

Death and SMSFs After the Event

Kevin O'Brien

Director of Landmark Legal

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Overview

- Understand legislative requirement for an SMSF.
- Who may be a trustee.
- What happens when a member dies.
- Death Benefit Nominations.
- Who can funds be paid to.
- Who can replace a member as trustee.
- Cases where trustee acting unreasonably.
- Binding v Non-Binding.



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 dies

- * On death a member can no longer be a trustee. Trust Deed will clearly note this position.
- * Company Constitution and Corporations Act provide that on death of a Director they cease to be a Director.
- * Can SMSF be compliant if member is not a trustee or a director? Sect 17A(1) and (2) SIS say no.
- * How is another trustee appointed / who has that power.
- * Can you Will nominate such a trustee?



Death Benefit Nominations

* You can have:

- a. No nomination or an invalid nomination;
- b. Pension (reversionary) beneficiary;
- c. Non-Binding Nomination;
- d. Binding (lapsing) nomination;
- e. Binding non-lapsing nomination.

* Section 59 of the SIS Act and regulation 6.17A of the SIS Regs do not apply to SMSF's.



Who can funds be paid to

Person	Lump Sum Beneficiary	Pension Beneficiary	Tax on Lump Sum
Putative spouse	Yes	Yes	No
De facto spouse	Yes	Yes	No
Same sex spouse	Yes	Yes	No
Child – under 18	Yes	Yes*	No
Child – 18 to 25, dependant	Yes	Yes*	No
Child – 18 to 25, not dependant	Yes	No	Yes
Child – over 25	Yes	No	Yes
Child under significant disability	Yes	Yes	No
Interdependent relationship	Yes	Yes	No
Legal Personal Representative	Yes	No	Possible



Replacing member as trustee

* Fund has 6 months from date of death to arrange for replacement trustee.

* For personal trustee funds where there where 2 trustees then a sole trustee cannot remain. They can either:

1. add a further trustee to make fund compliant; or
2. Consideration appointing a corporate trustee, where a single director may continue to act.

* For corporate trustee funds the sole member may continue as sole director;

* Deceased can make direction under Will as to who is to replace them as trustee, often the executor.



Cases where trustee unreasonable

* *Katz v Grossman*

- Couple where individual trustees
- Daughter and son who were not members
- One trustee died and survivor appointed daughter co-trustee
- Surviving spouse then passed away
- Daughter appointed her husband co-trustee
- Trustees paid entire benefit to daughter, leaving son out
- Son contested the decision in court and lost
- Court held trustee had discretion to pay all benefit to daughter.

Could appointing a corporate trustee on death of first trustee have prevented this scenario, as no need to appoint daughter as additional trustee?



Cases where trustee unreasonable

* *Re Marsella; Marsella v Wareham (No 2)*

- Wife and daughter from first marriage trustee of fund
- Wife sole member and married to second husband for over 30 years
- Had binding nomination to husband, which had lapsed
- No valid nomination, discretion to the trustee
- Daughter appointed her husband co-trustee
- Trustees paid all benefits to daughter – over \$460,000.00
- Claim brought by husband on grounds trustee did not act in good faith
- Court determined to set aside the trustees decision and remove trustees
- Trustees ignored husband of 32 years and deceased other son
- Held the trustees did not act on their duties in a proper manner



Binding v Non-Binding

- * Cases prior show the risk of non-binding nominations
- * The discretion left a surviving trustee may cause misuse?
- * It can however be effective to have a non-binding nomination:
 - Circumstances may have changed from time of nomination;
 - Now in retired phase as against accumulation
 - Is flexibility for a spouse a better option then be bound
- * Binding nomination will provide surety for a party
- * The trustee is bound to pay money as directed
- * What if there has been a life event that may have changed someone's decision
- * A Will may be revoked on marriage but not a binding DBN.



Contact Details

Kevin O'Brien - Solicitor Director of Landmark Legal

Your Family Wealth Firm

Unit c203, 215-217 Pacific Highway,

Charlestown NSW 2290

Zenith Tower Level 20

821 Pacific Hwy,

Chatswood NSW 2067

02 4943 3905

kevin@landmarklegal.com.au



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