SMSF ASSOCIATION

Technical Summit 2022

DEEP DIVE 4

Charting a course through unpredictable seas

SMSFs and holistic estate planning – some key lessons

Speaker
Matthew Burgess

Title
Director

Organisation
View Legal

Charting a course through unpredictable seas

Introduction

In light of ongoing changes to the taxation regime and the expanding wealth of Australia's aging population, there has for many years been a growing need for superannuation related estate planning to utilise appropriate structuring.
With the post baby boomer intergenerational wealth transfer wave gathering pace, the issues with superannuation related estate planning are becoming increasingly important.
This white paper explores 12 of the most important points in the area - with a particular focus on issues related with incapacity.
All content is sourced from View Legal's weekly blog (see http://blog.viewlegal.com.au/).

Powers of attorney – statutory v common law documents

Following previous View posts a question has been raised about the need to comply with the state-based legislation in each jurisdiction when creating a general power of attorney, as opposed to an enduring power of attorney.

Broadly the position in relation to general powers of attorney is as follows:

1. Each state has legislation setting out a statutory regime for making a general power of attorney;
2. In addition to this statutory regime, there is at common law the right to make a power of attorney or otherwise delegate the rights of a principal to an attorney;
3. Assuming the document creating the attorney appointment is properly crafted, a common law appointment of attorney will generally have more flexibility than a statutory document (which will often be in a standard pro-forma).

Enduring powers of attorney are not able to be made at common law and it is therefore necessary to rely on the statutory regime.

The reason that the common law does not support enduring powers of attorney is because a power of attorney terminates automatically when a principal loses legal capacity.

The common law treats a principal-agent relationship as a personal one. This means an agent has no authority to act on behalf of a principal if the principal themselves can no longer act.

Looking through a sole trustee appointing an attorney

Following recent posts about attorney appointment, it is important to remember that a sole individual trustee of a trust can appoint their attorney/s under an enduring power of attorney to act on their behalf if they are unable to carry out their duties as trustee of the trust.

This approach is subject to the trust deed for the trust allowing this outcome.

An example of the relevant clause a trust deed should contain is as follows:

“The Trustee may authorise any person to act as its attorney to perform any act or exercise any discretion within the Trustee’s power including the power to appoint in turn its own agent, attorney or delegate.

The appointment may be in respect of more than one delegate or severally and may include provisions to protect those dealing with the agent, attorney or delegate.”

An example provision that should be added to the enduring power of attorney is as follows:

“Whereas I am currently the sole trustee of ‘[#insert] Trust’ a trust established pursuant to the Deed dated [#insert], pursuant to the Trusts Act [#insert details of the relevant stat based Act] and of every other power and law thereunto enabling in the event of my inability for any reason either temporarily or permanently to carry out my duties as sole trustee, or as one of a number of trustees of the [#insert], then this enduring power of attorney operates and allows the attorneys named in this document to act as my attorneys in respect of my trusteeship of the [#insert].”

Don’t wanna be the one? - Corporate trustee appointing an attorney

Recent posts have considered various aspects of attorney appointments.

Where a company is acting as trustee of a trust, it can appoint an attorney to act on its behalf as trustee of the trust, so long as the:

1. constitution for the company permits attorney appointments; and

2. the trust deed for the trust also contains a power for the trustee company to nominate an attorney.

The attorney appointment document should ideally specifically confirm that the:

(a) trustee company has power under the trust deed to appoint an attorney; and

(b) company, in its capacity as trustee for the trust, is appointing the attorney in accordance with the power.

EPAs and SMSFs – Bit like Generals and Majors

Following recent posts about attorney appointments it is important to also remember the special rules that apply in relation to self-managed superannuation funds (SMSF).

As is well understood, a superannuation fund is an SMSF where all members of the fund are trustees or directors of a corporate trustee – see sections 17A(1) and (2) of the Superannuation Industry (Supervision) Act 1993.

A super fund is also a complying SMSF where an EPA of a member is a trustee or a director for a corporate trustee in place of a member during any period that attorney has an enduring power of attorney (EPA) in respect of a member of the fund who themselves is unable to act (see section 17A(3)(b)(ii)).

In order for section 17A(3) to apply the person seeking to become a trustee or director needs to be appointed under an EPA of the member who cannot act. A general power of attorney will not be sufficient.

Practically, the only way in which an attorney under an EPA can act in the role as trustee for an SMSF is for the existing member to be removed from their role as trustee (or director of the corporate trustee as the case may be), and for the attorney under that member's EPA to be appointed as the new trustee or director in place of the member.

In addition to satisfying the statutory provisions, the trust deed for the SMSF must also be complied with.

Importantly, the attorney for the member performs their duties as a trustee of the SMSF, or a director of the corporate trustee of the SMSF, pursuant to their appointment to that position, rather than as an attorney or agent for the member.

The Tax Office has detailed their views in this area in Self-Managed Superannuation Funds Ruling SMSFR 2010/2. As usual, if you would like a copy of this ruling please let me know.

Latest BDBN case: YES! attorneys can make a BDBN, the details matter however ...

Re Narumon Pty Ltd [2018] QSC 185 is another binding death benefit nomination (BDBN) case that offers many lessons. As usual, if you would like a copy of the decision please contact me.

While the case allowed an enduring power of attorney (EPA) to be used to refresh a BDBN there are many aspects that meant this outcome is not necessarily the 'standard' position.

In a factual matrix where the member of an SMSF had made a lapsing BDBN and then lost capacity, the key BDBN related issues revolved around attempts to both 'refresh' the lapsed BDBN and create a new BDBN to remedy the member's error of purporting to nominate a non SIS dependant in the BDBN.

In summary the court confirmed:

1. The provisions of the trust deed for a superannuation fund are critical to the outcome, for industry or retail funds interest parties must contact the trustee to access the trust instrument.

2. The persons nominated under the BDBN need to be SIS dependants in order to be entitled to receive any part of a death benefit.

3. Depending on the deed it may be that the nomination of a non-dependant will not invalidate the balance of the BDBN.

4. It will be much easier (& hopefully avoid court) if the deed and the EPA grant the attorney the right to sign a BDBN.

5. Here there was no such power in the deed or the EPA, however the Power of Attorney legislation (in Queensland) was held to give the power to refresh the stale BDBN - this said, the Queensland legislation is unique in this regard and the position is likely different in other states.

6. It was noted it can be critical however that there is at least a conflict of interest clause in the EPA if the attorney is to be nominated under a new BDBN, which is not standard in government EPA forms in any states (including Queensland). Without a conflict of interest clause in an EPA it is likely impossible for anything other than a 'refreshing' of a BDBN to be done; and even this may not in fact be possible.

7. While the Superannuation Complaints Tribunal decision D07-08\030 [2007] SCTA 93 (in which it was also accepted that an enduring power of attorney can permit an attorney to complete and sign a BDBN) was mentioned, it was also noted that this decision did not provide any detailed discussion.

And, in case there has ever been any doubt; estate planning is more than a will. Here the SMSF death benefit was more than 95% of the deceased's entire wealth ...

SMSF trusteeship: Individual v Corporate ... every 1s a winner

The debate about whether to use a company or individuals as the trustee of a self-managed superannuation fund (SMSF) is longstanding and arguably ongoing.

Here are the 9 top reasons we see most specialist advisers recommending there is only one winner to the debate, namely - always use a corporate trustee.

1. Costs

Often, cost is used as the key reason for not having a corporate trustee.

The reality is that the company establishment cost and relatively nominal ongoing ASIC fees (particularly if a special purpose company is used, allowing access to the concessional ASIC annual fee for SMSF trustees) are significantly less than the costs associated with individual trustees.

This is especially stark in an estate planning context - the death of a director results in one ASIC form being lodged. The death of an individual trustee causes the need for a formal deed of change of trustee and then the subsequent notification to every asset register. This process must be repeated on the death (and likely also any capacity) of every trustee.

2. Limited Liability

The liability of a company is limited to its paid up capital - a properly structured SMSF special purpose trustee company will have an exposure of $2.

Individual trustees have unlimited liability, jointly and severally.

This can be particularly important if the SMSF owns real property given the inherent risks with that class of asset.

This reason on its own makes corporate trustees compelling.

3. Penalties

The administrative penalty regime generally applies at the trustee level.

Therefore, a single company trustee has one penalty imposed for each contravention.

An SMSF with (say) 3 individual trustees has triple the penalty - one imposed for each trustee.

4. Sole member funds

A sole member SMSF with a corporate trustee can have the one individual as both the sole member and the sole director.

A sole member SMSF with individual trustees must have 2 people appointed - thereby opening up many of the issues outlined above.

Furthermore, even if the SMSF starts as a 2-member fund, when one trustee dies it often forces the appointment of a corporate trustee – again, triggering many of the difficulties mentioned above. Arguably, the mantra 'begin with the end in mind' is relevant.

5. Administration ease

Title in the assets of the SMSF remains permanently in the name of the corporate trustee, regardless of how many changes to directorship (or indeed shareholding) are made.

In contrast, every admission or cessation of a member (not only on death) triggers the need to have a formal change of trusteeship - as well as the transfer of title to all assets of the SMSF.

6. Compliance

Generally, in terms of what the auditor (and ultimately the Tax Office) expects to see, the use of a special purpose corporate trustee more easily facilitates appropriate levels of record-keeping, overall governance and legislative compliance.

7. Perpetual existence

Companies have no ending date (unless specifically resolved to the contrary).

This fact is generally seen as allowing far greater certainty and ease of managing control of the SMSF as compared to individual trusteeship.

8. Control strategies

As a company acting as the trustee of an SMSF need only ensure all members are directors, there are a number of strategies available to otherwise regulate management and control of the company (and in turn the SMSF).

For example, there is complete autonomy on who the shareholders of the company are and how shareholder decisions are to be made.

The rights of the shares on issue can also be tailored to (for example) automatically end on the owners death or incapacity, ensuring control passes seamlessly and without the prospect of challenge under an estate plan.

9. Maximum numbers of trustees

The maximum number of individual trustees at law in most jurisdictions is 4.

SMSFs considering larger numbers of members following the introduction of the 6 member fund rules will need to have a company as trustee, as there are no similar limitations on the number of directors of a trustee company.

People are strange … When SMSF trustees disagree

Today's post considers the situation of where the trustees of a Self Managed Superannuation Fund (SMSF) cannot agree.

This situation arose in the New South Wales Supreme Court decision of Notaras v Notaras [2012] NSWSC 947.

In this case, two brothers were the trustees and members of a SMSF. Over time, one of the brothers (Brinos) made withdrawals from the SMSF, of which around $60,000 were alleged to be in excess of his entitlement.

Brinos' brother (Basil) had no knowledge of the withdrawals and thus had not provided consent.

Basil approached the court to seek an order that Brinos be removed as trustee of the SMSF due to his failure to act jointly and replaced with a corporate trustee (Bazport) of which Basil was the sole director and shareholder.

The court accepted Basil's arguments and appointed Bazport as the co-trustee in the place of Brinos leaving the SMSF with both an individual and corporate trustee.

The Court confirmed Basil would (as a result of the decision) need approval from the Tax Office for its failure to comply with the superannuation law requirement of all members of a SMSF also being trustees.

As usual, please contact me if you would like access to any of the content mentioned in this post.

A 101 tip on changing trustees

A regular theme in previous posts is how critical it is to ensure that the provisions of a trust instrument are followed precisely when taking steps in relation to the trust.

The SMSF related case of Moss Super Pty Ltd vs. Hayne [2008] VSC 158 is one example of this principle, in the context of a change of trusteeship.

In summary:

1. as is becoming increasingly common, there were issues around the rightful controller of the SMSF following the death of one of the members;
2. the surviving member purported to change the trusteeship of the SMSF, so that a company of which she was the sole shareholder and director would be appointed;
3. the trust deed set out the process by which a change of trusteeship could take place and specifically required the 'founder' to appoint any new trustee;
4. while the sole director of the new trustee company was also the founder, she did not in fact sign the change of trustee documentation in the capacity as founder;
5. in other words, while she signed as the sole director of the new trustee, there was no provision where she also signed under the founder role; and
6. critically, the court found that, as was the case here, legal structures are created where individuals had multiple roles to play, the requirements around those roles must be respected and complied with.

In many respects, the decision reflects a number of analogous situations in the context of family trusts including the case of re Cavill that has been featured previously.

Lost SMSF trust deeds – an (un) kool thing

As mentioned in previous posts, lost trust deeds can cause significant difficulties for trustees of family trusts.

In the context of SMSFs and other forms of fixed trusts with a narrow range of known beneficiaries (who can be proved via other evidence), a court application for adopting a new trust deed is generally seen as being unlikely to be necessary from a trust law perspective.

However the federal court decision in Kafataris v DCT [2008] FCA 1454 highlights that even for trusts with an ostensibly narrow range of potential 'beneficiaries' care must be taken.

In this case a husband and wife established separate SMSFs appointing themselves as sole members. They declared a property owned by them as property of their respective SMSFs.

In considering who the 'beneficiaries' of each SMSF were, it was held that upon construction of the SMSF deeds, the class of beneficiaries was broader than each single member. This was because the trust deed allowed the trustee to pay benefits to the member's dependants and even relatives (if there were no dependants, as defined under the superannuation legislation) of the member.

As such, the potential class of beneficiaries included 21 different people.

Best practice therefore dictates that each person who can enforce the due administration of the trust should be a party to and sign a deed of variation that seeks to implement a replacement for a lost trust deed.

Non-lapsing BDBNs ... there is no debate

For many years there was a level of debate about whether self managed superannuation funds (SMSFs) were permitted to offer binding death benefit nominations (BDBNs) and if so, whether any such BDBN would automatically lapse after 3 years.

A similar level of confusion has existed in relation to the form of a nomination, for example if witnesses are needed, how many should there be.

The Tax Office ultimately answered the question succinctly in SMSF Determination 2008/3, where they confirmed that section 59 of the Superannuation Industry (Supervision) Act 1993 and regulation 6.17A of the Superannuation Industry (Supervision) Regulations 1994 (SISR) do not apply to SMSFs.

This means that the governing rules of an SMSF may permit members to make death benefit nominations that are binding on the trustee, whether or not in circumstances that accord with the rules in regulation 6.17A of the SISR.

According to regulation 6.17A(7) of SISR, a BDBN regulated by that provision lapses -

1. at the end of the period of 3 years after the day it was first signed, or last confirmed or amended, by the member; or
2. if the governing rules of the fund fix a shorter period -- at the end of that period.

Similarly, the position in relation to non lapsing BDBNs for non-SMSFs (eg retail, industry, corporate and small APRA funds) has also been the subject of long standing debate.

The approach that appears generally accepted for non-SMSFs and BDBNs can be summarised as follows -

(a) 'standard' BDBNs are lapsing and will comply with section 59(1A) of SISA. This means they will also be regulated by regulation 6.17A (7) SISR (as set out above);

(b) it is possible however for non-lapsing BDBNs to be created under section 59(1)(a) of SISA. This section is not caught by regulation 6.17A (7) SISR and therefore any BDBN made pursuant to this section does not automatically lapse. Arguably the key aspects of ensuring the non-lapsing BDBN is in fact valid are that the trust deed for the fund must permit the approach and the trustee of the fund must consent to the nomination and the form it can be made in (for example, including the number of witnesses);

(c) in contrast, standard lapsing BDBNs do not require the consent of the trustee.

In this context the decision in Hill v Zuda Pty Ltd as trustee for Holly Superannuation Fund [2019] WASC 238 (and the subsequent related decision in Hill v Zuda Pty Ltd as trustee for The Holly Superannuation Fund [2020] WASC 89) is a useful cross reference.

In this case the key question the court considered was whether a purported BDBN was invalid due to the, alleged, noncompliance with regulation 6.17A.

The court was blunt in its conclusions that:

1. pursuant to section 59(1) of SIS, the conditions of regulation 6.17A do not apply to SMSFs, unless the terms of the constituent deed expressly provide to that effect.

2. the authorities all support the conclusion that regulation 6.17A has no application in relation to SMSFs.

3. there was therefore nothing to support a cause of action calling into question the validity of the BDBN on the basis that the trust deed for the SMSF failed to comply with regulation 6.17A.

The above conclusions were similarly, very bluntly, confirmed by the High Court in Hill v Zuda Pty Ltd [2022] HCA 21.

In this decision the High Court confirmed:

1. Regulation 6.17A has no application to an SMSF.

2. The fact that the requirements of regulation 6.17A concerning the giving of notice by a member of a regulated superannuation fund to the trustee of that fund do not apply to an SMSF is not surprising given that an SMSF is, by definition, a superannuation fund in which members of the fund are also trustees of the fund.

3. In this context, the giving of notice of the kind envisaged by regulation 6.17A would be at best an exercise in formality - and at worst redundant. In other words, the two purposes of regulation 6.17A – of enabling members to compel trustees to distribute death benefits in accordance with their wishes and ensuring that members have sufficient information – are inapt to administration of an SMSF.

4. The inferior Court of Appeal should have reached its conclusion (ie that 6.17A has no application to an SMSF) by construing the regulation for itself, rather than relying on a decision of a court it was not bound by.

For ease of reference the provisions of section 59 of SISA are set out in full below.

Section 59 SISA - Exercise of discretion by person other than trustee

(1) Subject to subsection (1A), the governing rules of a superannuation entity other than a self managed superannuation fund must not permit a discretion under those rules that is exercisable by a person other than a trustee of the entity to be exercised unless:

(a) those rules require the consent of the trustee, or the trustees, of the entity to the exercise of that discretion; or

(b) if the entity is an employer-sponsored fund:

> (i) the exercise of the discretion relates to the contributions that an employer-sponsor will, after the discretion is exercised, be required or permitted to pay to the fund; or
>
> (ii) the exercise of the discretion relates solely to a decision to terminate the fund; or
>
> (iii) the circumstances in which the discretion was exercised are covered by regulations made for the purposes of this subparagraph.

(1A) Despite subsection (1), the governing rules of a superannuation entity may, subject to a trustee of the entity complying with any conditions contained in the regulations, permit a member of the entity, by notice given to a trustee of the entity in accordance with the regulations, to require a trustee of the entity to provide any benefits in respect of the member on or after the member's death to a person or persons mentioned in the notice, being the legal personal representative or a dependant or dependants of the member.

(2) If the governing rules of a superannuation entity are inconsistent with subsection (1), that subsection prevails, and the governing rules are, to the extent of the inconsistency, invalid.

SMSFs and Trustee Incapacity: I don't know how + I don't know why

Generally, if a member of a self managed superannuation fund (SMSF) loses capacity, section 17A(3)(b) of the Superannuation Industry Supervision Act 1993 (Cth) states that the fund will be a compliant fund if the attorney for a member who has lost capacity becomes the trustee of the SMSF or a director of the corporate trustee.

The legislation allows 6 months for a SMSF to ensure it is compliant, however it does not automatically appoint the attorney as the replacement trustee or director.

Therefore to ensure compliance the provisions of the trust deed for the SMSF and/or the constitution of any corporate trustee will regulate exactly how the attorney must be appointed.

Each of the above points is confirmed in the Tax Office's release Self Managed Superannuation Funds Ruling 2010/2.

SMSFR 2010/2 also confirms the approach to take in a number of common factual scenarios, for example:

1. The attorney performs their duties as a trustee of the SMSF, or a director of the corporate trustee of the SMSF, pursuant to their appointment to that position; rather than as an attorney or agent for the member. This means that any restrictions contained in State legislation against conferring trustee powers via a power of attorney are irrelevant.
2. The enduring power of attorney must be current and accord with the relevant State legislation at all times during which the attorney is acting on behalf of the member.
3. Where an enduring power of attorney is executed in favour of multiple attorneys, one or more of those attorneys can be appointed as a trustee, or a director of the corporate trustee, in place of the member.
4. If a member executes an enduring power of attorney in favour of an existing member who is already a trustee, or director of the corporate trustee, in their own right the attorney will act in two roles. Namely on behalf of the incapacitated member (as their legal personal representative) and in their own capacity for themselves.

5. This means, for corporate trustees the incapacitated member should be retired as a director and for individual trustees a formal deed of change of trustee should be signed retiring the incapacitated member and appointing the attorney. This is the case even if that attorney is already a trustee and member in their own right and ensures there is not a sole trustee (even if the same person is superficially the 'only' trustee as they are in fact acting in two different capacities).

SMSF trustee's losing capacity - it's only the beginning

Many previous posts have explored how unintended consequences can arise where the control of a self managed superannuation fund (SMSF) is not carefully considered as part of a comprehensive estate plan.

The decision in Dawson v Dawson [2019] NSWSC 826 is another example.

The background of the case was as follows:

1. a member of a 2 member SMSF appointed his son as his enduring power of attorney (EPA);
2. the member had appointed different people as his executors under his will;
3. when the member lost capacity, the son, due to him being the legal personal representative (LPR) under the EPA, was appointed as a trustee of the SMSF;
4. when the member died, the executors of the will (as the deceased's member's LPR) purported to act as replacement trustees for the son, on the basis that the son's appointment was automatically terminated on the death of the member (because the EPA terminated at that point).

The court confirmed that the son in fact validly remained trustee of the SMSF, despite his role as attorney under the EPA ending on his father's death.

In particular the court held:

(a) When an LPR, for example, an attorney under an EPA, is appointed as a trustee of an SMSF, they act in their personal capacity as trustee pursuant to their appointment as trustee, rather than as an attorney or agent for the member.

(b) This means that the appointment does not end and is in no way dependent on the document (eg the EPA) that originally created the person's role as the member's LPR.

(c) Conversely, simply because someone is the LPR for a member does not mean they are automatically appointed as the trustee for the member under an SMSF - the LPR's appointment as trustee must be implemented in accordance with the terms of the trust deed and rules at law.

(d) The above conclusions are also subject to the terms of the trust deed for the SMSF more generally - here (and in our experience under most deeds, including the View SMSF trust deed) trustees appointed because they are the LPR of a member unable to act are appointed in their personal capacity.

(e) That is, the terms of the deed do not limit the LPR's appointment as trustee of the SMSF in any way, nor do they mandate termination of trusteeship if (for example) the member dies and the role of acting as the member's attorney therefore ends.

(f) The personal appointment of a member's LPR does however also mean that a trustee of an SMSF, once appointed, may be personally liable for any breaches of trust and in turn may be subject to civil and criminal penalties for breaches of duties under the superannuation laws.

About the writer

Matthew Burgess is one of the founders of specialist firm View Legal.

Having the opportunity to help clients achieve their goals is what he is most passionate about.

As Matthew always works in conjunction with trusted advisers (whether it be accountants, financial advisers or other lawyers) and their clients, finding ways to fundamentally improve the value received by those advisers, and in turn their clients, has led him to develop numerous game changing models. Examples include providing guaranteed upfront fixed pricing, founding what is widely regarded as Australia's first virtual law firm and more recently, developing a platform that gives advisers access to market leading advice and support for less than $10 a week.

Matthew's specialisation in tax, structuring, asset protection, estate and succession planning has seen him recognised by most leading industry associations including the Tax Institute, SMSF Adviser and the Weekly Tax Bulletin and since in the 2014 'Best Lawyers' list for trusts and estates and first in 2019 for wealth management and succession planning Practice and either personally, or as part of View, first in 2015 in 'Doyles' for taxation and first 2017 for wills, estates and succession planning.

Work is one aspect of his life that Matthew loves, so there is no need to be constantly searching for 'balance'. His other great loves are:

1. Family – they are profiled in various ways through the series of children's books he has written under the pseudonym 'Lily Burgess' – see http://www.wordsfromdaddysmouth.com.au and various TV commercials;
2. Learning – going cold turkey on television and most forms of media in late 2005 has radically increased Matthew's ability to study the great authors and inspired him to publish a book that explores the concept of 'true success' – see www.thedreamenabler.com.au
3. Health - aside from being a foodie and swimming at least 5kms a week, Matthew installed a stand up workstation in 2007 and among a few other lifestyle choices, it changed his life.