

Alternate Trustees for SMSFs

It is generally well understood that each member of an SMSF must be an individual trustee or a director of the corporate trustee. Further, if someone can't be a trustee or director, due to being disqualified, then they cannot be a member of the SMSF. For single member funds, the member needs to be one of only two individual trustees or where there is a corporate trustee the member is either the sole director or one of only two directors. This is clearly defined within section 17A of the Superannuation Industry (Supervision) Act 1993 (SISA93). Satisfying the definition of an SMSF is essential to maintaining the complying status of a fund.

There are limited circumstances where a person other than the member may act as trustee in place of the member, still allowing the fund to maintain its complying status. This Fact Sheet outlines the situations in which this can occur. It should be noted that in the event a fund fails to meet the definition of an SMSF there is a six (6) month window to rectify the situation without compromising the complying status. This window does not exist when a new member is added to a fund.

What does the law say about what exceptions can apply to an SMSF?

Section 17A(3) of SISA93 covers the exceptions available where other persons may be trustees, it states as follows:

"Certain other persons may be trustees

(3) A superannuation fund does not fail to satisfy the conditions specified in subsection (1) or (2) by reason only that:

(a) a member of the fund has died and the legal personal representative of the member is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during the period:

(i) beginning when the member of the fund died; and

(ii) ending when death benefits commence to be payable in respect of the member of the fund; or

(b) the legal personal representative of a member of the fund is a trustee of the fund or a director of a body corporate that is the trustee of the fund, in place of the member, during any period when:

(i) the member of the fund is under a legal disability; or

(ii) the legal personal representative has an enduring power of attorney in respect of the member of the fund; or

(c) if a member of the fund is under a legal disability because of age and does not have a legal personal representative:

(i) the parent or guardian of the member is a trustee of the fund in place of the member; or

(ii) if the trustee of the fund is a body corporate--the parent or guardian of the member is a director of the body corporate in place of the member; or

(d) an appointment under section 134 of an acting trustee of the fund is in force.

Based on this, the main exceptions to the trustee arrangements can be summarised as follows:

- Upon the death of a member the Legal Personal Representative (LPR) steps in as trustee or director of the corporate trustee until the death benefit commences to be paid
- Where a member is under a legal disability or has an enduring power of attorney (EPOA) in place, the LPR steps in as trustee or director of the corporate trustee
- Where a member is a minor, a parent or guardian acts as trustee or director of the corporate trustee on their behalf until they turn 18.

What is a legal personal representative?

An LPR can be one of the following:

- Person who holds an enduring power of attorney to act on behalf of another person
- Executor of the will or the administrator of the estate of a deceased person
- Trustee of the estate of a person under a legal disability or a minor

Other than a parent/guardian acting in the place of a minor child, the concept of the LPR is integral to the other exceptions in section 17A(3). The following explores each of the situations in which the LPR or another person may act as trustee.

1. Deceased member

On the death of a member, the member's LPR can be appointed as the trustee or director of the corporate trustee until the death benefits have begun to be paid. They will not become a member of the fund but will enable the SMSF to still meet its trustee requirements.

The appointment of the LPR is not automatic upon death. It's important to check the trust deed rules around appointment of a trustee making sure it allows for the LPR to act until the death benefits have begun to be paid. If there is a corporate trustee, the constitution also needs to be checked to see how directors can be appointed. Once a death benefit has been commenced to be paid, then the LPR must be removed as trustee. This is important to understand as a death benefit that is paid as a lump sum can be paid in two stages, as an interim and final payment. The LPR must be removed after the interim payment is made. A death benefit is also paid when a death benefit income stream is commenced. As stated above, the SMSF then needs to meet the definition of an SMSF in section 17A but has a 6-month period to restructure.

Whilst the legislation refers to LPR as a singular term, a member is not actually restricted in the number of LPRs they appoint to act on their behalf as trustee or director of the corporate trustee. Paragraphs 17A(3)(a) to (c) should not be read as being restricted to one for one substitution of the LPR (or parent/guardian) for the member as trustee or director of the corporate trustee.

Therefore, an SMSF member can have several executors named in their will and they are not restricted from having them all appointed to act for the SMSF until the point at which the death benefits begin to be paid. The LPRs can make the decision whether to appoint one and/or all to the fund.

2. Legal disability including minors

The LPR of a member can be a trustee of the fund or a director of the corporate trustee of the fund in place of the member during any period when the member of the fund is under a legal disability.

A legal disability is commonly present in the following circumstances:

- Minors under 18 years of age
- Mental incapacity

The term legal disability is not actually defined in the legislation, but the above circumstances are noted from the ATO's information in relation to how beneficiaries of trusts are taxed, and are the commonly accepted circumstances.

Members of an SMSF can be under the age of 18 however they cannot legally be a trustee until the age of 18 is attained. Whilst a minors LPR may act on their behalf as a trustee, it is more common that they will not have an LPR appointed. In this instance their parent or guardian can act on their behalf as an individual trustee or director of the trustee company. One parent/guardian can act in the place of multiple children and still satisfy the definition.

When the child turns 18, they are no longer under a legal disability and will need to become a trustee or a director of the corporate trustee in their own right, depending on the structure of the fund. Of course this only applies if the child does not suffer from mental incapacity.

Any members that are legally incapable of being a trustee due to a mental condition must have an LPR to act on their behalf as trustee or director of the trustee company. Issues with mental incapacity can often occur later in life, although should be planned for at any stage in life due to intellectual disability, acquired brain injuries or mental illness. Having an EPOA in place can alleviate some of the issues that arise when a member loses capacity. As stated earlier, a person who holds an EPOA for a member will be their LPR and can be appointed to act as trustee or director of the corporate trustee on their behalf.

3. Enduring power of attorney

An EPOA is a legal document in which an individual can appoint a person/s to manage their personal, financial or medical affairs if they are unable to whilst they are alive. The arrangement ceases upon death unless it is revoked prior (while an individual still has legal capacity). An individual should seek legal advice with reference to preparing an enduring power of attorney as each State jurisdiction has differing rules.

Preparing a general power of attorney is not sufficient for nominating an LPR. Preparing an enduring power of attorney does not automatically deem that person/s to be trustee of an SMSF.

Where an EPOA is held for a member, the nominee can be appointed as a trustee or director of the corporate trustee for the member in their place. They can act on the member's behalf where they cannot; and they are not required to be a member of the fund. The appointment may be for a specific time period or for the remainder of the life of the member depending on the circumstances.

The common situations in which a member would have an EPOA in place and wish to have them appointed as trustee or director of the corporate trustee would be as follows:

- Planning for mental incapacity
- Being older and no longer wanting to manage the responsibilities of an SMSF
- Going overseas for an extended period of time enabling the fund to satisfy the definition of an Australian Superannuation Fund.

The ATO have released a ruling, SMSFR 2010/2, that specifies where an EPOA is executed in favour of multiple attorneys, one or more of those attorneys can be appointed as a trustee or director of a corporate trustee in place of the member. Similarly, within a fund, multiple members can execute an EPOA in favour of the same LPR who can be appointed as a trustee or director of a corporate trustee in place of each of those members.

Example 4, from SMSFR 2010/2 is relevant where there are 2 members of an SMSF with a corporate trustee of which they are the directors:

- The 2 members/directors of the corporate trustee decide to travel indefinitely, and each prepare and execute an EPOA in favour of their 3 adult children.
- Under the EPOAs, the children are to act jointly and never separately/severally.
- The 2 parents then resign as directors of the corporate trustee and appoint the 3 children as directors in their place. The fund then satisfies the definition of an SMSF in section 17A.
- The 3 children are LPRs of the parents as they hold EPOAs for them.
- Being directors of the company, they are to act in their capacity as directors (able to act separately/severally) and not under the requirements of the EPOA.

As indicated above, one for one substitution is not necessary. Therefore, paragraphs 17A (3)(a) to (c) should not be read as being restricted to one for one substitution of the LPR (or parent/guardian) for the member as trustee or director of the corporate trustee. As you can see from example 4 of the ruling, each member has effectively appointed 3 LPRs to act on their behalf.

They relevant key points are summarised at paragraph 65 of SMSFR 2010/2:

- An existing member and trustee or director can also be a trustee or director in the place of another member where they hold an enduring power of attorney for that member;
- A legal personal representative who holds an enduring power of attorney for more than one member can be a trustee or director in the place of one or more of those members; and
- Where one member has granted an enduring power of attorney to more than one person, one or more of those people can be appointed as trustee or director in place of the member.

Practical steps

There are a number of considerations when an alternate trustee is being appointed.

Firstly – that person must not be a disqualified person and they must consent to act as trustee of the fund.

Secondly – they must sign a trustee declaration within 21 days of being appointed trustee. An existing trustee who has already signed a trustee declaration and takes on the responsibility of trustee in another member's capacity is not required to sign two declarations.

Thirdly – the appropriate regulators must be notified. Both the ATO and ASIC (for corporate trustees) require changes in trusteeship and directorship to be notified within 28 days.

Finally – it is prudent for the trustees of the fund to acknowledge the appointment and any subsequent removal, for record keeping purposes and to maintain those minutes for 10 years.

As you can see there are several exceptions to the basic rules around who can be a trustee or a director of a corporate trustee for an SMSF. Consideration should be given to who will step in on the death of a member, or if a member becomes incapacitated and can no longer perform their duties as trustee. Proper planning should minimise any issues that may arise and ensure the member's intentions are followed and that any alternate trustee is acting in the best interests of the member.

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