

# Deceased estates: taxation and latest developments

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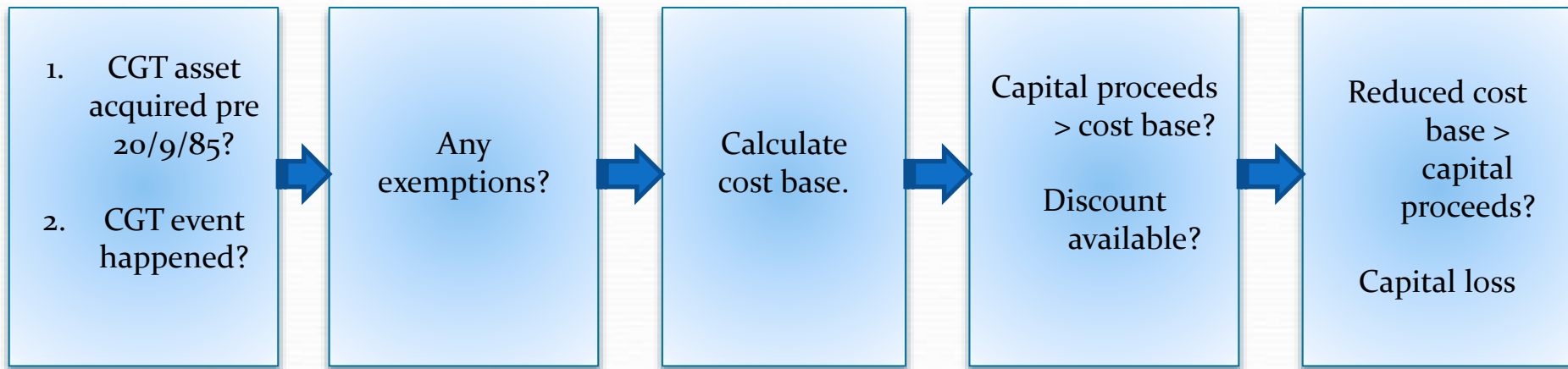
# Agenda

- Some tax issues with deceased estates
- Latest cases in deceased estates

# Deceased estates

- Executor's responsibilities
  - Lodge final income tax return for deceased
  - Lodge final BAS (if in business)
  - Tax returns/payments for other entities
  - Lodge estate income tax and other returns (eg business)
  - Payment of outstanding liabilities
- Personal liability of executors?
  - s 254 & Div 6, ITAA36
  - Eg *Barkworth*; *DCT v Brown*

# Deceased estates – CGT basics



# Deceased estates - CGT

- Exemptions and concessions eg
  - Cars
  - Personal use assets acquired for \$10k or less
  - Main residence
    - Special rules for deceased estates

# Deceased estates - CGT

- Cost base

1. Money or MV property for acquisition
2. Incidental costs (eg legal costs, stamp duty etc)
3. Holding costs (eg maintenance, insurance, rates etc)
4. Capital expenditure to preserve or increase asset's value or for installation/moving
5. Costs to establish, preserve or defend title or rights

# Deceased estates - CGT

- Death is not a CGT event.
  - Disposal of a CGT asset *is* a CGT event (by LPR or beneficiary).
  - Roll-over
  - Transfer of asset to LPR or beneficiary = no CGT
  - Exceptions
    - Foreign residents
    - Trustee of complying super funds
    - Exempt entity

# Deceased estates - CGT

- Transfer to beneficiary needs to be under:
  - Will
  - Intestacy
  - Appropriation in satisfaction of pecuniary legacy etc
  - Settlement of claims
  - *NOT* power of sale
- NOT apply to assets acquired after death



# Deceased estates - CGT

- Deemed acquisition
  - Deemed acquisition – date of death
  - Consequences:
    - Lose pre-CGT status
    - Resets 12 month time period for CGT discount

# Deceased estates - CGT

Asset type	Cost base
Post-CGT asset	Inherit deceased's cost base
Pre-CGT asset	Market value on date of death
Main residence prior to death	Market value on date of death
Trading stock of deceased prior to death	Market value on date of death (subject to exceptions)

- Beneficiary can include LPR's asset expenditure in cost base

# Deceased estates

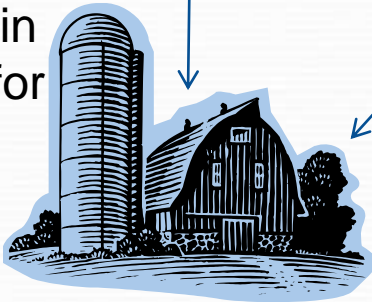
Hubert



Helga -  
beneficiary



Purchased in  
Aug. 1984 for  
\$200,000



- Hubert dies on 8 March 2008
- Market value of property is \$900,000 on that date
- Helga inherits
- Cost base of property for Helga is \$900k
- Property loses pre-CGT status

# Deceased estates

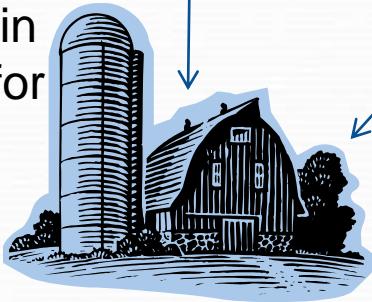
Hubert



Helga -  
beneficiary



Purchased in  
Aug. 1986 for  
\$200,000



- Hubert dies on 8 March 2008
- Market value of property is \$900,000 on that date
- Helga sells property in December 2008
- Helga inherits cost base of \$200,000
- No CGT discount as deemed acquisition date of 8 March 2008

# Deceased estates - CGT

- Main residence exemption
  - Includes adjacent land up to 2 ha (less area of dwelling)
  - Absences – can treat as main residence
    - Eg nursing home prior to death
    - Rent out – 6 yr max.
    - Otherwise - indefinitely

# Deceased estates - CGT

- Exemption for beneficiary for CGT even happening to a dwelling.

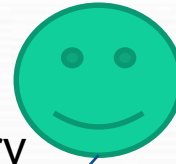
Meet one of these:	And one of these:
<ul style="list-style-type: none"><li>• Post-CGT dwelling and</li><li>• Main residence just before death and</li><li>• Not to produce assessable income.</li></ul>	From death, dwelling was main residence of: <ul style="list-style-type: none"><li>• deceased's spouse</li><li>• individual with right to occupy under will</li><li>• individual beneficiary (brings about CGT event)</li></ul>
Pre-CGT dwelling.	Ownership interest ends within 2 yrs of death.

# Deceased estates

Hubert



Hans -  
beneficiary



Main  
residence -  
Purchased  
on 1 January  
1980



- Hubert dies on 8 March 2008
- Hans sells on 10 March 2009
- What if property was purchased on 6 September 1986?
- What if Hans sold the property on 10 March 2010?

# Deceased estates - CGT

- Inter vivos gifts of post-CGT assets
  - Assume carry-forward capital losses of deceased
  - Property pregnant with unrealised capital gains
  - Transfer to beneficiary after death
  - Lose benefit of capital losses
  - Inter vivos gift
    - Realise capital gains & offset against capital losses



# Deceased estates



Inter vivos  
gift

Property with  
\$200,000  
unrealised  
capital gain



- Hubert has carry forward capital losses of \$400k
- Assume inter vivos gift
- Realise capital gain on the property
- Capital gain can be fully offset against carry forward capital losses

# Deceased estates – other assets

- Trading stock

- Assessable income of estate includes MV at death
- Cost base = MV at death
- Elect either:
  - Include value at end income yr in assessable income
  - Certain crops – nil amount
  - Must continue to carry on business after death & hold as trading stock/asset of business
  - Take that cost base

# Deceased estates – other assets

- Depreciating assets
  - Balancing adjustment
  - Termination value on death
  - Depreciation – adjustable value at death

# Deceased estates – joint tenancies

- Survivors acquire deceased's interest on date of death
- Post-CGT assets
  - Apportion deceased's cost base between survivors
- Pre-CGT assets
  - Apportion MV on date of death of deceased's interest between survivors

# Deceased estates

Hubert



Helga



- Post –CGT property purchased for \$500,000

- \$20,000 acquisition costs



- Hubert & Helga are joint tenancies

- Hubert dies on 7 Feb. 2014

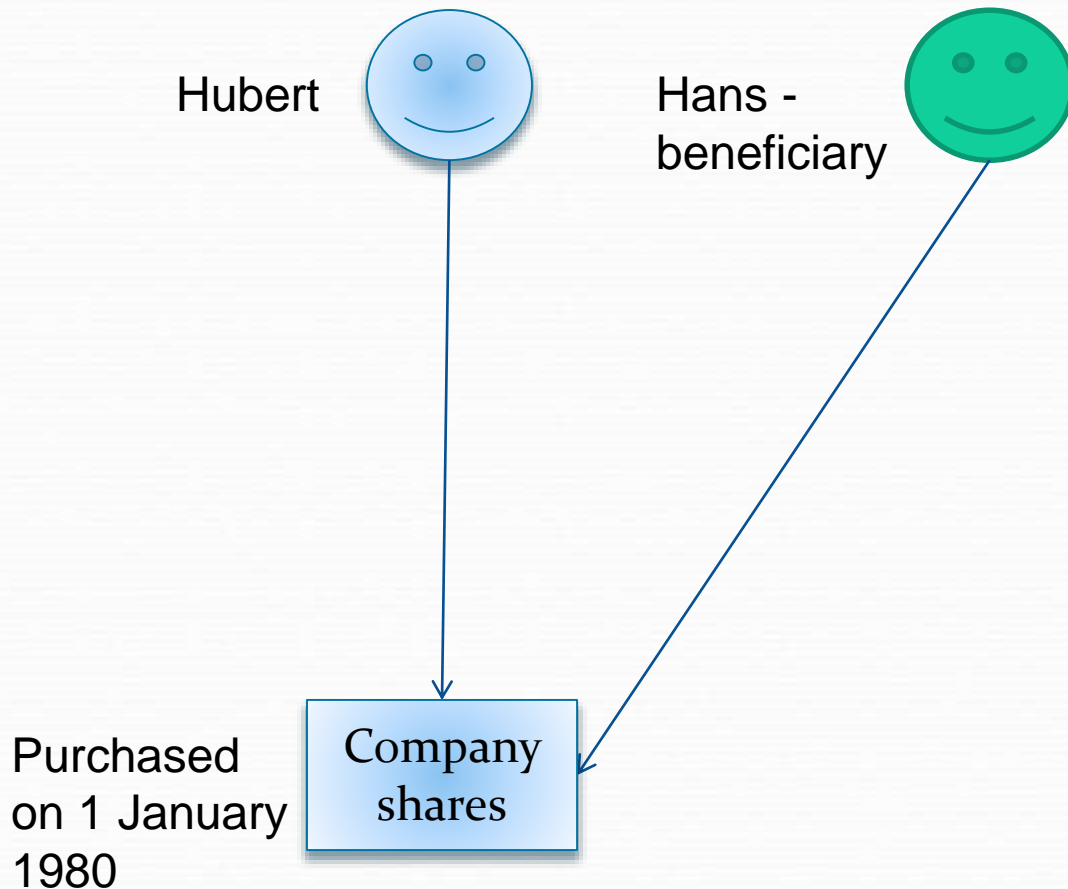
- Helga inherits his interest – right of survivorship
- Total cost base of \$520k for property

- Helga inherits \$260k cost base for Hubert's interest

# Deceased estates – companies

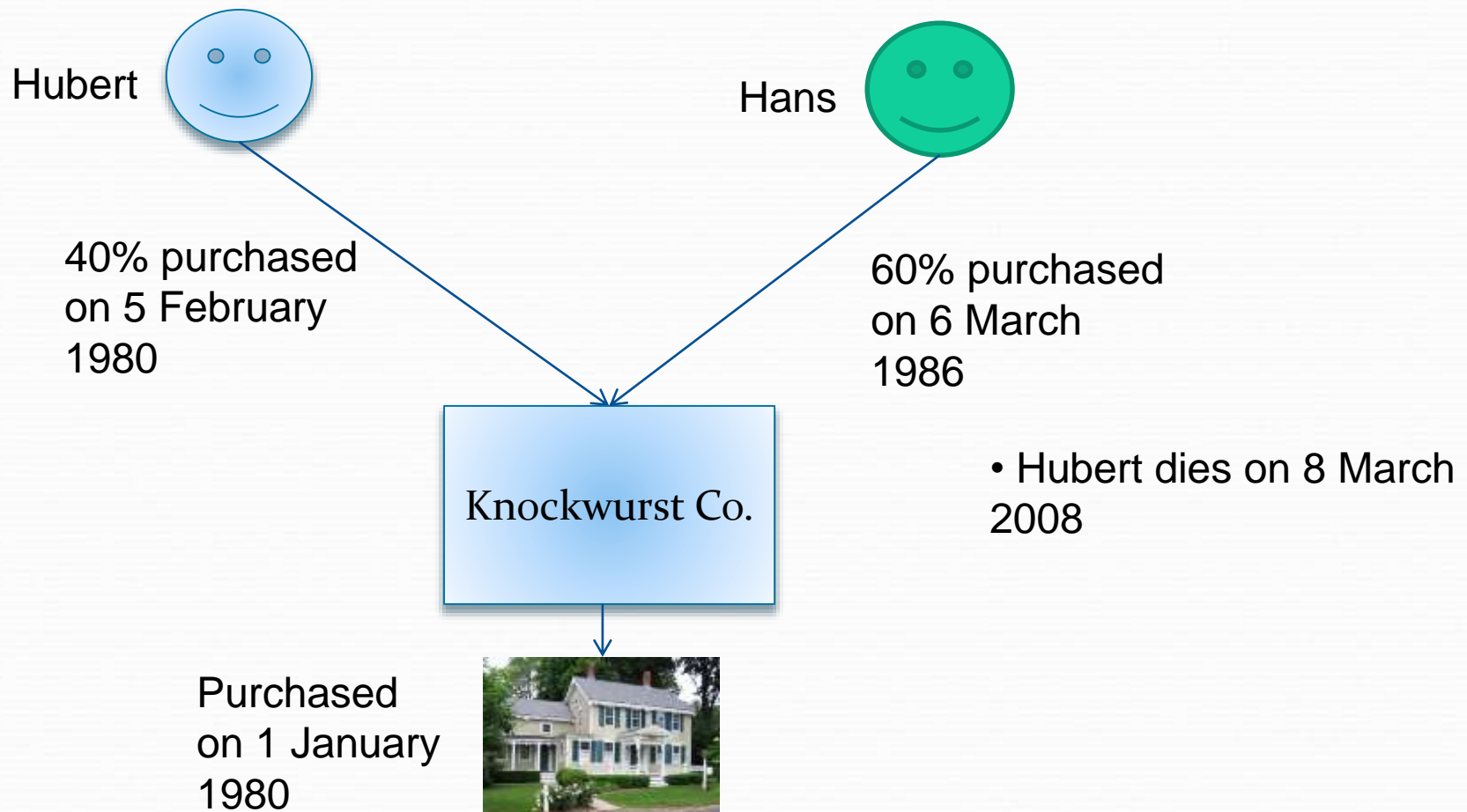
- Pre-CGT assets held by companies/trusts
  - Maintain same ultimate owners
  - >50% certain beneficial interests
  - Lose pre-CGT status assets
  - Exemption for death
  - Complications with interposed entities
- Pre-CGT shares/trusts - CG

# Deceased estates – companies



- Hubert dies on 8 March 2008
- Cost base 8 March = \$200k
- MV 8 March = \$300k
- Hans sells on 10 March 2009 for \$400k
- Capital gain?
- What if property was purchased on 6 September 1986?

# Deceased estates – companies





# Small business CGT concessions

- LPR / beneficiary can utilise if:
  - CGT asset forms part of estate (business assets)
  - Devolve to LPR / beneficiary
  - Deceased would have been entitled just before death
  - CGT event happens within 2 years of death

# Small business CGT concessions

- Basic CGT discount
  - 12 months
  - 50% - individuals/trusts
  - 1/3 - super funds
- 15 year exemption
- 50% active asset reduction
- Retirement exemption
- Rollover

# Small business CGT concessions

- Basic conditions
  - \$2m turnover test OR
  - \$6m net asset value  
(affiliates/connected entities)
- CGT “active” asset
  - Used in business (affiliate/connected entity)
  - Half ownership period / 7 ½ years
- 50% active asset reduction

# Small business concessions

Hubert



Sells restaurant business assets for \$2m (\$1m cost)

\$2m assets

\$1m mortgage



Super - \$2m

- Assets are active
- <\$6m net assets
- Capital proceeds \$2m
- Cost base \$1m
- Capital gain \$1m
- Discount 50% - \$500k
- Active 50% - 250k



Helga (affiliate)



\$2m assets

# Small business concessions

Hubert



Sells chalet  
for \$5m (\$2m  
cost)

- Asset is NOT active
- <\$6m net assets
- Capital proceeds \$5m
- Cost base \$2m
- Capital gain \$3m
- Discount 50% - \$1.5m

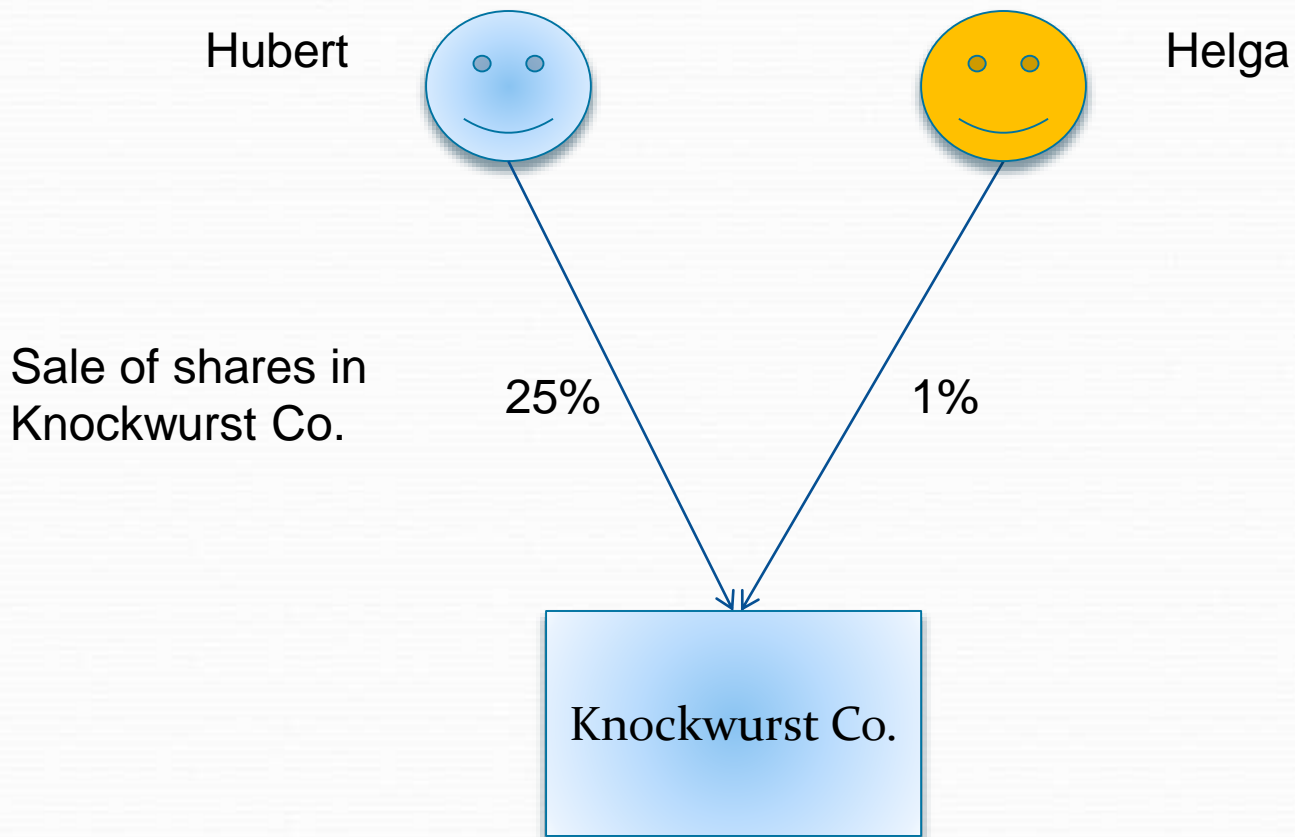
MV \$5m  
Used to  
derive  
rent



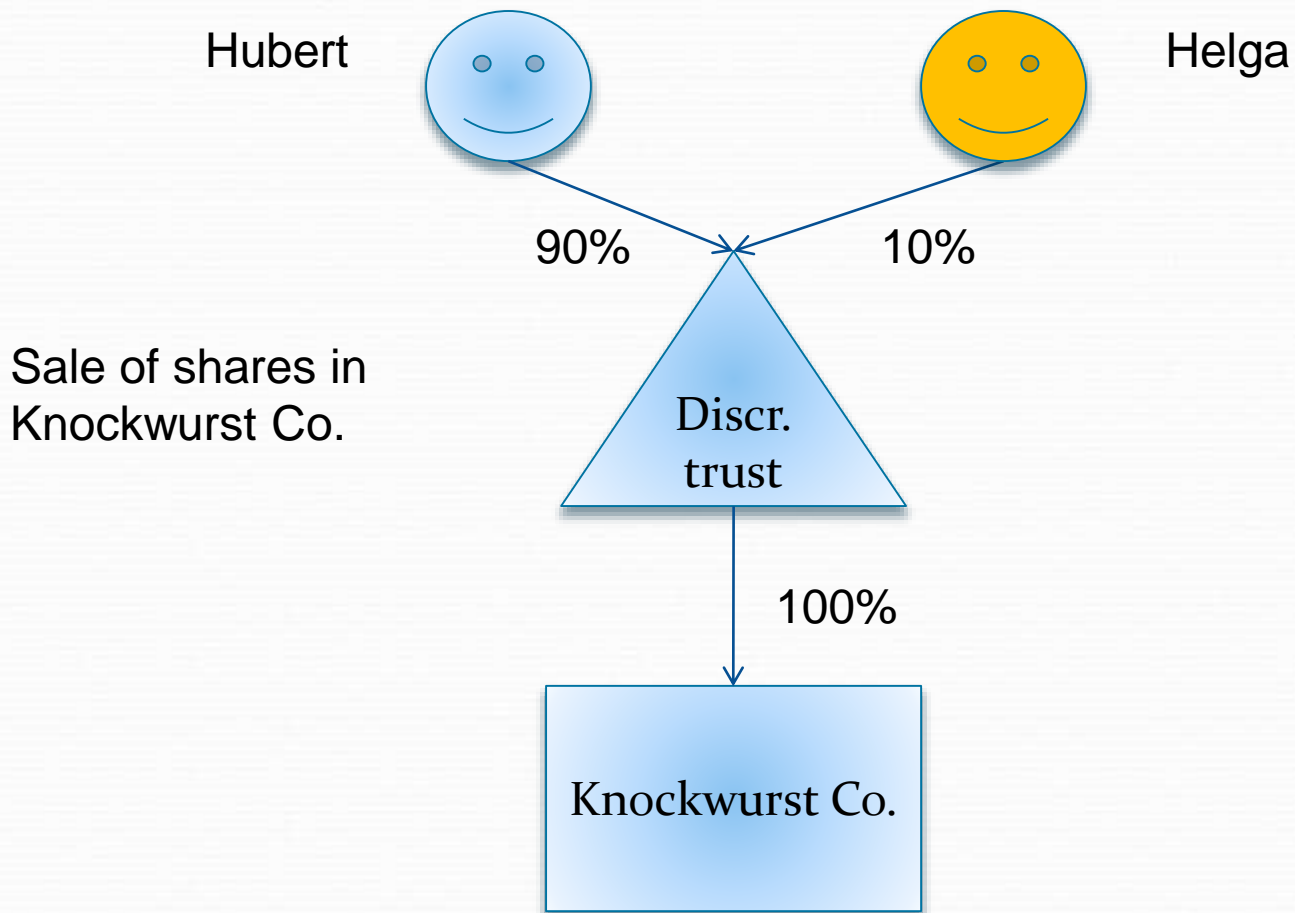
# Small business CGT concessions

- Shares/trust interests
  - Active assets + cash is 80%+ of all assets
- CGT concession stakeholder
  - Significant individual (20%+)
  - Spouse
- Interposed entity – 90% stakeholders

# Small business concessions



# Small business concessions





# Small business CGT concessions

- 15 year exemption
  - Basic conditions
  - 15 years continuous
  - 55+ in connection with retirement (*retirement not need to be met for deceased estate*) OR
  - Permanent incapacity
- Shares/trusts – significant individual for 15 years
- Overrides other concessions

# Small business concessions

Hubert (56)

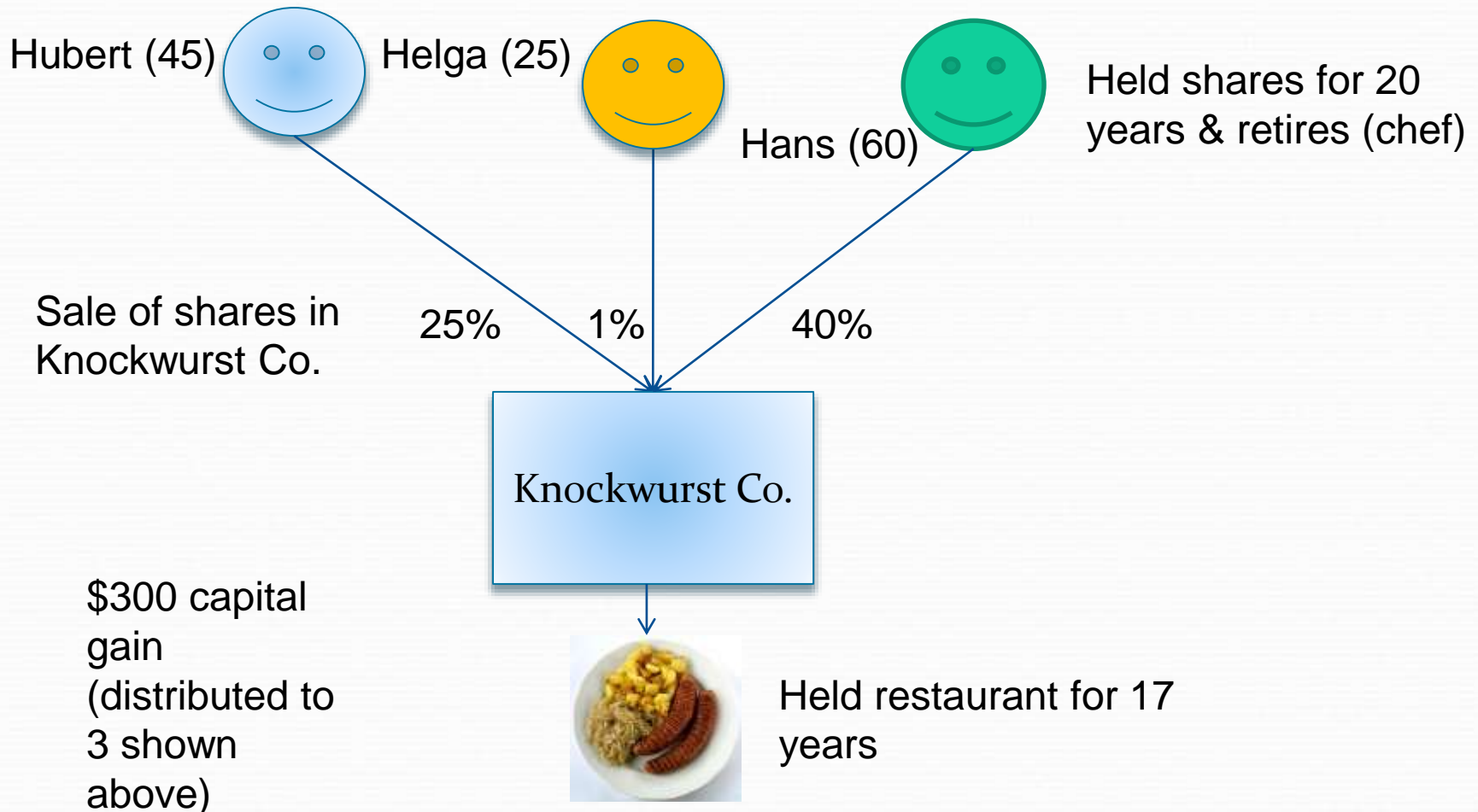


- LPR sells restaurant assets after death of Hubert
- Held for 17 years



\$1.5m current  
year turnover

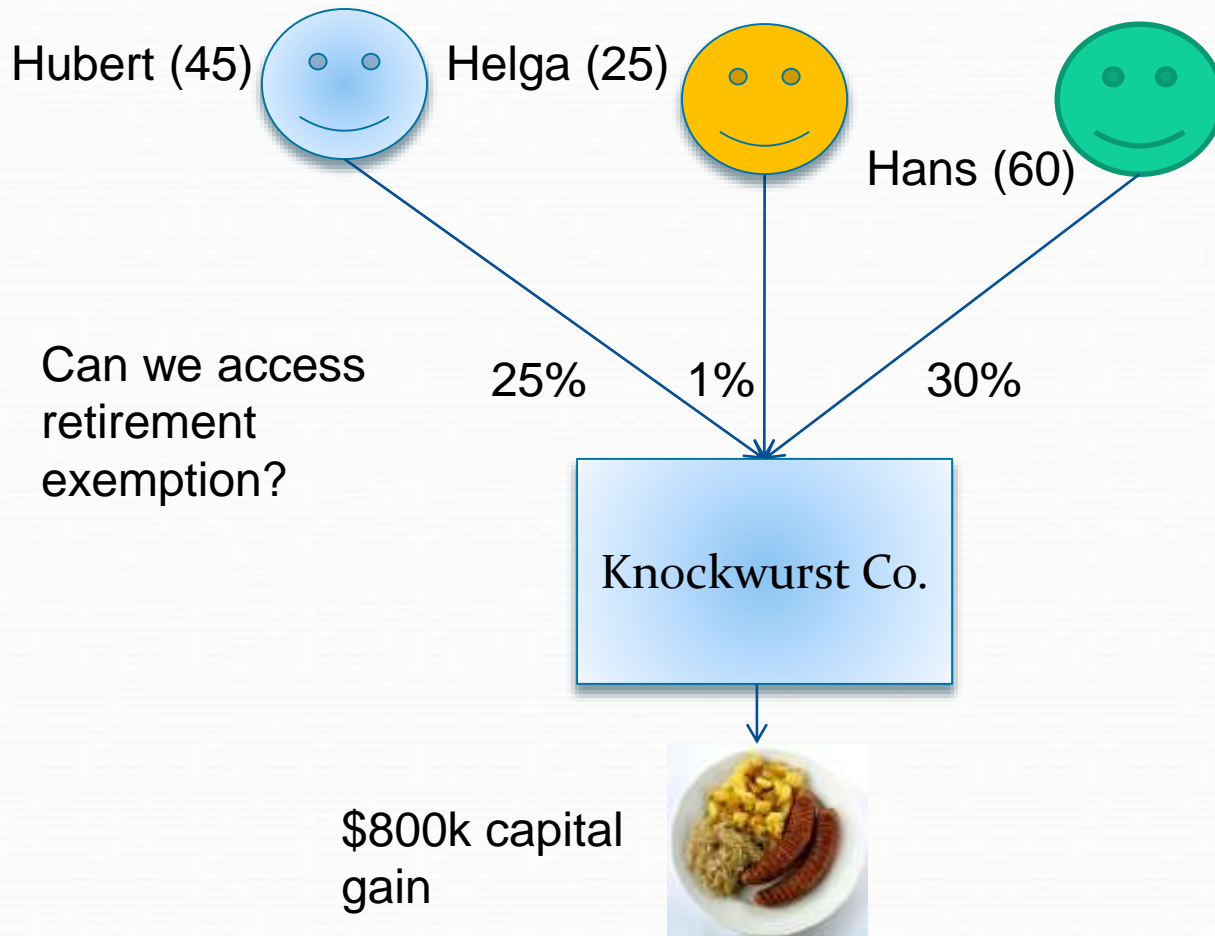
# Small business concessions



# Small business CGT concessions

- Retirement exemption
  - Basic conditions
  - \$500 lifetime limit
  - 55+ OR
  - Super fund/RSA if <55 (*not apply for deceased estate*)
- Shares/trusts – 1 significant individual
- Shares/trusts – distribute to 1+ CGT concessions stakeholder

# Small business concessions



# Small business CGT concessions

- Rollover relief
  - Basic conditions
  - Disregards capital gain
  - 2 years
  - Replacement asset – longer

# Small business concessions

Hubert



- Buys replacement asset after 3 years?
- Buy after 1 year
- Uses in business
- Price - \$1m
- Capital gain = \$2m - \$1m



CGT Asset

Sell for \$2m  
capital gain

# Deceased estates – stamp duty

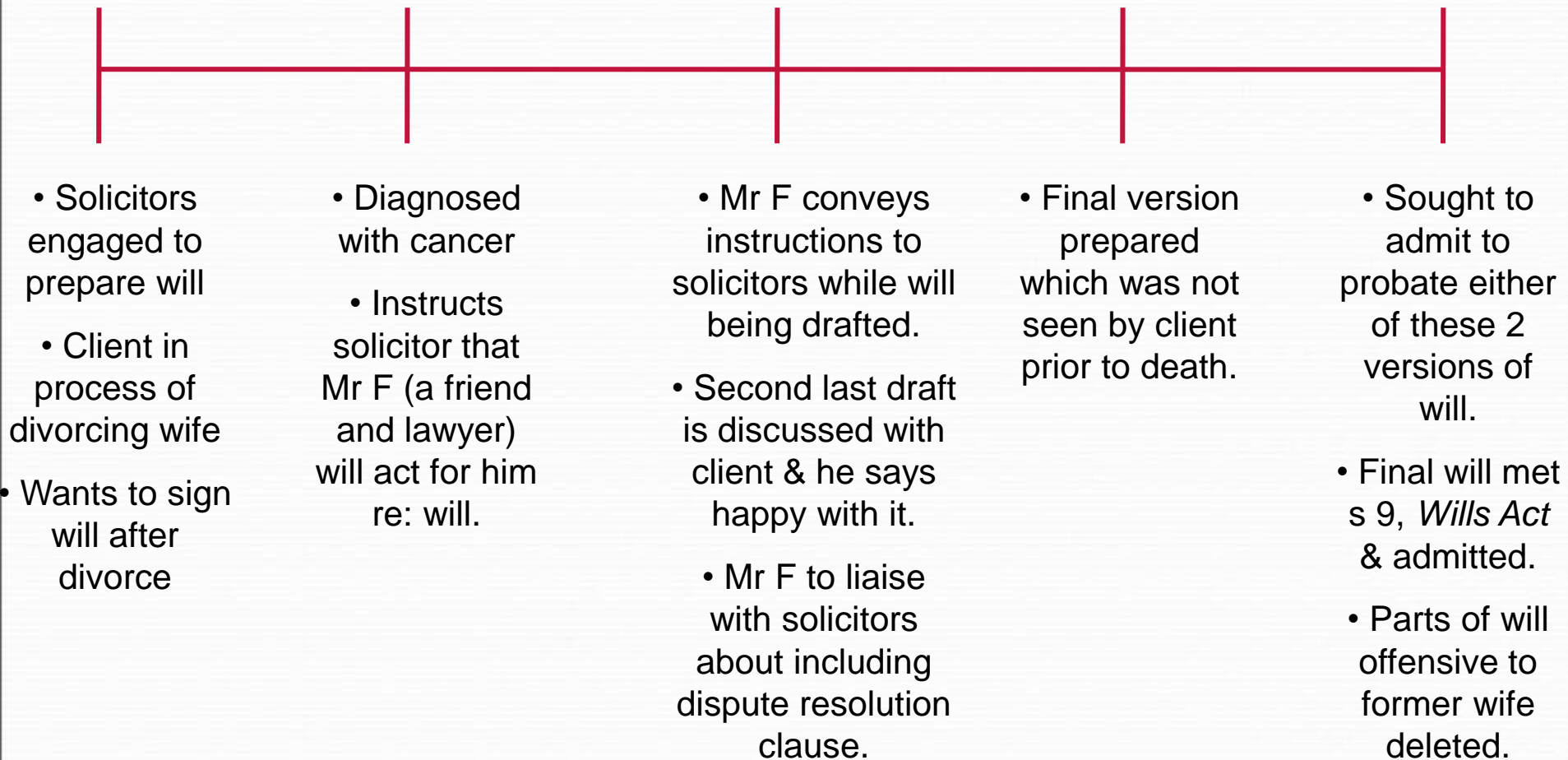
- Transfers under will
- Transfers in satisfaction of entitlements arising under will
- Court orders for provision
- Settlement of TFM claims – problems



# *Fast v Rockman* (informal will)

- Informal wills can be admitted under s 9, *Wills Act 1997*
  - Need a document
  - Testator intends document to be will
  - Court can consider evidence of statements of testamentary intention & evidence of manner in which document executed

# *Fast v Rockman* (informal will)



# Re Schoenmakers *(rectification of will)*

18 June  
2009

Prior to death

13 July 2011

March 2012

Feb. 2013

- Will prepared by Trust Co.
  - Acted as attorney.
  - Holds retirement village unit.

- Attorney sells unit & moves to nursing home.
  - Evidence that deceased intended brother gets proceeds from unit sale & gift not fail.
  - Trust Co staff not inform deceased of need to change will.

- Death

- Probate granted.
- Trust Co. writes to deceased's brother & told him unit sold with deceased's approval.
- Attempts to settle dispute.

- Deceased's brother brings proceedings seeking leave out of time to apply for the rectification of will.

# *Re Schoenmakers* (rectification of will)

- Will
  - *As to the net proceeds from the sale of the principal residential property owned by me at the date of my death for my brother Frans Schoenmakers should he survive me. Should he not survive me then for his wife. Should she also not survive me then the net proceeds shall fall into and form part of the remainder of my estate.*

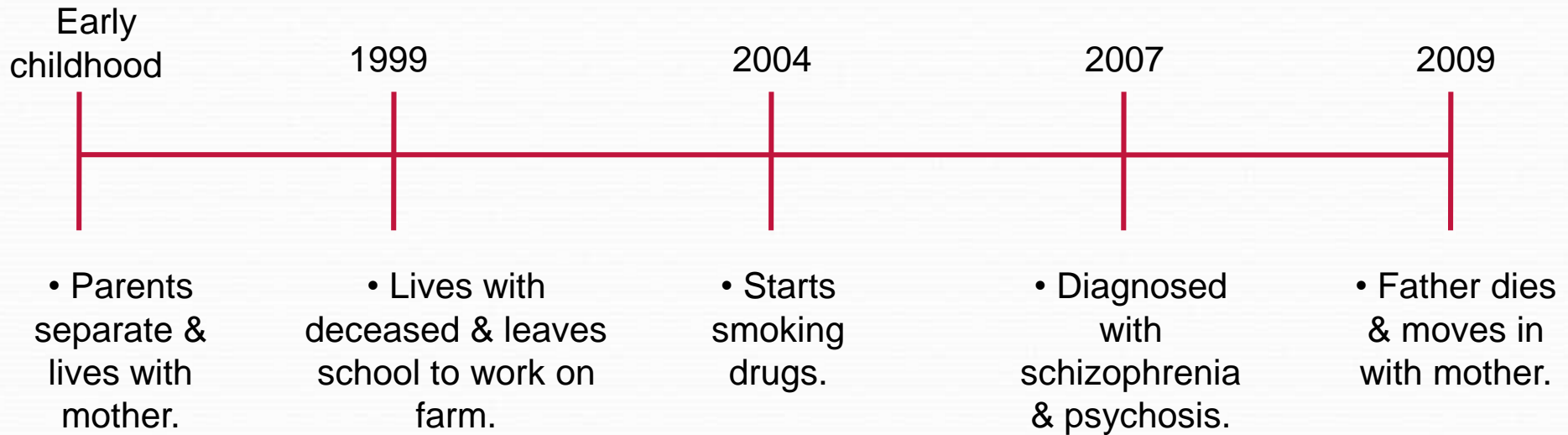
# *Re Schoenmakers* (rectification of will)

- Extension granted – delay explained
- Principles for rectification
  - Will fails to carry out testator's intentions
  - Testator's actual intention must be proven
  - Standard of proof – balance of probabilities *but* clear & convincing proof required
  - Not sufficient that testator would not have wished property to be disposed of in a particular manner because of clause in will
  - If no evidence of intention – cannot rectify

# *Re Schoenmakers* (rectification of will)

- Evidence was clear – proceeds of sale to brother
- Evidence of nursing home staff
- No instructions dependent on holding unit at death
- Will not give effect to intention
- Rectified
  - *As to the balance remaining of the net proceeds of sale..., or any moneys representing the same, for my brother Frans Schoenmakers should he survive me.*

# Trapani v Ciocca (TFM claim)



# *Trapani v Ciocca* (TFM claim)

- Trust established by will
  - Deceased's sister & nephew trustees
  - Life interest for only son
  - Residue on death – 23 nephews & nieces
- TFM claim for whole estate– argued:
  - Trust only failed to make adequate provision
  - Life interest only
  - May recover from illness & have family
  - Trustees not suitable



# *Trapani v Ciocca* (TFM claim)

- Relevant factors
  - Only son
  - No obligation to provide for nephews/nieces
  - Modest estate (\$468k before costs)
  - Only 23 at death – circumstances may change
  - Deceased assumed responsibility & then mother
  - Mother's house - mortgage
- Appropriate provision:
  - Absolute interest – use funds to buy house
  - Funds administered by Senior Masters Office

# *Will of Vourdoulidis* (TFM claim - intestacy)

- \$317k estate (just over \$200k after costs)
- Estate passed to 1 uncle & 2 aunts (intestacy)
- Cousin seeking provision
  
- Background
  - Deceased – intellectual disability
  - Never lived independently
  - Beneficiaries lived in Greece
  - Only saw them for a brief period

# *Will of Vourdoulidis* (TFM claim - intestacy)

- Background
  - Cousin & his parents – only family in Aust.
  - Cousin's father supervised special needs
  - Cousin took over in 1993 after parents died
  - Provided assistance when violent outbursts
- Court
  - Took on central role in deceased's life
  - Beneficiaries – should receive share
  - \$150k provided

# Cody v Cody *(Dispute between trustees - conflict)*

Death

After death

Oct. 2012

Dec. 2012

June 2013

- Will with widow & 2 of 5 children as executors.
- Falls Creek property one of assets.

- Dispute about use of property.
  - 2 of 3 trustees (and 2 other children) wanted to sell.
  - 1 trustee & remaining child wanted to keep.
- Appln. for court ordered sale.

- Calderbank offer made proposing auction of property & payment of costs from estate.
- Open for 4 days.
- Rejected.

- Mediation held.
- Binding heads of agreement entered.
- Property to be sold by set date with beneficiaries to use.
- Conditional on terms settlement.

- Terms of settlement had not been entered into.
- Court order that property be sold at end of 2014 ski season unless majority of beneficiaries agreed to retention.

# *Cody v Cody* (Dispute between trustees - conflict)

- Court on costs:
  - Trustees' costs must be properly incurred to be covered by indemnity
  - Unreasonable in rejecting Calderbank?
  - No – early stage / no genuine comp. / short time
  - Costs out of estate up to mediation
  - After mediation – 3<sup>rd</sup> executor pay costs personally
  - Resistance to sale after mediation - improper

# *Caruana v Caruana* (removal of executor)

23 May 2006

August 2006

Dec. 2006

Dec. 2006

2006 onwards

• Will:  
(a) One son as executor (defendant)

(b) Equal division – 6 children

• Sells family home  
• Lends proceeds to def. & wife  
• As conbn to new family home  
• Deceased not registered on title

• Child writes about non-registration

• Def. acknowledges loan  
• Def. says will sell property to repay loan less expenses.

• Deceased lived in Def's home  
• Def. renovates home for deceased's wheelchair

# *Caruana v Caruana*

August 2011

10 July 2012

After July 2012

Oct. 2006

30 July 2013

- Deceased dies

- Def's solicitor tells of agreement with deceased for deductions from loan:

(a) \$138k nursing fees

(b) \$7,500 renovations

(c) \$26k expenses

- Provides account

- Plaintiffs query missing cash & proceeds of sale of personal effects

- Account adjusted

- Plaintiffs dispute account

- Probate obtained

- Plaintiffs seek to remove Def. as executor

- Initial consent to resignation, but reneges

# *Caruana v Caruana*

- Principles for removal
  - Welfare of beneficiaries & estate
  - Discretionary & fact dependant
  - Conflict of duty & interest not necessarily enough
  - Must affect efficient admin. of estate



# *Caruana v Caruana*

- Amount of loan repayable? (none repaid)
- Court:
  - D. Preferred own interest to estate
  - No documents to support deductions
  - Unnecessary costs to estate admin.
  - D unreasonable cause of litigation
  - Pl & D costs paid by D personally

# Presenter contact details

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