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SMSF Estate Planning: Navigating the Endgame

Theo Marinis enlists the support of two colleagues to provide some general insights on how to make effective estate planning provisions around a Self-Managed Superannuation Fund.

By Theo Marinis
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A Eureka Report reader recently asked for advice on SMSF endgame scenarios — particularly the interplay between Wills (drafted by a lawyer) and SMSF Deeds (drafted by an advisor) such as the incorporation of a testamentary trust clause in the Wills of two members of a SMSF. What should happen when one member passes to ensure preservation of a reasonable living income for the other. What basic instructions should be briefed to the lawyer and the adviser?”

I have enlisted the help of my professional colleagues to provide readers with some general insights into what might be involved, and from me, some advice on where to start.

Given the complex and specific nature of the issues raised above, it is important to understand that this is not a personalised answer and I will begin by directing readers to the General Advice Disclaimer at the bottom of this article.

On the specific subject of SMSF members and testamentary trusts, Marc Romaldi of WRP Legal & Advisor cautions that the interaction between these concepts is critical and needs to be considered on a case-by-case basis.

“On their own, testamentary trusts are a powerful tool to help a person and/or couple facilitate the transition of their wealth to the next generation,” Marc says. “However, an ill-conceived estate plan without regard to financial or accounting outcomes and their impacts, can be at best, pointless and at worst, result in completely unintended consequences.

“Equally, it is possible to structure and cater for a person’s affairs with specified outcomes, like ensuring the financial security of a surviving spouse without what some might consider to be the added complexity, or cost, of a testamentary trust.”

There is also another complicating factor – what if the members of the SMSF are a couple and they break up?

“Any experienced lawyer will draft a will and construct an SMSF deed and succession strategy with a view to navigating ‘bumps in the road’,” Marc says. “However even the best laid (estate) plans should always be reviewed to ensure they are still appropriate.

“Separation is a common prompt for review of one’s estate plan but again, it is critical to involve all your advisors to ensure your objectives are capable of being satisfied after a separation – estate planning is seldom solely a lawyer’s domain, particularly when an SMSF is involved.”

Marco Piteo, of Piteo Accounting & Advisory, recommends that where there is more than one SMSF member it is essential from a taxation point of view to recognise the impact that the death of one could have on the survivor.

“The possibility of having to pay out a death benefit from an accumulation account, particularly where the SMSF holds very illiquid assets such as direct property or business real property assets, needs to be considered at the very outset,” Marco explains.

“Holding appropriate life insurance cover can provide one solution; a pool of funds held outside of the superannuation environment may also become necessary or appropriate if benefits are required to be paid out of super on death. Therefore, different tax structures may need to be created, such as private investment companies and or trusts, new super accumulation accounts, or even investment bonds.

“If you are in the drawdown phase of your SMSF, bear in mind too that in the event of the death of one member, payment of an income stream to the surviving member may be subject to the completion of final legal formalities.

Whilst a SMSF fits well with the need of those who have a deep interest in controlling their own affairs, particularly where small businesses are concerned, with greater control also comes greater responsibility.

“Keeping all of the required accounting and compliance records up to date is vital, as the ATO is more aggressive when dealing with SMSFs and SMSF auditors. As a result, regular/annual property valuations will be required for SMSFs with unlisted assets such as direct property, due to tighter compliance requirements for SMSF auditors,” says Marco.

As a Baby Boomer, one of the smartest things you can do is to recognise your mortality and get your financial affairs in order.

This action will save inter-family and business strife, guard against foolish decisions during age-related decline, and save your estate money. While there will be costs involved, it will be far cheaper than failing to do so and having your legacy tarnished by messy legal and tax disputes.

The first step should be the formation of ‘Team Me/Us’ right away. Included should be your financial adviser, your legal adviser and your accountant – plus your partner or adult offspring.

The next step is to recognise that there are different jurisdictions at play. As a former insurance CEO used to quip “get all of the contenders into the same room” – the inference being that they can all keep an eye on each other, with no room for excuses.

In other words, I would recommend that you, in conjunction with your financial adviser, organise a meeting with all of the participants mentioned above. The meeting should have an agenda and minutes recorded.

The briefing to your financial adviser, lawyer and accountant should be that you require professional cohesiveness and agreement across all documents. You expect them to be ‘watertight’ so they can’t be misconstrued or unpicked, as far as the law will allow. It is recommended that you don’t bother trying to do this yourself – or point out areas of contention – unless you are suitably qualified and have years of practice in the area, as this is expert territory.

You should also ask all of the professional advisers to follow the lead of your estate planning wishes, to ensure that there are no contradictory outcomes, and to bring back any specific issues to a second meeting of 'Team Me/Us' for resolution.

Next, you need to pose this question: How viable is maintaining your SMSF when compared to other cost-effective retirement savings vehicles – for example a retail super fund?

Don't leave out the extra work you must take on as an SMSF trustee. When this is factored in, you may well find that the cost is far greater for an SMSF.

Whilst there is an argument for running your direct share portfolio in the SMSF, bear in mind that this is also possible with many well-run and cost-effective retail super platforms.

Using an SMSF to purchase a direct business real property asset is perhaps a valid reason, if as a superannuation trustee you are satisfied that this type of asset is genuinely an appropriate retirement savings investment. If you feel you must have an SMSF, I recommend you raise this issue with your financial adviser and commit to seeing through a process of stabilisation for all your 'instruments'.

In my experience, an SMSF is only a feasible structure if you have more than $500,000 in retirement assets and love the associated accounting and regulatory challenges. I must admit that I had a 'hobby' SMSF for over a decade, but as my business grew, I began to recognise that it was more cost-effective for me to outsource my trustee responsibilities to a highly efficient retail superannuation platform. As a consequence, I wound up my own SMSF in 2002.

The basic tip for creating a large pool of superannuation is to invest as much as you can, as soon as you can – and for as long as you can – in the most cost effective (efficient) structure.

Where your affairs become more complex (SMSF or not) it is always sensible to form a team of advisers who can work together respectfully.

I also recommend that your partner (or adult offspring) become involved from the outset, even if they protest that they know nothing about the topic or don't understand what is being discussed. When the inevitable occurs, for your loved one, your professional advisory team will be your greatest guide down one of the loneliest paths – the path to having an estate finalised.

With acknowledgement and thanks to Marc Romaldi, Director WRP Legal & Advisory and Marco Piteo, Managing Partner Piteo Accounting & Advisory.

Theo Marinis is Managing Director of Marinis Financial Group.

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