- It is important to note that there are significant taxation differences for unit trusts, depending on whether they are 'fixed trusts'.

How can interests in the assets of a unit trust be transferred?

- A person's will cannot deal with the underlying assets of a unit trust – but only who is to receive the units that a testator individually owns.
- The trust deed will determine what rights the unit holders have in relation to income and capital distribution.
- It will also stipulate the rights of the unit holders when the trust is wound up.

What happens following the death of a person who owes money to a trust?

- The general rule is that any debts owed at the time of a person's death must be repaid out of their estate.
- This includes all moneys owed to a trust.
- Therefore, it is important that all such loans and debts are documented, to ensure that the money can be recovered from the estate and further comments in this regard are set out below.

What happens following the death of a person who is owed money by a trust?

- Often trusts distribute income to the beneficiaries, which is then loaned back to the trust. Alternatively, the distribution may be determined, but left unpaid.
- Separately, a beneficiary may have advanced capital into the trust which is yet to be repaid.
- In each of the above situations, these outstanding amounts are amounts owing to a testator at the time of their death and become an asset of that person's estate.
- Unless there is an agreement in place, all debts are payable to the testator's estate at call. This means that if the estate so demands, the amount must be paid immediately.
- As part of an estate plan therefore, a decision should be made as to where the testator wants these entitlements asset to go.
- There are several options, including:
    - allow the loan to become part of the estate so that the beneficiary (or beneficiaries) who receives the residue (often a TDT) will become entitled to repayment of the loan;
    - allocate the loan to a separate beneficiary;
    - have the loan repaid before death; or

Case Study – Trust to protect assets

Phil and Beryl appeared in a Case Study in the paper "Dealing with Estate Assets". They are married with two sons Robert and Patrick. Patrick has a difficult often rocky marriage but they want to help out Patrick because they love him and their grandchild.

Phil and Beryl have a family trust, they decide to lend $400,000 from the trust to Patrick to help him purchase a home in his name. A loan agreement is prepared between the trust and Patrick and the trust takes out a mortgage over the Patrick's house.

If Patrick separates from his wife in the future, the loan made by the family trust is protected.

Phil and Beryl also took the step of providing that on their deaths their other son Robert would be the trustee and appointor of the family trust. Ensuring the asset protection for Patrick is continued.

2. Assets in Companies

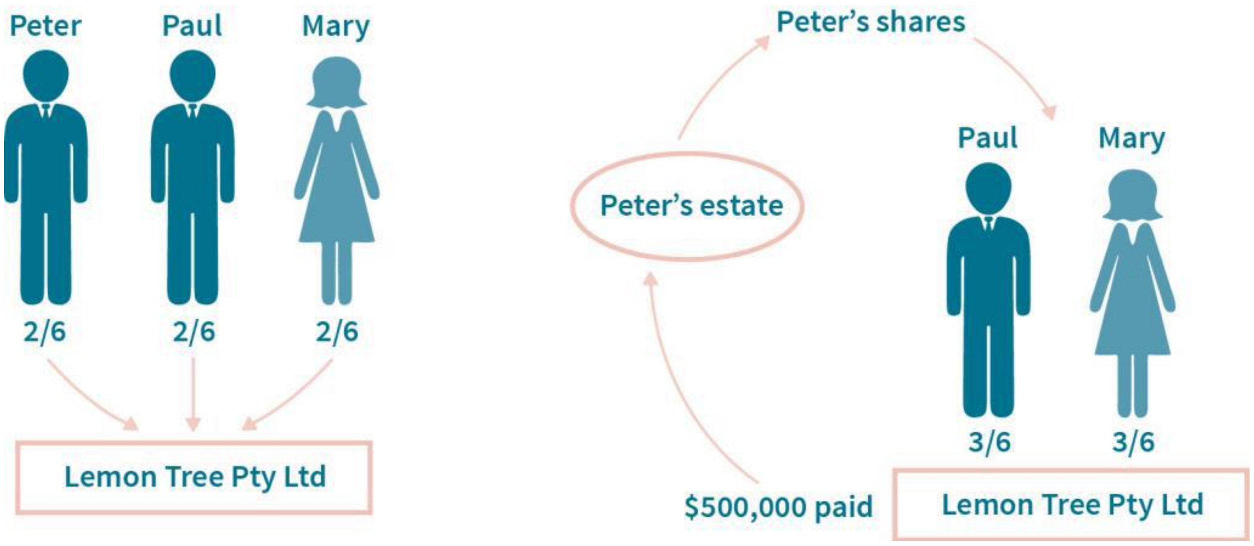
What happens to company shares owned by the testator upon death?

- Unlike a trust, a company is a separate legal entity. It has its own legal identity that is discrete from its shareholders.
- Companies can own property, enter into contracts and be subject to legal liability in the same manner as an ordinary person.
- Shares represent ownership of a company. However, even as an owner, a shareholder is not entitled to the assets of the company. Thus, the death of a shareholder has no effect on the company's continuing existence, or on its assets.
- The shares owned by the testator in a company form part of their estate and can be dealt with of by their will.
- During the period when the testator's estate is being administered, their executor will be able to exercise any rights that attach to their shares (for example, voting at general meetings).

How a Business Succession Agreement works

- Partners in business whether as individuals or as shareholders in a company can benefit from a Business Succession (Buy/Sell Agreement).
- Peter, Paul and Mary between them own all the shares in Lemon Tree Pty Ltd, which operates a mining services business. The company has a value of $1.5 million.
- They enter into a Business Succession (Buy/Sell Agreement) which is triggered if any of the business owners dies or becomes totally and permanently disabled.
- Peter is killed in an accident at a mine site.

Example



- Under the Buy/Sell Agreement, Paul and Mary have the option to purchase Peter's shares for their current market value.
- Under the same agreement, Peter has the option to force Paul and Mary to buy his shares for their current market value.
- As part of the agreement, each party has in place Life and TPD insurance, and agrees that any proceeds received count as part of the purchase price.
- Following Peter's death, Paul and Mary trigger the option to buy Peter's shares. Peter's estate receives $500,000 under his insurance policy.

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