Your questions answered

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What to do with your SMSF when it's just you left

Q Your recent article about how to handle the death of a trustee in a two-member self-managed super fund (How to leave your spouse with more after you die) raises another issue. That is that SMSFs cannot operate with only one trustee. What are the best options for the remaining trustee and how long do you have to get your act together for the Australian Taxation Office?
– Richard

A: Self-managed super funds can operate as single-member funds where a two-person fund is reduced due to one member dying. This can occur in a relatively straightforward manner where a fund has a corporate trustee (a company that acts as the trustee), says North Sydney financial planner Kevin Smith of The Professional Super Advisers.

While the article you refer to does not specifically state that the two members of the SMSF (who asked about leaving their super to each other under binding death benefit nominations) have a corporate trustee, this was indicated by the questioner saying that he and his wife are directors of the SMSF.

You can be a director of an SMSF trustee only where the fund has a corporate trustee, Smith says. And where this is the case, one of the advantages is being able to continue the SMSF as a single-member fund with minimum hassle.

This contrasts with the alternative SMSF structure of individual-member trustees, where anyone wishing to continue a fund after the death of a member faces a more complicated situation. Among other things, it generally results in the surviving member changing the fund structure from individual trustee to corporate trustee. Alternatively, they can appoint another individual and have two individual trustees.

Where an SMSF has individual trustees, all investments and other transactions must be in the names of all the trustees "as trustee for" the name of the super fund.

Where a trustee dies and he or she is replaced by another individual trustee, their respective names must be substituted for one another, an exercise that can involve time-consuming paperwork.

Where a fund has a corporate trustee, Smith says, there is nothing you need to do straightaway as far as appointing new trustees or renaming investments is concerned as all investments are in the name of the corporate trustee. You will, of course, need to inform the Australian Securities and Investments Commission, which regulates companies, of the change in director.

What you will need to consider is how a spouse's super will be added to yours and whether this requires any transfer balance cap adjustments to the surviving spouse's retirement savings.

Q My husband and I have a self-managed super fund that owns a residential investment unit in North Queensland. We set up the fund to buy the property after going to a seminar. It has been a terrible investment that we have been trying to sell for more than a year. It is valued at 30 per cent less than we paid for it and having it in the SMSF is costing a lot to run, especially as it has a mortgage. We have another property we are about to sell. Could we buy the SMSF property from the fund at the valuation? We would clear the mortgage and own it outside super and then close the fund.
– Dale

A: Yes, you and your husband can buy the investment property from your self-managed fund and own it as an investment outside super.

Assuming the proceeds from the property held outside super is sufficient to fund this purchase, says Michael Hallinan, an executive consultant at SUPERcentral (the SMSF advisory division of Townsends Lawyers), there is no reason in the *Superannuation Industry Supervision (SIS) Act* to stop members buying assets from their SMSF. However, the price would have to be at the market value, supported by a report from a licensed valuer.

Hallinan says super rules relating to the fund acquiring assets from a member (or related party) stipulate that the sale price would have to be at arm's length and the terms of the sale would also have to be arm's length. Care would have to be taken that the transaction is in the best financial interests of your superannuation and not favour you personally in any way. This suggests that once the residential unit is sold by the SMSF and the mortgage discharged, the only asset of the SMSF would be cash, which would have to be paid to another super fund – as a benefit transfer for you and your husband – after the super fund is wound up.

Another issue is that the sale of the SMSF residential unit would very likely create a capital loss and, if you wind up the SMSF, the possibility of this loss being carried forward would no longer be available to you.

Where you do have a carry-forward loss, this may be offset against future taxable capital gains. That said, the cost of maintaining an SMSF for the sole possibility of offsetting a carried forward capital loss may exceed the future benefit of keeping the SMSF.

Another tax consideration is that the property held outside super that you sell may be liable for capital gains tax.

Another reason why keeping the SMSF going might be worth considering is whether the advice you received in the seminar you mention was defective or incomplete. If so, you may be able to seek compensation – possibly by court action or via a complaint to the Australian Financial Complaints Authority. According to AFCA, there are some things you can't complain to it about, including if your complaint concerns only investment performance.

There are some exceptions – for example, if the complaint concerns non-disclosure or misrepresentation. But you will have to present a convincing argument. SI