



SUPERANNUATION

Managing control of an SMSF after the death of a member

SMSFs are a popular wealth accumulation vehicle for many families, and as a result of the attractive tax rates applying to superannuation funds, superannuation is often one of a person's major assets during the later part of their life, and even on their death (particularly if there is a life insurance policy owned inside the superannuation environment, which is payable on death).

Other articles on this website address the issue of the deceased controlling the payment of those superannuation benefits by way of binding death benefit nominations (BDBNs), but it must always be borne in mind that although a member of a SMSF may seek to ensure that his or her intentions as regarding payment of superannuation death benefit are complied with by:

- 1) leaving a valid BDBN (particularly in the case of the death of the second of the spouses who normally establish an SMSF during their working careers); or
- 2) embedding directions for the payment of the death benefit in the terms of the trust deed;

such steps will not of themselves provide complete security that the deceased's wishes will be given effect to.

Care must always be taken to ensure that the terms of the particular SMSF Trust Deed are understood and complied with, as failure to do so may invalidate a BDBN, or enable a challenge to the deceased's desired disposition of superannuation death benefits ('SDB's').

(This becomes particularly important in the case of blended families where the deceased has remarried or has children from different relationships, or there is dissension between members of the family.)

Superannuation death benefits do not form part of the estate of the deceased, unless made part of the estate by either:

- 1) a BDBN leaving the SDB's to the estate, or
- 2) the trustee of the SMSF distributing the benefits to the estate.

It is also possible to include an adjustment provision in the will directing executors to take account of benefits beneficiaries have already received from superannuation, but any benefits paid to the estate could become subject to family provision claims in which disappointed potential beneficiaries seek orders from the Court awarding them a share of the estate.

Control of SMSFs

SMSFs must have no more than 4 members.

If the fund has a single member the fund must have 2 natural person trustees (one of whom is the member) or a corporate trustee (in which case the member must be the sole director, or one of 2 directors.)

If there is more than one member either:

- each member must be a trustee, and each trustee must be a member, or
- if there is a corporate trustee, each director of the company must be a member of the fund and each member must be a director of the trustee.

SMSFs can be controlled at either:

- 1) the member level, or
- 2) the trustee level (particularly if the trustee of the SMSF is a company).

If a member has died or is under some legal incapacities, pursuant to S.17A(3) of SIS either:

- the legal personal representative ('LPR') of the deceased (the executor); or
- the attorney of the incapacitated member;

can be appointed as a trustee in place of the affected member within 6 months of the date of death.

In the case of a deceased member the LPR is able to represent the deceased member at the trustee level from the date of death until the date death benefits commence (only). Whilst (a single) attorney or LPR may become a trustee in place of a deceased member, such appointment is not automatic, and the trust deed must be reviewed to determine who has the power to appoint a replacement trustee on the member's death.

Often SMSF trust deeds will give the members the power to appoint trustees, but this depends on the terms of the particular trust deed.

The trustee appointment provisions in the trust deed and the nomination of executors under the member's will are vitally important.

It is beyond the scope of this article to do more than touch very lightly on just some of the issues to be considered, and specific advice should be sought on individual client's specific circumstances and needs.

From an estate planning perspective it is important that the deed is drafted so that membership of the member does not automatically cease on the member's death, and that the LPR or attorney of the member has the power to ensure that the deceased member's wishes are carried out.

Use of a corporate trustee of an SMSF permits considerably greater planning and security.

It is possible to ensure that votes are allocated to members based on their account balance or in some manner other than each member having equal voting rights.

It may be prudent to include a provision in the trust deed which prohibits any determination in respect of payment of death benefits until the deceased member's LPR is appointed as trustee, or a director of the trustee. The deed might be drafted so that each member has the ability to nominate a successor trustee (their LPR) upon their death, perhaps automatically (provided that the successor trustee has provided the necessary consent and declaration pursuant to SIS S.7).

Trust law requires a trustee's decision to be unanimous, so it is not technically correct for the trust deed to include provisions which permit the trustee representing the deceased member to have the only vote in respect of payment of death benefits, or for the trustee votes to be weighted in accordance with the account balance of the member, but it may be possible for there to be special voting rights in the case of a corporate trustee, because such powers could be implemented at the shareholder level, rather than at the trustee level.

For this and other reasons corporate trustees are to be preferred to individual trustees where there is a desire to exercise control over the decisions of the trustee of an SMSF, because it will be possible to tailor the terms of the constitution of a corporate trustee to include specific voting rights and other provisions which allow greater control over the payment of death benefits and the ongoing management of the fund.

Care will be required in ensuring that the constitution of a corporate trustee permits control over the fund and payment of death benefits.

It should also be borne in mind that it is possible to draft enduring powers of attorney (EPAs) so that there is a different financial attorney appointed for different matters (eg a member may wish to appoint a specific person as his or her attorney for the purposes of acting as director of the trustee, or as trustee of an SMSF).

Pension dependants

For persons who die after 1/7/07 it is only possible to pay or revert a superannuation benefits pension to a dependant of the member, and if the dependant is a child of the member then:

- 1) the child must be under the age of 18 years; or
- 2) if over 18 less than 25 years of age and financially dependant or disabled;

[an interesting anomaly may permit grandchildren of the deceased member to continue to receive pensions after their 25th birthday if they were financially dependent on the deceased member immediately prior to the member's death].

Warning

This is an extraordinarily complex and evolving area of law, which will only become more important as the proportion of assets held in superannuation funds increases, and with the transfer of wealth from baby boomers to subsequent generations.

Readers should seek expert advice from their solicitor and accountant in relation to their particular circumstances, and not rely upon comments above in their particular circumstances.

Ensuring SDB's pass to the desired (and most tax effective) beneficiaries forms just one part of a comprehensive estate plan.

The difference between properly understanding your options and planning to ensure that your (educated) intentions are given effect to, as opposed to relying on the accurate (but unhelpful) assurance that 'I'll be dead so it won't be my problem' may involve very significantly financial outcomes for loved ones.

Ken Waddington and other members of our office can assist you to endeavour to achieve optimal outcomes.

GARLAND WADDINGTON