



June 2008

Estate Planning & SMSFs: managing the pitfalls

● Managing superannuation death benefits...

Clients with Self-Managed Superannuation Funds (SMSFs) need special attention when it comes to their estate planning needs. To help you with this we have identified some of the key questions you need to consider for each client as part of ensuring they have the right solutions in place to meet their estate planning needs....

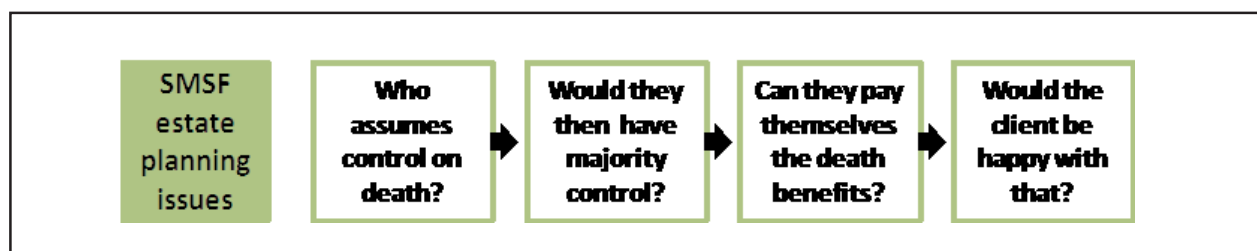
1. How much is currently in the SMSF? How does this compare to the rest of their assets? It's important to get a view of the client's total asset portfolio value. What you can do is help the client understand what is likely to happen to their superannuation if they die and what their preferred beneficiaries are likely to receive in certain circumstances. Once they know that, they can take action to adjust their estate plan if required.

2. To whom would the client like to leave their super death benefits? The SIS Act defines who this can be ie a dependant which includes a spouse, any child or any person with whom they had an interdependency relationship or their legal personal representative (executor).

3. Is this the optimal distribution from a tax perspective? Whilst the SIS Act defines who can receive the death benefits, the Income Tax Act will impact on the tax payable by the ultimate beneficiaries. Where possible the superannuation should be directed to financial dependants and other non-superannuation estate assets should be directed to non-financial dependants. This is the reason for the question above in (1) i.e. if the estate distribution needs to be adjusted so that it accords with the wishes of the Willmaker, there will need to be adequate funds in the non-superannuation estate assets to enable that to occur. It also assumes the executor has the power to adjust the estate payments to take the superannuation payments into account when distributing assets from the estate.

4. What happens to control of the SMSF when the Willmaker dies? Their legal personal representative (executor) assumes their role as trustee (or as director if they have a corporate trustee).

5. Will their executor then have control or majority control over the SMSF? It's important to understand the 'what if' scenarios in relation to control of a SMSF. For example if a husband and wife were the only members and the husband died, assuming the wife was his executor, she would then have complete control of the SMSF. Similarly, if the husband, wife and a child are all members and the wife was sole executor, she would take over her husband's role and would assume majority control of the fund. However if it was just husband and wife who were the members and they both died, the question is who then takes over? In many cases it is often the eldest child who has been nominated as executor (assuming they are adults).



6. Can the executor pay themselves the death benefits? They can if they are defined as a dependant under the SIS Act and there is no binding death nomination in place directing it elsewhere.

7. Does the client therefore want their executor to be in control of their super? In the above scenarios, let's say the wife is executor and takes over control of the fund. As she is a dependant she could then pay herself the death benefits even if her husband had other financial dependants eg children from a prior relationship. If this is what the husband wants there is no problem, however if it's not, it's important that he understands this is what could happen.

Similarly if the client is concerned that in the event that both he and his wife die, that one of their children will take over control of the SMSF in their role as executor. As a dependant under the SIS Act, they could legitimately pay themselves the entire death benefits even if they have siblings [see Katz v Grossman 2005]. If the client is at all concerned in this instance, they have a couple of options.

- a. They can appoint co-executors in the event they are both deceased. For example if they have three children they can all be co-executors.
- b. They can have a binding death nomination put in place. In many circumstances this would ideally direct the death benefits to the estate to ensure the beneficiaries received the tax benefits plus the advantages of testamentary trusts. However...

8. Is it always a good idea to put a binding death nomination in place to take away the discretion of the executor? It is certainly a solution if the client is concerned about who could receive the funds. However a caution is required - binding death nominations should not be automatically implemented. For example, it may be best for a beneficiary to receive a child

allocated pension or a reversionary pension outside a Will whilst for some, receiving the death benefits via a Will with testamentary trusts could be more appropriate. Each client's circumstances need to be considered before putting a binding death nomination in place.

9. One more thing... Power of Attorney and SMSFs... Just as it's essential to consider who is executor and therefore who will take over control of the death benefits, it is just as important to ensure that the client understands that the person to whom they give their enduring (financial) Power of Attorney, would also take over their role as trustee of the SMSF whilst they are incapacitated.

Note the Power of Attorney no longer applies once the client (Donor) has died. The executor takes over managing the client's affairs.

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