

TESTAMENTARY TRUSTS IN PERSPECTIVE



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Stefan is qualified as a Chartered Accountant (SA) but also holds a Doctorate Degree in Trust and Tax law. He headed the National Trust & Estate department at PwC. He is now director of SBRO Financial Services and WRS Fiduciary and Tax where he provides support to financial advisors around the country and also to clients directly. Stefan was also the presenter on various half day and full day seminars during 2006 to 2016 on law of trusts & estate planning, amongst others for SAICA, FPI and SAIPA. Over the years he was also involved in various discussions on radio on RSG's Moneyweb. He is co - author of the well - known publication "Trust Law and Practice".



SLOGAN OF ESTATE PRACTITIONERS

“Death is not the end. There remains the litigation over the estate.”

“Happy families are all alike; every unhappy family is unhappy in its own way.”



AGENDA

1. Differences between an *inter vivos trust* and testamentary trust
2. Appropriate scenarios to implement a testamentary trust
3. Amendment of trusts
4. Special Trusts - Income Tax Act
5. Important differences between an inter vivos and testamentary trust
- tax perspective
6. Section 7C considerations and testamentary trusts
7. Practical aspects



1. *Inter vivos* trusts v Testamentary trusts

- The difference lies in the FOUNDING ACT of the trust:
 - Does it happen by a founder via an inter vivos transfer?
 - Does it happen by a testator which create the trust in his will?
- DOCUMENT: trust deed (contract) (iv trust), will (t trust)
- Transfer type: donation (iv trust) or bequest (t trust)
- Founder: in life (iv trust), not in life (t trust)
- What about bequests to existing inter vivos trusts?

SIDENOTE: Some commentators differentiate between Testamentary trusts & Mortis Causa trusts
- Testamentary Power of Appointment (*Braun v Blann & Botha*)
- Hanekom case - Once the trust is created trust rules should dictate!!



2. When to implement a Testamentary trust

- The Founder wants to protect the assets, or the person which will benefit from the inheritance

And

- There's no need /it's impractical to create an *inter vivos* trust
 - No need / impractical to peg the value of estate of the estate planner
 - Or, the asset that he wants to protect only comes into existence at the demise of the estate planner (life policy proceeds)
 - Or, the person needs protection after the demise of the estate planner only
 - Or, existing *inter vivos* trust may be at risk (eg potential sequestration and existing trust may be attacked by the curator)



2. Appropriate scenarios

- The Founder wants to protect the person which will benefit from the inheritance
 - Minors
 - Persons with incapacity/ies
 - Spouses
- The Founder wants to protect the inheritance
 - Spendthrift heirs
 - Retain for future generations (grandchildren)
 - Existing *inter vivos* trust may be under attack (sequestration)
 - The Founder wants to steer away from the section 7 anti-avoidance provisions (income tax) by bequeathing to trust



3. Amendment of trusts

➤ Inter vivos trust

- Amend in terms of the amendment clause in the deed
- Amend in terms of common law

➤ Testamentary trust

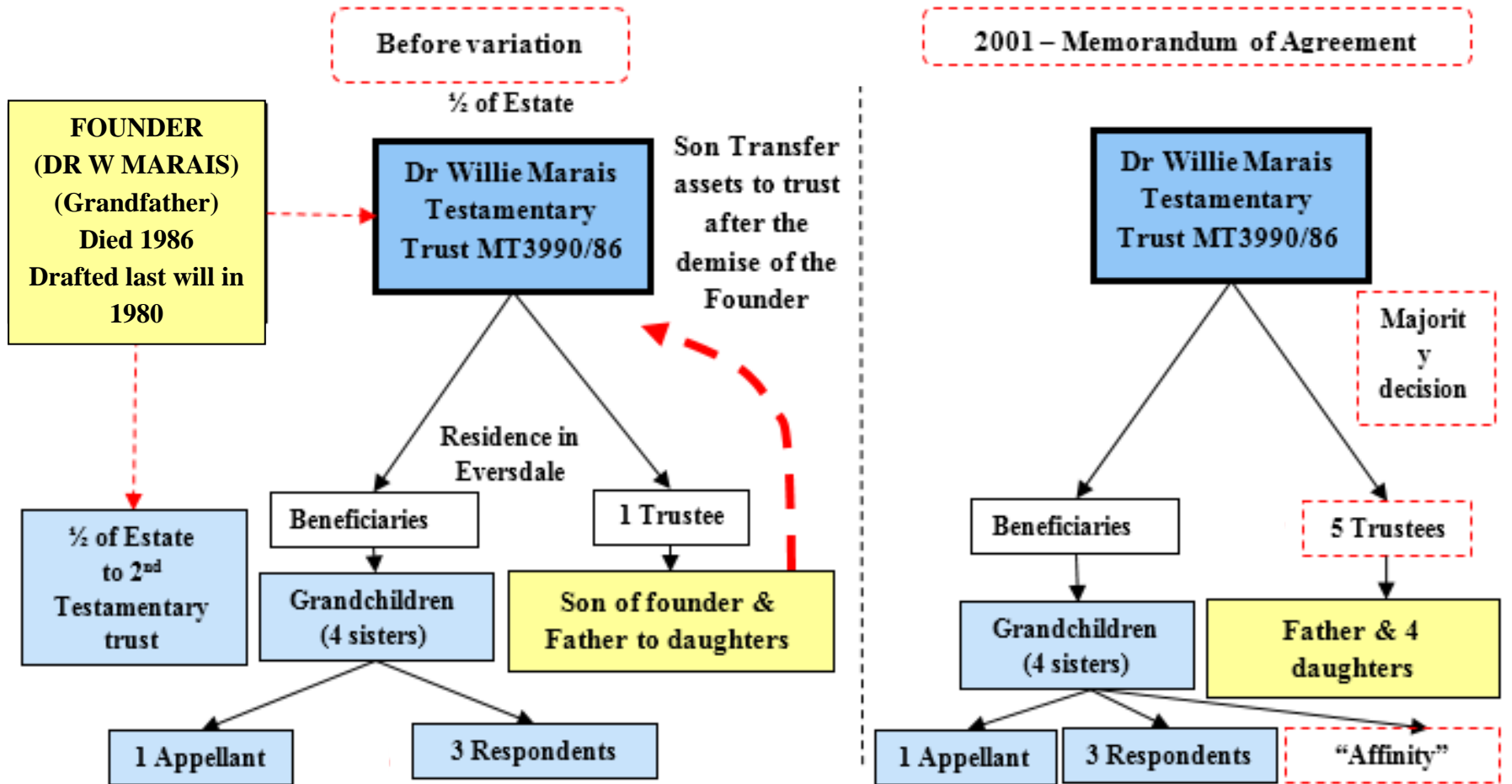
(why relevant?)

- HANEKOM v VOIGT N.O AND OTHERS (15493/2014) [2014] ZAWCHC 194 (10 12 2014)
- Masters Directive 2 of 2017
- Section 13 of the Trust Property Control Act



3. Amendment of trusts

HANEKOM v VOIGT N.O AND OTHERS (15493/2014) [2014] ZAWCHC 194 (10 12 2014)



Question of law: The question before this Court for determination was whether the 2001 Memorandum constituted a valid amendment?

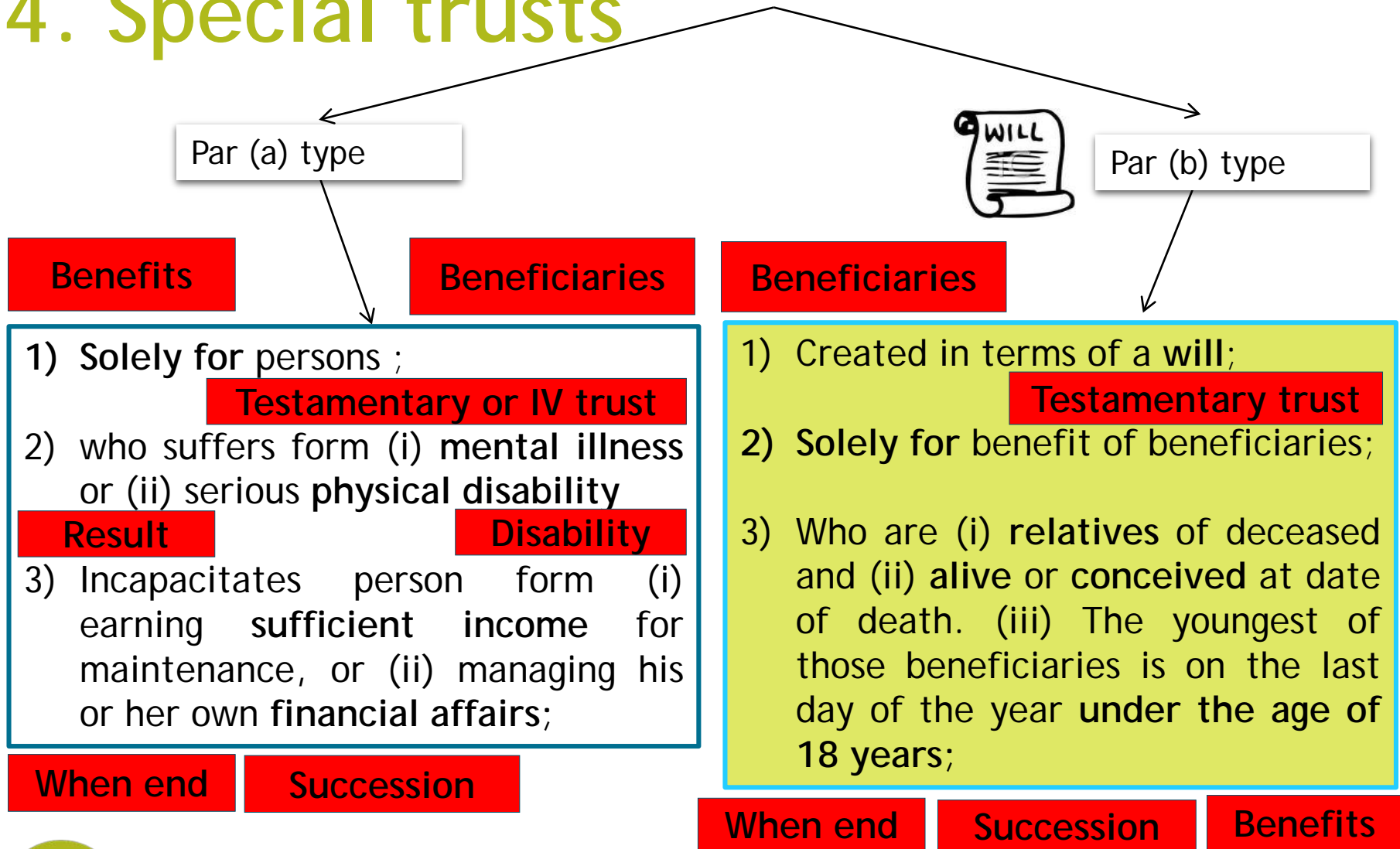


Master's Directive 2 of 2017

The trustee and trust beneficiaries of a testamentary trust may not amend the terms of a testamentary trust.



4. Special trusts



4. Special trusts ... continue

➤ What about vesting?

- A special trust as defined can be a discretionary trust, a vesting trust or a bewind trust

➤ Is this trust really beneficial from a tax perspective?

- Yes - only if the beneficiaries are clothed with contingent rights

➤ Binding Private Ruling 306 - 28 June 2018

- This ruling determines the donations tax consequence of a cash transfer made to a special trust.
- The applicant: A resident adult suffering from a debilitating malady
- Trust: A discretionary inter vivos trust created by the applicant and registered as a special trust



4. Special trusts ... continue

- The applicant suffers from an early onset of dementia, but is currently still lucid and has the capacity to contract.
- The applicant will transfer an amount to the trust in order to provide for her future upkeep and wellbeing.
- This amount does not represent the applicant's entire estate.
- The trust provides for primary and secondary beneficiaries. The applicant is the primary beneficiary, and her descendants are the secondary beneficiaries.
- Both the primary and the secondary beneficiaries are contingent beneficiaries as their rights to receive income or assets are subject to the exercise of the trustees' discretion.
- The trustees may only exercise their discretion in respect of the secondary beneficiaries on the passing of the primary beneficiary.
- Purpose of trust - take care of the applicant when she becomes debilitated by her medical condition, by providing for her care and maintenance.

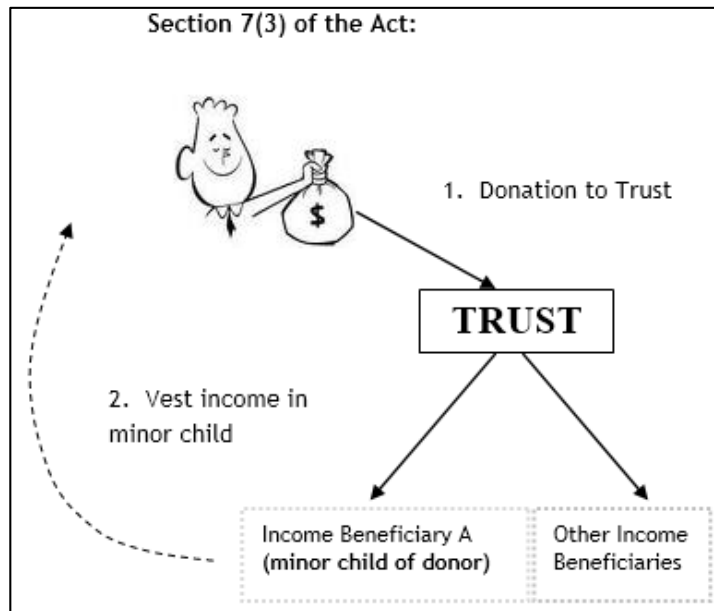
Ruling

The amount to be contributed by the applicant will not constitute a donation and, as a result, no donations tax will be levied.



5. From a tax perspective - important differences between testamentary and *inter vivos* trusts

- If transfer to trust is a bequest then the FUNDER / DONOR is not alive anymore. Then no applicability of section 7



Result: Income accruing to beneficiary A deemed to be the income of the donor



5. From a tax perspective - important differences between testamentary and *inter vivos* trusts

- Transfer Duty: Distributions to Beneficiaries of a T Trust versus a IV trust - section 9(4)(b) of the Transfer Duty Act

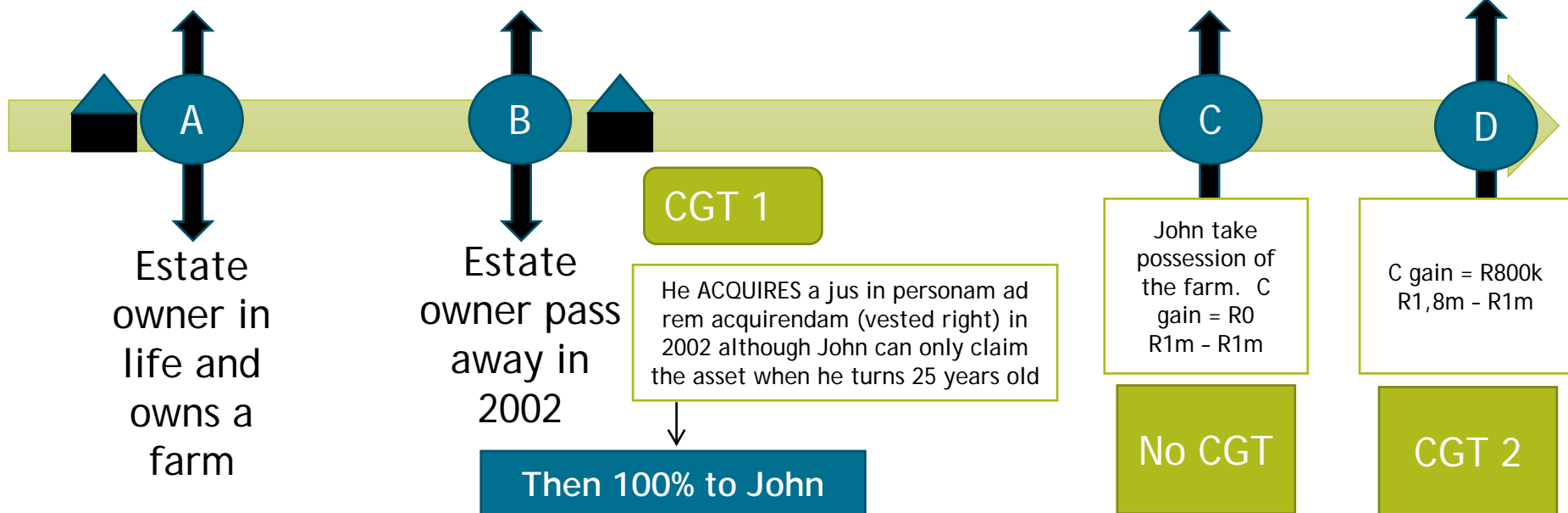


VESTING vs TRANSFER OF AN IMMOVABLE PROPERTY

John (20 years) inherits the farm but can only take possession of the farm when he reaches the age of 25 years. Current value R1m = John's base cost

John reaches 25 years and he claims the farm. Value then R1,2m.

John sells the farm for R1,8m



VESTING vs TRANSFER OF AN IMMOVABLE PROPERTY

8th Schedule to the ITA

Par13. Time of disposal.—(1) The time of disposal of an asset by means of—

- (a) a change of ownership effected or to be effected from one person to another because of an event, act, forbearance or by operation of law is, in the case of—
 - (iiA) the distribution of an asset of a trust by a trustee to a beneficiary to the extent that the beneficiary has a vested interest in the asset, the date on which the interest vests.'

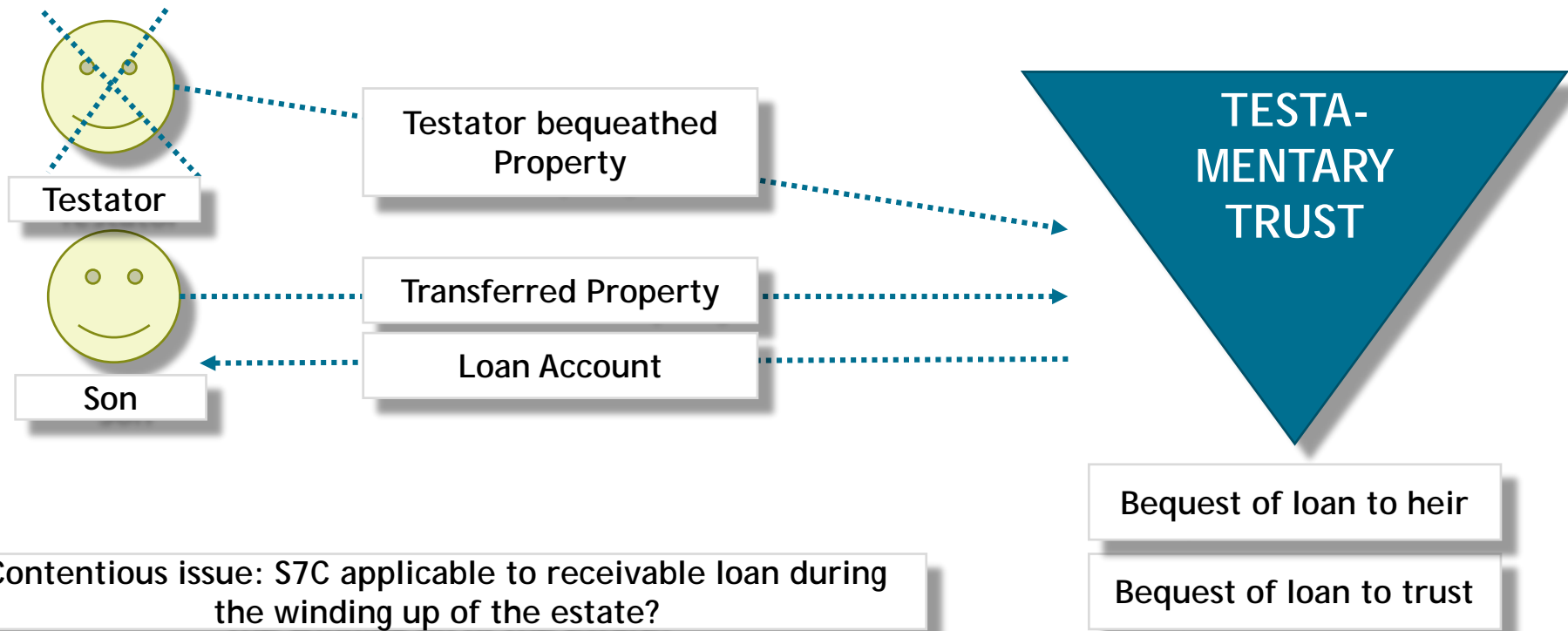
The effect of the above provision is to take the time of disposal of the asset by the trust back to the time of vesting of that asset.



6. Section 7C considerations

Not levying interest

Deemed donation



7. Other Practical Aspects

- Can a testamentary trust be nominated as beneficiary on a policy?
- Estate Duty Saving when trust pays for the policy as owner
- Can retirement fund proceeds be transferred to a trust?
- Appointment of trustees - JM 21 form
- Very important:
 - Bequeath assets to trust
 - Bequeath loan accounts owing from trust to trust





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