

Self-managed superannuation funds

Why members need an Enduring Power of Attorney

Key points

- All members of an SMSF must be either a trustee or a director of the trustee company
- If a member loses capacity, this may cause some serious issues for the SMSF
- To avoid these problems, all SMSF members should have an Enduring Power of Attorney in place

What happens when an SMSF members loses capacity?

1. Section 17A of the *Superannuation Industry (Supervision) Act 1993 (SIS)* requires all members of an SMSF to be either a trustee or a director of the trustee company.
2. If a member loses capacity, they cannot be either a trustee or a director, and this has the potential for some serious issues for an SMSF confronted with an incapacitated member.
3. Where a member has granted an Enduring Power of Attorney, then the SMSF can comply with section 17A of SIS by the attorney or attorneys becoming the trustee or director in the place of the member. In the absence of an Enduring Power of Attorney, the member's benefit must leave the fund, either as a roll out or a benefit payment.
4. Where a person does not have an Enduring Power of Attorney and loses capacity, then there is legislative provision for another to be appointed as administrator over the person's affairs – this can include that person's parent.

Can an administrator become the trustee or director in the member's place?

5. It was unclear whether the administrator appointed by a tribunal (where there is no enduring power of attorney, or the enduring power of attorney is invalid) was included in the definition of legal personal representative in section 17A(3) of SIS.
6. In ATO ID 2010/139, the ATO clarified that a person appointed as administrator for a member can act as trustee of a self-managed superannuation fund.
7. However, the process to have an administrator appointed by a the state based tribunal can be lengthy, more expensive and stressful.
8. Therefore, it is still of the greatest importance that all members of self-managed superannuation funds have a valid and current enduring power of attorney in place to cover this issue.
9. If you would like to receive advice regarding an Enduring Powers of Attorney, please contact us.

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