESS DOES NOT MEAN LOSS OF CONTROL

Tax effectiveness does not mean loss of control. Where a primary beneficiary has attained the preservation age and chooses to use the trust, the effect is to place those inherited assets in the hands of trustees. The trust structure is one in which the primary beneficiary holds three key powers:

(1) the power to appoint the trustees (and the primary beneficiary can appoint herself or himself a, or the sole, trustee);

(2) the power to consent to distributions (the trust sets out a wide range of potential beneficiaries to whom income or capital can be distributed); and

(3) the power to consent to ending the trust (like all trusts the rule against perpetuity applies, meaning in

most Australian jurisdictions the trust must run for a period shorter than 80 years, but the trustees, who may be or include the primary beneficiary, or who have the permission of the primary beneficiary, can end the trust at any time).

Those key powers allow the primary beneficiary to control the trust. Indeed, the primary beneficiary has practically as much control as the beneficiary would have with a simple or absolute gift.

THE TRUST STRUCTURES IN THIS WILL OFFER SOME ASSET PROTECTION

Assets held in trust are afforded some protection from loss simply by virtue of being trust assets. This especially protects primary beneficiaries who have not reached the preservation age. One aim of this precedent is to enhance and enlarge this asset protection for primary beneficiaries who have reached the preservation age against loss through divorce, bankruptcy or other disastrous changes in circumstances. It should be mentioned that it is extremely difficult to protect assets of a person from being accessed by the court for the purposes of a matrimonial property settlement, either of the testator or settlor or of the trust beneficiaries: see generally *Kennon v Spry* [2008] HCA 56, BC200810608; and Family Law Act 1975 (Cth) Pt VIIIAA. The provisions of this trust deed cannot be relied on to be effective in this regard.

ASSET PROTECTION FOR BENEFICIARIES WHO HAVE REACHED THE PRESERVATION AGE

This will aims to balance, on the one hand, giving asset protection to primary beneficiaries who have reached the preservation age; and, on the other hand, giving maximum control of the property in the trust to primary beneficiaries who have reached the preservation age. In order to secure the intended asset protection, it is necessary to place some restrictions on the level of control given to the primary beneficiary. Two mechanisms are used in this trust to achieve asset protection.

Mechanisms used to enhance asset protection for beneficiaries who have reached the preservation age

First, balancing the powers of the primary beneficiaries against the restrictions on those powers

We have used a balancing mechanism to enhance asset protection for primary beneficiaries who have attained the preservation age. On the one hand, we have given the primary beneficiary very extensive powers; and, on the other hand, we have balanced these powers by denying the primary beneficiary other powers.

The powers given to the primary beneficiary are:

(a) the power to appoint and remove the trustees (and the primary beneficiary can appoint herself or himself);

(b) the power to consent to distributions; and

(c) the power to consent to the ending of the trust.

These three powers approach, but do not equate to, the powers of an absolute owner. They are balanced and qualified by restrictions. The restrictions mean that the primary beneficiary cannot:

(a) order the trustees to make distributions; or

(b) demand the ending of the trust.

If the primary beneficiary's powers were to include the power to order the trustees to make distributions or the power to demand the ending of the trust, the primary beneficiary would in effect be indistinguishable from a full owner. It would follow that the primary beneficiary would be unable to resist the demands of, for example, the divorcing spouse or the trustee in bankruptcy that the primary beneficiary secure distribution as required or secure the ending of the trust. In other words, the primary beneficiary could be required to act against her or his own best interests and wishes, and the asset protection the trust is intended to give would be destroyed.

Second, removing the powers of control from a primary beneficiary who becomes bankrupt, enters a relationship breakdown or becomes incapacitated

The trusts provide that if a primary beneficiary enters a marriage or relationship breakdown, or becomes bankrupt or mentally incapacitated, control of the trust is removed from the primary beneficiary concerned, and the executor of the estate will take control of the trust until the problem is resolved. The law gives powerful tools to the court to ensure that assets are available for matrimonial property settlements, and, as noted above, the use of a trust to secure protection is unlikely to work.

ASSET PROTECTION FOR BENEFICIARIES UNDER THE PRESERVATION AGE

For those beneficiaries under the preservation age, the trust is not optional: it is mandatory; and these beneficiaries are forced to have their inheritance held in trust until they have attained the preservation age.

The minimum age (that is, the preservation age) is set by the testator. Prior to reaching that age, the executor will appoint the trustees of such a trust (and the executor can appoint herself or himself), and the trustees will look after the trust for that beneficiary until he or she has attained the preservation age. While the beneficiary is still below the preservation age the trustees can agree to return trust capital for certain purposes such as education and reasonable maintenance and welfare. The benefit of making the trust mandatory in this way is that the trust gives proper protection to children who are minors, and it also protects immature beneficiaries who have attained majority but are still under the preservation age, against themselves: they cannot waste their inheritances.

IN WHAT CIRCUMSTANCES CAN — OR SHOULD — THIS TRUST BE USED?

It is suggested that this trust can be used wherever the testator wants to leave her or his estate for the benefit of her or his family, and wants to create a structure which will give each member of the family a choice of entering or not entering a trust structure, thus giving the family a means to reduce the impact of tax, and to gain asset protection.

COMPLEXITY AND LACK OF AWARENESS DISCOURAGE MANY TESTATORS FROM CREATING TESTAMENTARY TRUSTS

Unfortunately, many testators fail to include testamentary trusts in their wills, either through a lack of awareness of the tax effectiveness of such trusts, or because the testators or their lawyers are put off by what is perceived to be complexity in the wording of such precedents. The present precedent seeks to overcome the problem of perceived complexity by providing a clear, usable and understandable precedent which allows a testator to set up, in one will, separate testamentary discretionary family trusts for each of those members of the testator's family whom the testator wishes to benefit in that way.

A FURTHER INDICATION IN FAVOUR OF MORE FREQUENT USE OF THE TESTAMENTARY DISCRETIONARY FAMILY TRUST

Until July 2007 a superannuation pension could be passed to adult non-dependent children. This is no longer possible: such children must now be paid lump sums of such superannuation instead (either directly from the superannuation fund, or via the estate of the deceased). This means that more capital has to pass to children, and this increases the need for trusts like that being offered here.

CAN THE TRUST BE USED WHERE THE ESTATE IS MODEST?

It is suggested that there is no reason why the trust should not be used where the estate is modest. Reasons that may be offered for its use are:

(a) the trust precedent is understandable by the usual testator;

(b) the asset protection and tax reduction benefits are available even where the estate is modest;

(c) the costs of setting up the trust are not disproportionate to the benefit;

(d) each of the beneficiaries who has reached the preservation age has an individual choice whether to take advantage of the opportunity to become primary beneficiary of a trust, or to opt out and take her or his benefit absolutely;

(e) all beneficiaries who have not reached the preservation age have their benefits held in trust for them until they do reach the preservation age. When they reach the preservation age they can take their benefit absolutely or they can decide individually whether to continue in the trust structure. This is no different from the position that such beneficiaries occupy when benefits are left to them absolutely in the ordinary way, except that in the usual case the beneficiaries do not have the opportunity to continue in the trust structure when they reach the preservation age.

SIMPLICITY AND COMPLEXITY IN THE PRECEDENT

The precedent is necessarily considerably more complicated than a precedent for a simple will giving absolute gifts. Nevertheless, we have taken great pains to make the precedent as simple as possible without compromising its ability to achieve its aims. We have tried hard to avoid repetition, and to achieve transparency and understandability. One mechanism we have used to achieve simplicity is to separate the *creation* of the trusts from the *terms* of the trusts — the terms of the trusts are in schedules separate from the schedules creating the trusts. This has made greater simplicity possible because the terms of the trusts do not have to be repeated for each trust or group of trusts. This in turn means that internal inconsistencies that repetition brings can be avoided.

We have provided for only three groups of primary beneficiaries for whom trusts are created: the trust for the spouse; the trusts for the testator's children; and the trusts for children of a predeceased child or children. This approach has made it possible to give the will a simple and transparent structure with a minimum of repetition.

STRUCTURE OF THE WILL

The will is made up of a general part, and four schedules.

The general part contains the introductory provisions of the will: the name and address of the testator, the revocation clause and the clause describing the schedules and explaining when each one operates. **The first schedule** applies if the testator's spouse has survived the testator, and creates the trusts which are to operate in that case; **the second schedule** applies if the spouse or partner has not survived and creates the trusts which are to operate in that case; **the third schedule** applies in any event and contains the rules that apply to the particular trusts created by the will; and **the fourth schedule** applies in any event, and deals with the following matters — in relation to your executors: conflicts of interest, priorities, duties and powers; in relation to your will as a whole: interpretation of particular terms.

PART II

CLAUSE BY CLAUSE EXPLANATION OF THE WILL

Revocation clause

This clause revokes all previous wills you have made, making this will your only current will.

Executors, trustees and primary beneficiaries should seek legal and financial advice

This clause directs executors, trustees and primary beneficiaries to seek financial advice prior to administering the estate. This is not binding, but will increase the likelihood that prior to administering the estate, the executors, trustees and primary beneficiaries understand the tax-effective strategy that is being offered prior to administering the estate. Further to this, the clause makes the fees for seeking such advice a testamentary expense.

Presumption of survivorship

This clause provides that where two persons die and the order of deaths cannot be ascertained, the older is presumed to have died before the younger.

Exclusion of requirement that beneficiaries survive the testator by 30 days

This clause overrides the statutory presumption in some jurisdictions that for a person to take a benefit under the will, he or she must survive the testator by 30 days. The effect of this provision in the will is that a person can benefit under the will if he or she survives the testator by any period, however short. The clause does not negate the requirement in this will that for certain purposes a beneficiary must attain a set preservation age.

Power to disclaim

It may possibly help a beneficiary who is anxious to obtain or retain Centrelink or other benefits to be able to disclaim a benefit under the will. Specialist advice should be sought. The power should be used advisedly as disclaimer is likely to create a disposal for tax, social security, family law or bankruptcy purposes.

Schedules in your will

This clause lists the different schedules in your will. It explains that Schedule 1 creates the trusts which are to apply where your spouse survives you; Schedule 2 creates the trusts which are to apply where your spouse fails to survive you; Schedule 3 applies in any event and sets out the rules that apply to any trust created by your will; and Schedule 4, which also applies in any event, sets out matters that will regulate and assist in the process of administration of your estate. In relation to your executors: conflicts of interest, priorities, duties and powers; in relation to your will as a whole: interpretation of particular terms.

Schedule 1 — Provision for your spouse or your partner. This schedule applies only if your spouse or partner survives you

Appointment of executors

This clause details whom you appoint as your executors. In this document we refer to ‘executors’ and ‘trustees’, although there may be only one executor, or only one trustee. It notes that your executors (who will be your ‘legal personal representatives’ following your death), will also be trustees of any estate property not transferred to a testamentary trust created by your will.

Creation of trust

This clause creates a testamentary trust for your spouse or partner, which comes into operation if your spouse or partner chooses to make use of such a trust in regard to part or all of your estate. The clause names the trust, and specifies your spouse or partner as the primary beneficiary of that trust. The clause then makes that trust subject to the terms set out in Schedule 3 of your will. The terms of the trust include such matters as who are the potential beneficiaries, and who are the trustees, of the trust.

If your spouse or partner chooses to have none of the assets of your estate which you have given to her or him transferred to this trust — that is, your spouse or partner dispenses with the trust — the trust is not created, and your spouse or partner will inherit the assets directly and absolutely.

If your spouse or partner chooses to have some but not all of the assets of your estate which you have given to her or him transferred to this trust, the trust will operate in respect of those assets only; your spouse or partner will have dispensed with the trust in relation to the remaining assets and will inherit those assets directly and absolutely.

Disposition of your estate

This clause deals with what your testamentary wishes are generally (that is, whether you want to make some specific gifts, and then give the balance of your estate for the benefit of your spouse, or if you wish to simply give your whole estate for the benefit of your spouse).

Your spouse may direct your executors (and your spouse may be the, or an, executor) to transfer part or all of the assets given for the benefit of your spouse to the testamentary trust that has been created for her or him. Alternatively, your spouse may choose to not use the trust and simply require your executors to transfer the whole disposition to your spouse personally for her or his absolute benefit as if this had been a simple gift in an ordinary will.

End of Schedule 1

Schedule 2 — Provision for your children and children of your predeceased children. This schedule applies only if your spouse or partner does not survive you

Schedule 2 details your wishes in case your spouse or partner fails to survive you. (If your spouse or partner does survive you, that is, if Schedule 1 comes into operation on your death, Schedule 2 will never come into effect.)

Appointment of executors and guardians

This clause details whom you appoint as your executors. It notes that your executors (who will be your legal personal representatives following your death), will also be trustees of any estate property not transferred to a testamentary trust created by your

Creation of trust for your children

This clause creates a trust for the benefit of your child (or separate trusts for each of your children where you are survived by more than one child). It names each trust, and specifies that the child for whom that trust is created is the primary beneficiary of that trust. Again, as for the trust for the spouse, it provides that the terms of each such trust are detailed in Schedule 3.

Disposition of your estate primarily for your children

This clause expresses your general testamentary wishes in the event your spouse fails to survive you. You may wish to make specific gifts, and then make a residual disposition of your estate to your children, or simply pass your whole estate to your children equally. This clause refers to the disposition to your child as being an ‘allocated part’, to allow reference to it later in relation to what is to happen if a child of yours fails to survive you, leaving a child of their own.

As with Schedule 1, your children (having reached or reaching the preservation age) would have the choice of taking all or part of their inheritance in the trust that is created for their benefit.

Allocated part to be divided into third generation parts for children of predeceased child

This clause provides that if a child of yours dies before you or fails to survive you, leaving a child or children of their own, the allocated part that would have passed to that child of yours, will be held as a third generation part for their own child, or divided into equal third generation parts, one for each child of the deceased child, if that child is survived by more than one child of her or his own.

This clause specifically notes for clarity that if more than one of your children did not survive you, and those children were survived by their own children, the third generation parts for the children of one predeceased child might not be equal to the third generation parts for the children of the other predeceased child. So, for instance, if one of your children who did not survive you had only one child, that child would be given the whole of the part that would have gone to that child's parent, but if another predeceased child had two children of their own, those children would each receive half of what would have gone to their parent.

Creation of trust for child of predeceased child

This clause provides that in the event that a child of yours does not survive you, leaving a child of their own (that is, a grandchild of yours), a trust will be created for any such grandchild (whose parent, being your child, did not survive you).

Disposition of third generation parts for child of predeceased child

This clause provides that if on your death a child of yours has predeceased you, and that child leaves a child who does survive you, the part of your estate which is for the benefit of that child will be held on a trust created by this will until the child reaches the preservation age, and the terms of trust are those in Schedule 3. If the child of your predeceased child has reached the preservation age, the trust is optional at the instance of the child.

Disposition if you leave no spouse, child or grandchild

At this point the testator provides for what is to happen if he or she dies leaving no surviving spouse, child or grandchild.

Equalisation of benefits

This clause gives the executors power to adjust the exact shares each child or grandchild is to receive in order to equalise their benefits, taking into account matters like the testator's superannuation and life insurance entitlements, the testator's interest in other trusts, and taxes and expenses arising from the testator's death.

End of Schedule 2

Schedule 3 — Provisions governing each separate trust created by this will. This schedule applies in any event

Application of the provisions in this schedule

Schedule 3 sets out the terms of all testamentary trusts that are created by your will.

The property of the trust

This clause provides that each trust will have a fund which will consist of the property transferred to it under your will, all income generated by the trust fund, any property added to the trust fund and any loans taken out for the trust.

The trustees of the trust: definition and appointment

This clause defines who the trustees of each trust are. The clause provides that if the primary beneficiary is over the preservation age and of full capacity, the trustees are whoever the primary beneficiary appoints from time to time. If the primary beneficiary is legally disabled (for example, legally unable to make decisions for herself or himself) the trustees are the trustees appointed by the legal personal representative of the primary beneficiary. If the primary beneficiary is under the preservation age, the trustees are appointed by the executors, and if they are unable to appoint a trustee, then the trustees are appointed by the guardian of the primary beneficiary or by the court. One, or more than one, trustee may be appointed, and the appointment of a professional or non-professional trustee is authorised.

Trustees: conflicts of interest

This clause provides that all powers and discretions conferred on the trustees may be exercised without obtaining independent legal advice or an order of court. This is so even if the trustee has a personal interest in the manner or result of exercising the power or discretion, or may benefit as a result of the exercise of the power or discretion, and notwithstanding that the trustee is the sole trustee of a trust.

Automatic disqualification of ineligible trustee

A main aim of this testamentary discretionary family trust is to provide asset protection for the primary beneficiary. This is a clause which helps secure this asset protection. (The other means by which asset protection is secured is, as mentioned above, denying the primary beneficiary two central powers: the power to order the trustees to distribute, and the power to end the trust.) The clause provides that if a primary beneficiary enters into a relationship breakdown or divorce, becomes bankrupt or becomes mentally incapacitated, the primary beneficiary cannot be trustee, ceases to be trustee and cannot hire and fire trustees. A similar provision applies to a company if a beneficiary who is affected by such difficulties is a director of, or holds a controlling interest in, the company. The replacement trustee is to be appointed by the executors (and if the primary beneficiary is an executor, the appointment is made by the other executors or the substitute executor).

This clause is important in spite of the fact that under general trust law a trust will offer some degree of asset protection. The problem is that aspects of both bankruptcy and family law will look through a trust structure to see who controls it. If the primary beneficiary is in a relationship breakdown, bankruptcy or suffers loss of capacity and also has an ability to end and vest a trust, the trust can be ‘looked through’, and potentially the trustee can be forced to exercise the primary beneficiary’s power of control to her or his own detriment. Other parts of the will provide for the continuing operation of the trust in the new circumstances.

If the trustee is a corporate trustee and the primary beneficiary sole director and shareholder of the company, the asset protection mechanism will not work. It is possible that the primary beneficiary might be able to restore some protection by resigning as director and shareholder of the company, or alternatively by tailoring the constitution of the company to meet the primary beneficiary’s requirements.

The primary purposes of the trust

This clause sets out the purposes of the trust, and states that a primary purpose of the trust is to provide for or benefit any beneficiary. The clause emphasises, however, that no beneficiary has any right to any benefit or provision from the trust. The reason is to make it abundantly clear that the power to control the trust lies with the trustees, and behind the trustees stands the primary beneficiary. The primary beneficiary is able to ‘hire and fire’ trustees, and consent to distributions. Hence the primary beneficiary can allow the trustees to withhold benefits from any beneficiary as and when the primary beneficiary chooses. This means that although the primary beneficiary can income split with any beneficiary if the primary beneficiary chooses to do so, no beneficiary can ever demand anything. So spouses (for example) are always listed in the classes of potential beneficiaries. The result is that although the primary beneficiary *may* pass income from the trust to the primary beneficiary’s own spouse or the spouses of the issue of the primary beneficiary, the primary beneficiary is never *obliged* to do so. One benefit of the trust structure is that it allows the primary beneficiary (through the trustees) to split income for tax purposes, and this clause is one which gives the primary beneficiary the power to choose, in her or his discretion, to make use of, or not to make use of, the tax rates then current in respect of beneficiaries.

The clause states the testator's wish that if the primary beneficiary is under the preservation age, the trustees should where possible retain trust capital, and only return it for the purposes of the primary beneficiary's medical and dental treatment, education (including vocational training), reasonable maintenance and welfare.

Beneficiaries of the trust

This clause details who the beneficiaries of the trust are. The primary beneficiary is a beneficiary of the trust. The potential beneficiaries are additional persons (beyond the primary beneficiary) to whom the trustees of the trust can distribute income or capital. It should be emphasised again that the potential beneficiaries have no legal interest in the trust, and have no right to receive any benefit of any kind from the trust. Their nomination as potential beneficiaries makes it possible for the primary beneficiary, in the primary beneficiary's discretion, to allow income and/or capital to be distributed to any or all or none of the potential beneficiaries.

It is the existence of the class of 'potential beneficiaries' that gives tax effectiveness to the trust by allowing the primary beneficiary to distribute the income of the trust fund (which is in fact the primary beneficiary's inheritance) in a way that takes advantage of more attractive tax rates.

The primary beneficiary's power indirectly to control distributions arises by virtue of the following clause, ***Powers of the primary beneficiary,*** which gives the primary beneficiary two crucial powers. These powers are, first, a power to consent to or withhold consent from the trustees to make or withhold distributions of income and/ or capital to one or more potential beneficiaries; and, second, a power to appoint and remove trustees.

The defined potential beneficiaries include the spouses, siblings and issue of: the testator, the primary beneficiary, the spouse of the primary beneficiary and children of the testator and primary beneficiary (the word 'issue' means all lineal descendants). Associated companies and trusts of the primary beneficiary and the testator (as well as charities) are also potential beneficiaries. Income or capital from the trust may be passed by the trustees (who are controlled by the primary beneficiary), to any persons nominated in this clause.

Powers of the primary beneficiary

This clause sets out the powers of the primary beneficiary. These are:

(1) where the primary beneficiary has reached the preservation age, the power to hire and fire trustees (the 'power of appointment') (before the primary beneficiary has reached the preservation age, the trustees will be chosen by the executor);

(2) the power to consent to income and capital distributions (the 'power to consent to distributions') (if the primary beneficiary is a minor, this consent can be given by the guardian of the primary beneficiary); and

(3) the power to consent to the ending of the trust (the 'power to consent to ending the trust') (if the primary beneficiary is a minor, this consent can be given by the guardian of the primary beneficiary — see subclause (b) of the clause ***Manner in which the powers of the primary beneficiary may be exercised***).

It should be noted that the primary beneficiary is not given the power to direct the trustees to make distributions or to require the trustees positively to act in relation to the trust. This omission is deliberate. If the primary beneficiary were to be given a power to direct the trustees to act, an outside person might be able to compel the primary beneficiary to act in ways contrary to the interests of the primary beneficiary. Further, and for the same reason, the primary beneficiary is not given the power to end the trust.

It may be mentioned that the asset protection given by the clause ***Automatic disqualification of ineligible trustees*** is achieved by the suspension of the power of appointment given by subclause (1) of the present clause.

Transfer of the powers of the primary beneficiary

A primary beneficiary may want to pass control of the trust to another person in her or his own lifetime to remove assets from the primary beneficiary's own control. Further, a primary beneficiary who (for example) wishes to ensure that her or his inheritance will pass to the primary beneficiary's children may be concerned that her or his will may be contested (perhaps by way of a family provision claim) on death. The primary beneficiary might accordingly decide to pass control during life to the primary beneficiary's children.

Accordingly, this clause allows the primary beneficiary to pass the powers that he or she holds under the trust, to another person or persons by deed or will.

It is possible that a primary beneficiary might neglect to make proper estate planning arrangements, and die without passing on the powers he or she holds under the trust, but survived by a child or children. The clause provides for such a case. The default arrangement is that powers which have not been passed on, pass under the clause to the primary beneficiary's child, or, if there is more than one, to the children jointly.

The default arrangement protects the primary beneficiary's children from seeing the inheritance, on the primary beneficiary's death, being subjected to family provision claims and the claims of creditors. It should be noted that in New South Wales a primary beneficiary who passes control during life with the intention of avoiding family provision might fall foul of the notional estate provisions of the Succession Act 2008 (NSW) Pt 3.3.

Manner in which the powers of the primary beneficiary may be exercised

This clause details the manner in which the primary beneficiary is to exercise the power of consent and the power of appointment given by the trust. (Only the power of consent is described in this note, but the same principles apply to the exercise of a power of appointment.)

The clause provides that consents must be given by the primary beneficiary, and if the primary beneficiary is a minor or is under a disability, by the primary beneficiary's legal personal representative or guardian.

If the primary beneficiary passed the power of consent to others by deed or will, the consent must be given in the manner specified in the deed or will. If the deed or will does not specify how those to whom the powers are passed must consent, they must consent unanimously. Where a person to whom the powers are given is a minor or is under a legal disability, the legal personal representative or guardian of that person may exercise the powers on her or his behalf.

Investment of the fund

This clause gives the trustees very wide powers of investment. The powers are wider if the primary beneficiary is over the preservation age and is not an 'ineligible trustee' (described in the clause ***Automatic disqualification of ineligible trustee***).

Clause 23(6) exempts the trustees from complying with the Trustee Act 1925 (ACT) s 14C(1) (or an equivalent provision). The section is quoted here so that the testator can know what the trustees are being exempted from:

14C Exercise of power of investment

(1) Without limiting the matters that a trustee may take into account when exercising a power of investment, a trustee shall, so far as they are appropriate to the circumstances of the trust (if any), have regard to the following matters:

(a) the purposes of the trust and the needs and circumstances of the beneficiaries;

(b) the desirability of diversifying trust investments;

(c) the nature of, and the risk associated with, existing trust investments and other trust property;

(d) the need to maintain the real value of the capital or income of the trust;

(e) the risk of capital or income loss or depreciation;

(f) the potential for capital appreciation;

(g) the likely income return and the timing of income return;

(h) the length of the term of the proposed investment;

(i) the probable duration of the trust;

(j) the liquidity and marketability of the proposed investment during, and at the end of, the term of the proposed investment;

(k) the aggregate value of the trust estate;

(l) the effect of the proposed investment in relation to the tax liability of the trust;

(m) the likelihood of inflation affecting the value of the proposed investment or other trust property;

(n) the costs (including commissions, fees, charges and duties payable) of making the proposed investment;

(o) the results of a review of existing trust investments.

Powers of my trustees

This clause sets out the particular powers of the trustees of each trust created under this will. These powers apply only to *trustees* appointed under Schedule 3 for the trusts created under Schedules 1 and 2; they do not apply to the testator's *executors* nominated under Schedules 1 and 2. (The powers of the *executors* nominated under Schedules 1 and 2 are set out in Schedule 4.) The trustees' powers are detailed paragraph by paragraph below. A brief summary of the power given in each paragraph is followed by an italicised comment in brackets on the purpose or relevance of that power.

Some of the trustees' powers may be exercised without the consent of the primary beneficiary. Some require the prior written consent of the primary beneficiary.

Without the consent of the primary beneficiary the trustees may:

(a) retain all or part of the capital and accumulate all or part of the income of the fund, up to the period of time permitted by law;

(*This enables the trustees to make no distributions and instead to accumulate the income of the trust.*)

(b) refrain, temporarily or permanently, from distributing or providing income, capital or other benefits from or relating to the fund, to any one or more or all my beneficiaries;

(*This emphasises that the trustees have the discretion to make or temporarily or permanently refrain from making distributions of income or capital to all or any beneficiaries.*)

(c) deal with all property in the fund in any way that my trustees choose as if my trustees were the absolute and beneficial owner or owners of the fund;

(*This gives the trustees full power to sell or purchase or let or otherwise deal with assets in the trust fund. As mentioned above, the trustees also have wide powers of investment.*)

(d) acquire or lease property for occupation, use or enjoyment by a beneficiary (whether alone or with some other person or persons).

(*This power is valuable if a beneficiary is, for example, young or vulnerable or for some other reason needs to live with someone who is not a beneficiary or potential beneficiary. Such a person would clearly benefit from the arrangement, and therefore, without this provision, the trustee would not be able to give effect to the arrangement.*)

(e) appoint accountants, administrators or advisers as my trustees believe appropriate for the responsible operation of the fund, and pay or recover the reasonable costs of these services from the fund; and (*This provision allows the trustees to appoint professionals to administer the trust if they so choose.*)

(f) charge for services performed in a professional capacity on a reasonable basis arrived at:

(i) where the primary beneficiary has attained the preservation age, by agreement with the primary beneficiary;

(ii) where the primary beneficiary has not attained the preservation age, by agreement with my executors,

and pay or recover such charges from the fund;

(*This provision allows a professional trustee to charge for her, his or its services. If the primary beneficiary has attained the preservation age, the primary beneficiary must agree; if the primary beneficiary is under the preservation age, the executor must agree.*)

(g) subject to this clause ***Powers of my trustees***, to the extent that it is relevant to their trust and appropriate to their functions, exercise the powers which I have given to my executors and trustees in the clause ***General powers of my executors and trustees****.*

(*This provision gives the trustees further powers which the trustees might occasionally need. It is not expected that they should be regularly resorted to by trustees, although it is important that the executors have them.*)

If they have obtained the prior written consent of the primary beneficiary, my trustees may:

(a) transfer all or part of the income and all or part of the capital of the fund to any one or more of the primary beneficiary and the potential beneficiaries, in the shares and amounts and at such time or times as my trustees in their discretion decide, without any obligation to make payments to or for any beneficiary or to ensure equality or proportionality among those to or for whom payments are made, and this power may be exercised even though the beneficiary is a trustee or the sole trustee;

(*This provision ensures that the trustees are given discretion to decide whether and how to exercise their power to distribute. However, they cannot abuse their power, as the consent of the primary beneficiary is necessary to use it.*)

(b) amend the provisions of Schedule 3, but not so as to alter the beneficiaries of the trust or to cause a resettlement of the trust;

(*This allows the trustees, with the consent of the primary beneficiary, to amend the terms of the trust. However, they may not change who the beneficiaries are, nor may they act so as to cause the trust to be deemed to be a 'new trust'. Changing the beneficiaries or creating a 'new trust' has serious capital gains tax and other consequences.*)

(c) bind by deed the future operations of the trust (including future distributions of income or capital of the trust fund, or future vesting of trust income or capital of the trust fund in any beneficiary of the trust);

(*This provision allows the trustees to fix in place the future operation of the trust. Examples would be fixing future distributions of income or capital of the trust, or a time at which the trust is to end.*)

(d) alter or revoke by deed a previous deed binding the future operations of the trust;

(*This clause allows the trustees to revoke any previous binding deed put in place by the effect of subclause (c) above.*)

(e) end the trust at such time as they in their discretion determine, provided that my trustees have ensured or ensure that the trust assets vest in the beneficiaries and in the proportions specified by the primary beneficiary;

(*This paragraph empowers the trustees to end the trust at any time, provided they ensure that the assets of the trust are given to the beneficiaries as directed by the primary beneficiary.*)

Subclause (2) provides that where there is more than one trustee of a trust, the trustees must act unanimously.

Ending of the trust and consequent vesting of trust property

This clause sets out the time when the trust ends. It provides that the trust will end on the first to occur of the following:

(a) the trustees ending the trust in accordance with the terms of the trust (which requires the consent of the primary beneficiary). In this case the trust fund passes to the persons specified by the trustees;

(b) the primary beneficiary dying before attaining the preservation age without leaving a child. In this case the trust fund passes back to and forms part of the residue of the testator's estate (that is, it is held for the benefit of the testator's residuary beneficiaries);

(c) the primary beneficiary dying after attaining the preservation age, without leaving children. In this case the trust fund passes to the primary beneficiary's estate; and

(d) the expiry of the maximum period permitted by the rule against perpetuities. In this case the trust fund passes to the beneficiaries then living in the following order: the primary beneficiary; if none, the issue of the primary beneficiary in equal shares; if none, the potential beneficiaries in equal shares.

End of Schedule 3

Schedule 4 — In relation to your executors: conflicts of interest, priorities, duties and powers; in relation to your will as a whole: interpretation of particular terms. This schedule applies in any event.

Executors: conflicts of interest

This clause provides that all powers and discretions conferred on the executors may be exercised without obtaining independent legal advice or an order of court. This is so even if the executor has a personal interest in the manner or result of exercising the power or discretion, or may benefit as a result of the exercise of the power or discretion, and notwithstanding that the executor is the sole executor.

Priorities for executors

This clause provides that there are two priorities for the executors: first, to administer and divide my estate in accordance with Schedule 1 and Schedule 2 of this will; and, second, to administer my estate in an efficient and cost-effective manner for the benefit of my beneficiaries, bearing in mind that tax effectiveness, while important, is not a primary concern.

Duty of my executors in relation to power to appoint to an existing trust

The testator may have acquired a power of appointment by some other deed or will. This clause is included to ensure that any such powers of appointment the testator has are exercised by this will.

Duty to seek out superannuation death benefit nominations

This clause requires the executors to seek out possible binding superannuation death benefit nominations which might be in force at the testator's death.

Self managed superannuation fund: application of shares in trustee

This clause requires the executors, as far as possible, to use and apply the testator's shares in the trustee of any superannuation fund to ensure as far as possible that death benefits are applied in a way which will further the division of the estate in accordance with the testator's will.

Power of my executors in relation to superannuation lump sum death benefit

Superannuation benefits are exempt from death benefits tax if they are paid to a 'death benefits dependant'; however, where taxable superannuation benefits are paid to non-dependants they are liable for between 16.5 per cent and 31.5 per cent lump sum tax on those benefits. (The latter rate would apply where the death benefits are the proceeds of a life insurance policy.)

If superannuation death benefits are paid into the estate, they are therefore best given to those beneficiaries who are defined as 'death benefits dependants' of the deceased (for the purposes of tax law, as distinct from dependants for the purposes of superannuation law), and to this end it is important to require that the executors ensure that the money is allocated for the benefit solely of beneficiaries who are death benefits dependants. (Where death benefits dependants are not beneficiaries of a trust but direct beneficiaries under the will, the benefit can be paid to them direct; if the death benefits dependants are beneficiaries under a trust created by this will, the executors who receive the lump sum payment for the estate pass the money on to the trustees with a direction that the money be allocated for the benefit solely of beneficiaries who are death benefits dependants.) Unless this is done it is possible that the ATO could deem the other beneficiaries to be part recipients of the benefit.

Accordingly, this clause provides that if superannuation death benefits are paid into the estate and there are beneficiaries who are 'death benefits dependants', the executors have a discretion to hold those benefits for the benefit of those beneficiaries in a

'Superannuation Proceeds Trust'. Because some of the testator's children may not be death benefits dependants this can cause an imbalance, and so the clause ***Equalisation of benefits*** gives the executors power to ensure that overall (that is, taking into account the superannuation benefits and other estate assets) all the testator's children be treated equally.

General powers of my executors and trustees

This clause includes the general powers that are to be given to the executors of the estate. These powers are standard and common executors' powers, and are included as a matter of course in the will. The powers of your executors, nominated under Schedules 1 and 2, are set out in this clause. These powers are also given to your trustees, in addition to the powers given to your trustees in the clause ***Powers of my trustees****.*

Executors' fees and commission

This clause provides for the remuneration of executors. It does not apply to trustees, whose remuneration is provided for in the clause ***Powers of my trustees****.*

Interpretation

This clause defines certain words:

'guardian' (means a person legally empowered to make financial decisions generally on behalf of that person);

'preservation age' is the age at which the primary beneficiary gains control of her or his trust, and is provisionally set at 25 years. A different age can be selected by the testator; and

'spouse', which is given a very wide meaning:

(a) the husband or wife of the person at any time; and

(b) the partner of a person, of the same sex or different sex.

It must be remembered that the word 'spouse' is important only in relation to potential beneficiaries (not the primary beneficiary), and although potential beneficiaries can have benefits distributed to them, being a potential beneficiary in no way implies that persons who fall within this wide definition will, or are likely to, receive benefits.