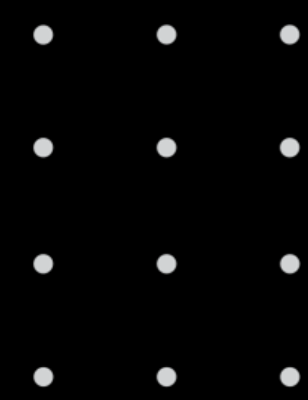


# THE PROTECTOR – ADVANCED ASSET PROTECTION



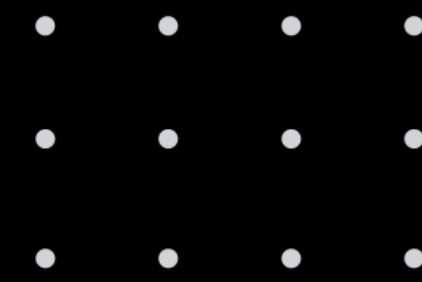
with Grant Abbott



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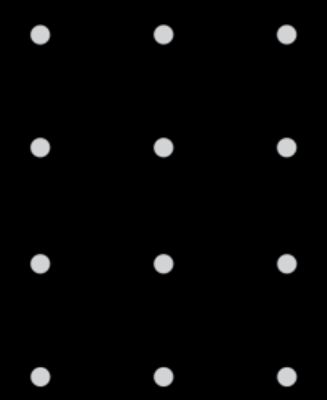
“ Building Family Wealth takes time, hard graft and a lot of blood, sweat and tears. But it can be torn down so easily in expensive litigation, legal challenges plus regulatory and economic threats. It is not unheard of that a \$1M estate is challenged and when it does expect upward of \$200,000 in legal fees and years of litigation. The bigger the estate the larger the fees. And anyone with a business that has a little risk, from a doctor advising patients to a property developer with their latest project to a hairdresser who may have spread Covid to clients, at any time they may be exposed to lengthy and costly lawsuits. ”





# OUR CLIENTS ARE EXPOSED EVERY WHICH WAY

They need our help! NOW!





- Australia has the highest per capita number of lawyers in the world
- Lawyers and Courts have adapted to a post Covid world
- Negligence, occupational health and safety, ASIC, ATO, Fair Work, building accident – who isn't exposed to a damages or loss claim?
- But luckily litigation takes time which is crucial to run out the four year section 120 clock for undervalued transactions



# **BANKRUPTCY** **EXPOSED**

- Assets, investments, companies, trusts and even super funds are exposed where a key person, director or trustee is in the throes of insolvency or bankruptcy
- Section 120 of the BA 1961 provides that the Trustee in Bankruptcy can apply to the Court to void an undervalued transaction
- The key issue is the solvency of the person at the time of the undervalued transaction
- Will a trustee in bankruptcy take action three years out?
- The best time to do it is now!!! And your clients know it. The big question is how are you protected personally – and your family!!!!



# INCAPACITY EXPOSED

- Covid should have burnt deep into the mind of everyone that hospitalisation can be moments away
- Where a person suffers from mental incapacity then they cannot be a trustee or director of a company.
- How many of the 2.5 million companies do not have an “incapacity plan” in place? Especially for sole directors for trading, bucket, discretionary trust or SMSF trustee companies.
- What happens to the shares and assets of incapacitated clients – is there an enduring power of attorney to even deal with banks and governments
- The best time to do it is yesterday!!! And do it for all family members over age 18.





**ESTATE  
PLANNING  
EXPOSED**

- On death most people who have a Will would expect that all of their personal assets, including home, investments and superannuation would be paid out in accordance with their Will.  
*Wrong!!!*
- Every State in Australia allows a disaffected person (someone who did not benefit from a Will or get what they believe they deserved) to claim against an estate. Any claim overrides the provisions of a Will.
- **A Real Case in Point:** A family provision claim on estate assets may result in long and costly court proceedings. In Western Australia in 2018 the judge of the WA Supreme Court castigated lawyers who had taken five years and \$500,000 in legal fees to challenge a \$600,000 estate consisting only of the deceased's home.
- Is traditional estate planning worth it if there is even a 5% or greater chance of a challenge?

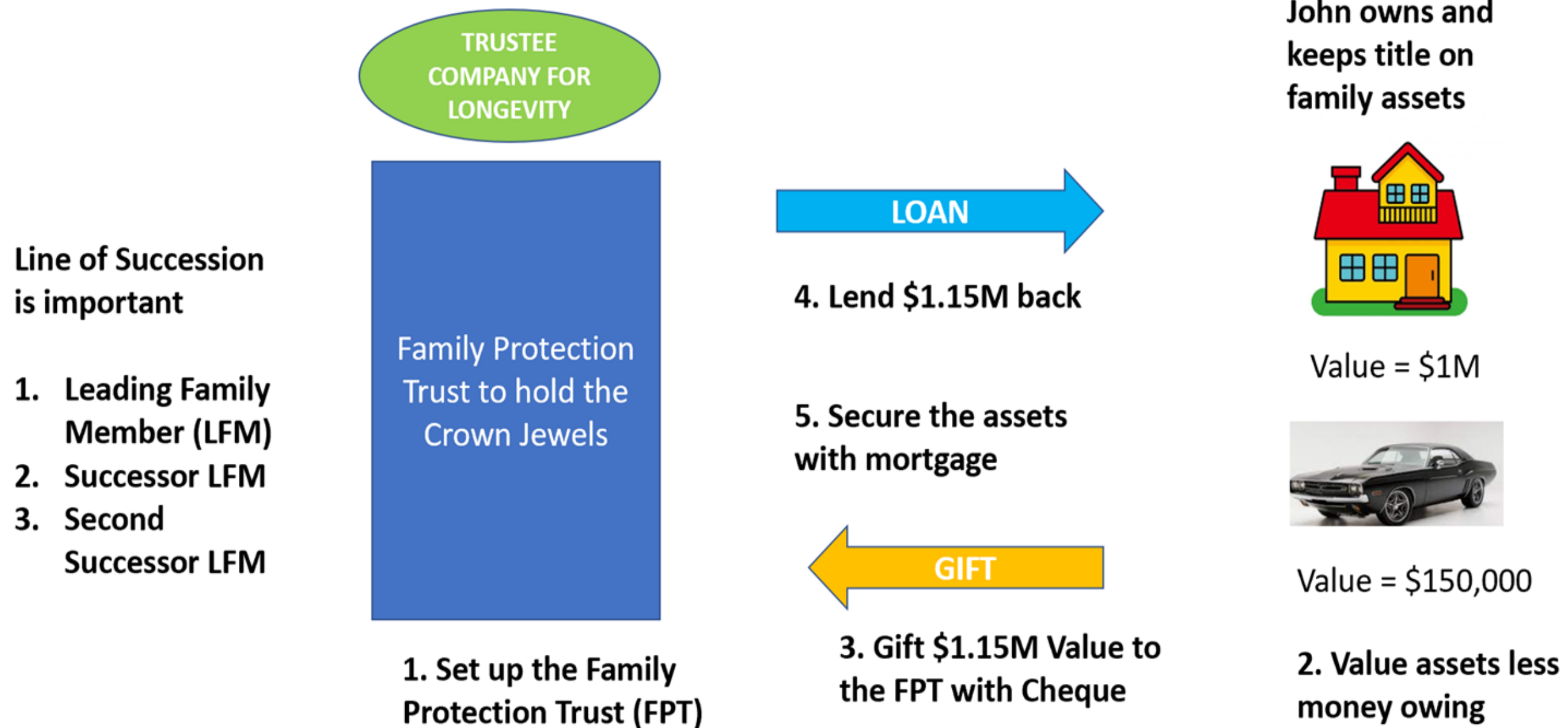


# FAMILY LAW EXPOSED

- Most people are not aware that a simple de-facto relationship that has lasted two years means both parties of the relationship, in the event of a relationship breakdown, have full recourse against the other's property under the Family Law Act in Australia
- Matrimonial property includes all assets, businesses, shares and superannuation
- Discretionary Trusts will be matrimonial property where the party to the marriage controls the trust
- Second or third generation beneficiaries that do not control the trust will not have trust matrimonial property but it will be a possible financial resource



# DIAGRAM ONE: PROTECTING FAMILY WEALTH WITH THE PROTECTOR





**STEP ONE –  
LEADING MEMBER  
DISCRETIONARY  
TRUST**

- Start with the Leading Member Appointor then build a line of succession three to four deep
- Joint LMAs will see the LMA transfer to the joint in the event that one of the LMAs dies, becomes incapacitated, is litigated against, subject to a bankruptcy claim, family law separation – is it best joint or cover two lines of succession. The problem is with a fight between joint LMAs – the whole system can break down
- LMAs are the principal beneficiary as is their bloodline and entities associated with them plus former LMAs are included
- Special purpose LM trustee company where shares held by LMA with those shares cancelled on termination of appointment and new shares issued to incoming LMA



**STEP TWO –  
VALUE  
VULNERABLE  
EXPOSED ASSETS**

- **THE PROTECTOR DOES NOT INVOLVE A TRANSFER OF ASSETS!**
- No asset transfer has three benefits:
  - No capital gains tax
  - No stamp duty
  - Keep tax profile
- Need to work out what assets are going to be secured and the net value (market value less liability) for each asset and aggregated value
- It is important to get market value – not at this step but for the later Call Option to show the option is at market value



**STEP THREE –  
GIFT THE NET  
VALUE TO THE  
LEADING MEMBER  
TRUST**

- **THE PROTECTOR DOES NOT INVOLVE A TRANSFER OF ASSETS!**
- The Deed of Gift is important, and the Abbott & Mourly Deed is strong and used for large charitable organisations
- You can gift:
  - Cash
  - Shares
  - Property
  - Unpaid present entitlements
- So, once it is gifted there is no way back – a deed of rectification will not work against the Deed of Gift
- The Gift will increase the underlying equity in the Trust but to gift you need a Promissory Note to evidence value

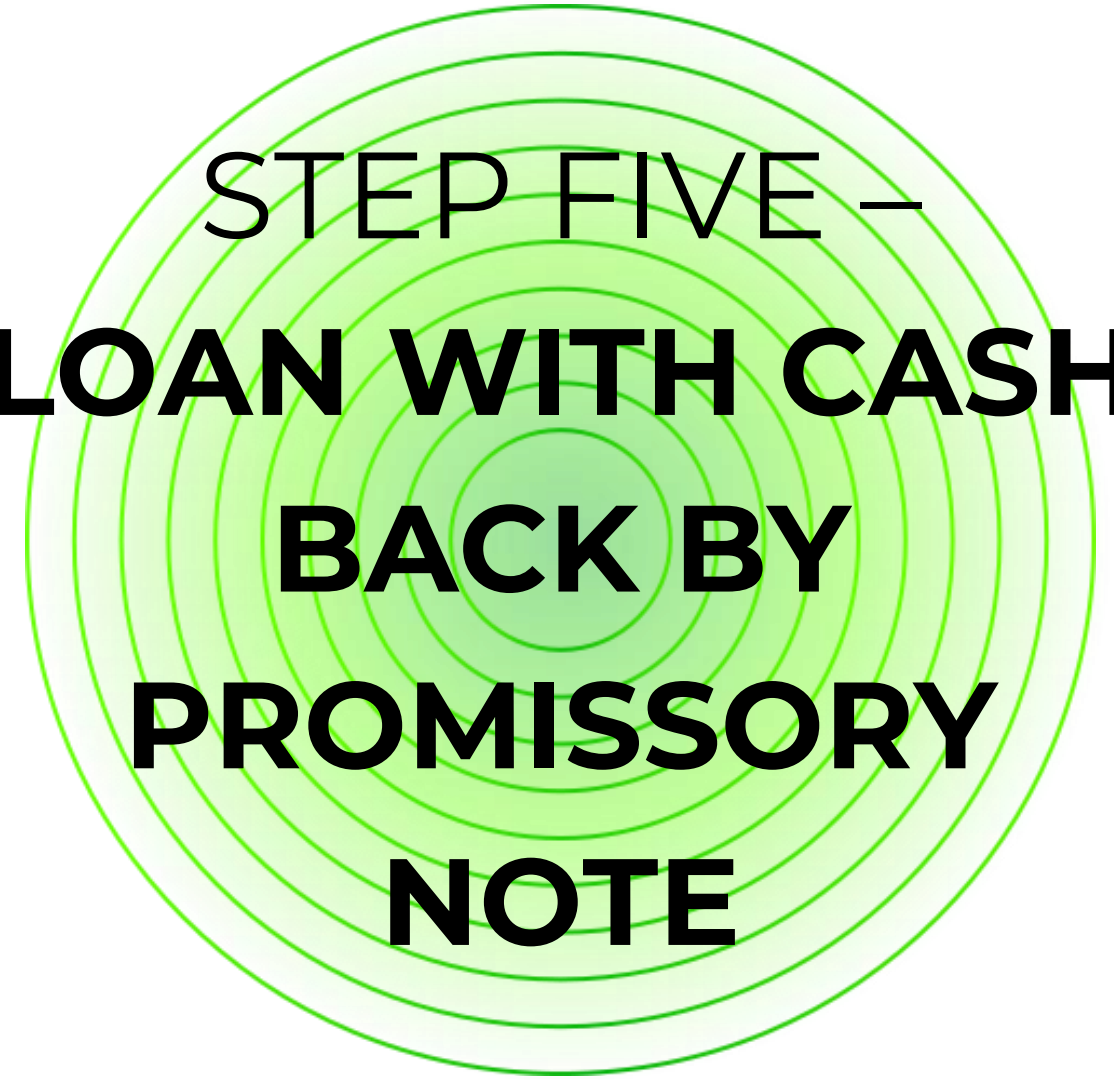
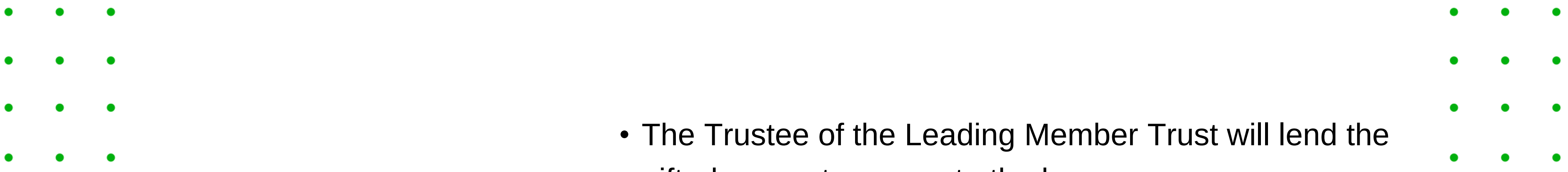




**STEP FOUR –  
GIFTING CASH WITH  
“ON DEMAND”  
PROMISSORY NOTE**

- The Bills of Exchange Act 1909 enacts laws in relation to Promissory Notes which were primarily used for interstate commerce prior to bank cheques
- Section 89: Promissory note defined:  
*(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to or to the order of a specified person, or to bearer.*
- Well accepted by Regulators – see the Commissioner of Taxations views particularly in relation to what is a contribution and what is a loan in terms of a Promissory Note. On Demand is important






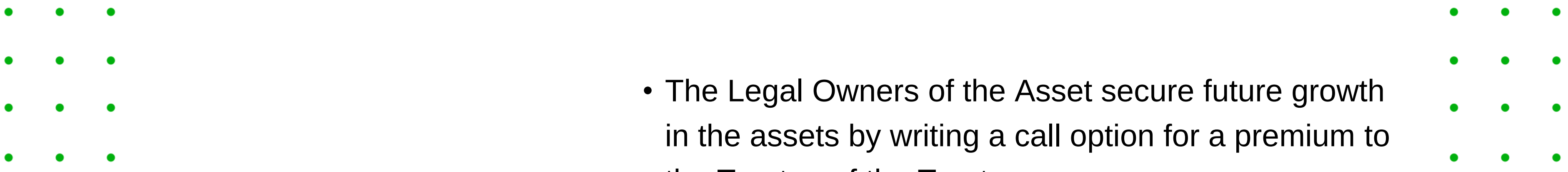
**STEP FIVE –  
LOAN WITH CASH  
BACK BY  
PROMISSORY  
NOTE**

- The Trustee of the Leading Member Trust will lend the gifted amount or more to the borrowers
- The terms and conditions are:
  - *The loan ceases at a set term or death of one or more of the gifters*
  - *The interest rate can be market value or lower depending on what cash flow is required*
  - *What is being loaned? The capital from the Promissory Note which is effected by an endorsement which is a return of the PN to the issuers, thereby cancelling the obligations on the holder as the holder is the holder*
  - *Is the loan to be secured by mortgage and/or personal guarantee from the borrowers*



STEP SIX –  
**SECURING THE  
LOAN AGAINST  
PROPERTY**

- Once the Protector is in place the next step is to secure the assets for the benefit of the Lender – the Trustee of the Trust
- *Eventum Optimum are LightYear Docs partners in terms of securing title*
- For real property this is to be secured using a registered mortgage
- For personal property, which is anything except real property, the asset is secured under the PPSR register



**STEP SEVEN –  
LEGAL TITLE  
HOLDERS WRITE A  
CALL OPTION  
OVER THE ASSET**

- The Legal Owners of the Asset secure future growth in the assets by writing a call option for a premium to the Trustee of the Trust
- *The Call Option enables the Trustee to acquire the assets for a set fee – generally the market value of the asset at the time the net value is gifted to the Trust*
- For the legal title holder any increase in value is not their increase but flows to the Option holder
- Terms and conditions of the Option:
  - Is it revocable or irrevocable
  - What is the end date and extension payments
  - What is the premium fee for the option
  - What is the exercise price



# CALL OPTION A BRAINWAVE

- *The Call Option enables the Trustee to acquire the assets for a set fee – generally the market value of the asset at the time the net value is gifted to the Trust*
- If the Legal Owners of the Asset get into legal or any other trouble the Trustee calls in the option - putting the Trustee in power and control compared to the original Protectors
- Just watch on the call:
  - stamp duty
  - capital gains tax
  - but weigh up against costs in litigation





# THE PROTECTOR Q & A SESSION

- This version of The Protector works with joint assets but for separate assets you will need to do separate mortgage deeds
- Let's cover what happens:
  - On death of the borrower
  - On divorce of the borrower
  - On a legal action being taken against the borrower
  - When a trustee in bankruptcy is appointed
- FAQ and tutorial videos available on the LightYear Docs Support page, by emailing [support@lightyardocs.com.au](mailto:support@lightyardocs.com.au) or by asking the live on-site chat Bot.





# THE PROTECTOR CLIENT COMMS

- The Guide to Family Wealth Protection is in draft for legal review then formatting for advisers to use with their clients seeking to protect family wealth
- I will be producing a video on The Protector which will highlight where clients may be exposed and how The Protector works generally
- If the client matter is significant feel free to engage Abbott & Mourly for a two zoom meeting process which will include restructuring existing trusts and SMSFs, building Wills, EPOAs, testamentary trusts, The Protector and Family Protection Trust. First zoom is no cost as it is a data collection process.



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