

Here's why every SMSF member needs an enduring power of attorney

You may have seen news coverage in 2016 about the "[Women and SMSFs Report](#)," jointly released by the Commonwealth Bank and the SMSF Association, indicating that more than half of SMSF members do not have an up-to-date will or a succession plan.

The research report surveyed 801 SMSF trustees, as well as 535 individuals without an SMSF, and found that while 78 per cent of them have a will, only 49 per cent actually have one that's up to date.

That's just for starters. Not only do SMSF members need to have an up-to-date will--everyone who is a member of an SMSF needs to also put into place an enduring power of attorney.

This is because if a member loses their mental capacity, perhaps through having a stroke or becoming a sufferer of dementia, they will no longer be able to be a trustee of their fund, or a director of the corporate trustee of their fund--putting at risk the complying status of the fund.

If they do not address the situation within the six-month period of grace allowed under section s17A(4) of the *Superannuation Industry (Supervision) Act 1993* (SISA), the consequences for the fund and their retirement savings will be very serious indeed.

On the other hand, if all fund members have an up-to-date enduring power of attorney, it makes things much easier in the event that:

- A member loses capacity--because their enduring attorney can become the trustee or director of the trustee in their place under sec 17A(3) of the SISA; or
- A member departs overseas indefinitely--because their (resident) enduring attorney can become the trustee or director of the trustee in their place to avoid fund residency issues under subsection 295-95(2) of the *Income Tax Assessment Act 1997*.

However, you need to ensure (on an ongoing basis) that the person nominated as enduring attorney is not a disqualified person (for example, someone convicted of an offence involving dishonesty) otherwise they will not be able to act as trustee or director of the trustee in place of the member.

Another absolutely essential estate planning tool that all SMSF members need to have is a binding death benefit nomination (BDBN).

This is because a will does not automatically deal with an interest in a superannuation fund, since an SMSF is a separate trust so its assets are not part of a member's personal estate.

Therefore, the only way that a member can dictate to whom their super death benefits will go is via a BDBN.

Ideally, the BDBN should be non-lapsing, in that it does not need to be renewed every three years (as is often the case with a public offer retail fund), plus it will still be effective if the member loses capacity in the meantime.

So, clearly, proper and comprehensive estate planning is necessary for everyone who is a member of an SMSF, and requires at least the following critical components which should be prepared in accordance with an overall estate planning strategy:

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- An up-to-date will;
- An enduring power of attorney; and
- A non-lapsing BDBN.

Ideally, each component should work consistently with each of the other components.

For instance, if a member wishes their SMSF death benefit to go 50 per cent to a surviving adult child and the other 50 per cent to the children of a deceased child (that is, their grandchildren) who are not financial dependants of the member, the member could make a non-lapsing BDBN giving 50 per cent of their death benefit to the surviving adult child and the other 50 per cent to their legal personal representative of their estate.

Then, in their will, they could make a gift of the super death benefit received from their SMSF to their grandchildren--or even better, to a testamentary discretionary trust with their grandchildren included as potential beneficiaries to provide both asset protection as well as significant ongoing tax savings in relation to their inheritance.

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