

Xpress Super Information

What happens to your SMSF if something happens to you?

With many trustees citing ‘control’ as one of the primary reasons for establishing an SMSF, there are many SMSF trustees that have failed to address the ‘what if’ scenario.

It is important that you plan what would happen to your SMSF assets, and who would have control if you and your spouse were both incapacitated, or worse, no longer alive.

There are too many SMSF horror stories as money often brings out the worst behaviour in people. There are many fights and legal battles around money (particularly amongst siblings when their parents have passed), that could be avoided.

Let’s look at a common SMSF arrangement – Husband/Wife, as individual trustees. When one member dies, the fund needs to update its trusteeship within the appropriate timeframe. The law provides 6 months to implement the change, but any change must be in accordance with the trust deed. What happens if the fund decides to appoint another individual to replace the deceased?

This creates an administrative nightmare – as all fund assets need to be amended to reflect the new trustee name which is the last thing most people want to be dealing with at that point.

Next question – who is going to become the second trustee? Consider carefully when appointing a second person as trustee as the role entails the same legal rights and responsibilities as the trustee who is also a member in the fund.

Given this responsibility,

- Will appointing one family member over another create a point of conflict among siblings?
- What happens in this circumstance in blended families, or where parents and children do not actually get along?
- Who has ultimate say over who is appointed in this role if it’s something that hasn’t been discussed or addressed?
- Is appointing a corporate trustee structure which allows for a single member and one director a better option to avoid future conflict?

Case Study - a costly lesson

There’s a widely talked about case called Katz v Grossman (2005) NSWSC 934.

- The deceased left behind a son and a daughter, both were the executors of his estate.
- His Will provided that his estate assets would pass equally to the two children.



- The deceased had \$1 million in an SMSF.
- Following his death, the SMSF was controlled by his daughter who had previously been appointed trustee. She subsequently appointed her husband as second trustee.
- The trustee decided to pay the \$1 million to the daughter, and not to the estate which was the father’s intention.

The deceased's son (the brother) took the trustees to the Supreme Court to challenge the appointment of his sister and her husband as trustee of the fund, and as such the payment of the death benefit. The Court determined that despite the appointment of the husband being questionable the appointment of the deceased's daughter was ok and as such her capacity to determine how the benefit was paid was within the scope of her trustee responsibilities. This case highlights the importance of considering:

- Who control passes to in the event of death; and
- The importance of considering how a binding death benefit nomination works in with a deceased's Will.

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How this could have been avoided

The deceased could have prevented the ensuing legal battle and subsequent relationship breakdown between his children by taking care of 3 simple things:

1. Making sure that he considered control of his SMSF in the event of him not being around, to prevent the angst and issues that faced his grieving family.
2. Amending the Fund's Trust Deed, so that his Legal Personal Representative could be appointed as the replacement Trustee of the SMSF upon his death;
3. Preparing a binding death benefit nomination that either nominated his children to receive equal share of his superannuation OR that his benefit be paid to his Legal Personal Representative which would direct the benefit to his estate.

Death is not the only time disputes can arise

As SMSF members age, there are occasions where due to ill health, a member can no longer fulfil their duties as an SMSF Trustee. In this case, the trustee would need to appoint a 'power of attorney' to fulfil the trustee role.

Given this responsibility, the same factors already outlined, need to be considered.

Trustee Tip

Take control of your fund affairs and be prepared for the inevitable. All of these issues can be avoided with proper planning. The investment spent up front to ensure your structure is set up properly may result in huge savings in the future.

We can help you be prepared

The ATO has found that a significant proportion of SMSF Trustees have yet to prepare for situations such as control of fund, incapacity and death.

Our parent company SuperGuardian can facilitate a 'control of fund' strategic review and provide a summary report with our recommendation.

As part of our strategic review we:

- Discuss your structure and future intentions;
- Review the SMSF trust deed;
- Review the company constitution;
- Consider power of attorney documentation and Legal Personal Representatives;

Summary

For further information on this topic, or to discuss your specific situation, please call us on 1300 216 890.

This advice has been prepared without taking into account your objectives, financial situation or needs and because of this you should, before acting on the advice, consider the appropriateness of the advice having regard to your objectives, financial situation and needs.

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