

Death and SMSFs Preparation

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Overview

- Understand legislative requirement for an SMSF.
- Who may be a trustee.
- What happens when a member loses capacity.
- The role of the Enduring Power of Attorney.
- What if there is no Enduring Power of Attorney.
- Why a corporate trustee.
- Death Benefit nominations.
- Reversionary pensions.
- Asset protection against tax benefits.



Legislative Requirements for an SMSF

- * Sect 17A Superannuation Industry (Supervision) Act 1993
 - No more than 6 members
 - Each member is a trustee or a director
 - Each trustee or director is a member (excepting single member funds)
- * Sect 19 deals with being a Regulated Superannuation Fund
- * Sect 42A SMSF must be a resident regulated fund



Who may be a Trustee

* s17A(1) SIS requires each member to be a trustee or a director of corporate trustee.

* s17A(2) SIS provides for single member funds that:

- Where trustees are individuals the member is 1 of 2 trustees, with a 2nd trustee that is relative of the member or the member is not an employee of the other trustee.

- Where the trustee is a corporate entity the member may be a sole director, or a second director must be a relative or the member or member is not an employee of other.



What happens when a member loses capacity

- * Losing capacity temporarily and/or permanently.
- * Brain injury, mental illness, dementia, etc.

- * Trust Deed will generally prevent a trustee who loses capacity from continuing as trustee.
- * Company Constitution will generally prevent a person from holding a role as director if they lose capacity.

- * Can SMSF be compliant if member is not a trustee or a director? Sect 17A(1) and (2) SIS say no.



The role of the Enduring Power of Attorney

* Sect 17A(3)(b) SIS provides a solution.

- The Legal Personal Representative of a member of the fund is a trustee of the fund or a director of the corporate trustee in place of the member during the time the member:

- i) under a legal disability; or
- ii) the LPR has an enduring power of attorney.

* Definition of LPR includes and executor, administrator or trustee of the estate of a person under a legal disability

What if no Enduring Power of Attorney

- * Definition of Legal Personal Representative includes the trustee of the estate of a person under a legal disability.
- * For NSW this means application to the Guardianship Tribunal for a Financial Management Order. This involves:
 - Cost and time involved in making the application;
 - Risk of disputes between family in regards application (consider issues around blended families).
 - Risk of having NSW Trustee appointed in front of family.
- * Vital to plan and ensure POA is in place for each member.



Why a Corporate Trustee

- * All assets of the SMSF are held in the name of the trustee or trustees.
- * If individual trustees then on the death or incapacity of a trustee who is then replaced by attorney or executor it will be required to arrange transfer of all assets to the new trustees – bank accounts, investments, property, etc.
- * When corporate trustee is in place then it is merely a matters of replacing the director in the company. There is no requirement to attend on transfer of assets to new trustees.



Death Benefit Nominations

- * You can have Binding or Non-Binding nominations.
- * Binding nominations require the Trustee to pay funds as directed.
- * Non-Binding leave the Trustee with discretion as to who to pay.

- * Is the binding nomination a lapsing or a non-lapsing notice.
- * If fund set up to comply with requirements of Reg 6.17(A)(7) of the SIS Regulations then nomination will lapse after 3 years.
- * You can have non-lapsing binding nominations.
- * Check the trust deed.

- * Can an attorney make, extend or renew a binding death benefit nomination? Consider *Re Narumon Pty Ltd*.

Reversionary Pensions

- * A reversionary pension applies when a member in pension phase passes away the income stream (pension) they were receiving reverts to another dependent member.
- * Can provide great tax saving and financial planning goals.
- * Need to consider:
 - Does it conflict with a BDBN?
 - Does the Deed give preference to one or the other if conflict?
 - Does it provide the asset protection a family desires?
 - Will it cause conflict in family?
 - What about blended families. Anything for children from prior?



Asset Protection against tax benefits

- * Tax benefits are for the realm of the accountants and the financial planner.
- * Also to consider the contribution caps and Centrelink issues.
- * Issues to consider around asset protection include:
 - Surviving partner remarrying. Could better protection of the fund be achieved by hold funds in a testamentary trust?
 - Blended families and does the member desire their super to go to their children from first relationship?
 - Blended families and if reversionary pension to spouse will this mean all funds end of with spouses children and not members children?



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