

Managing an SMSF when dementia affects a member

- Mary is experiencing the early on-set symptoms of dementia and has an enduring power of attorney where she has appointed the NSW Trustee and Guardian to act as her attorney.
- She has an SMSF with a corporate trustee and wants to know whether the NSW Trustee and Guardian can be appointed as a director of the corporate trustee of her SMSF when she no longer has mental capacity?
- There are workable solutions using NSW Trustee and Guardian.

John and Mary have an SMSF with a corporate trustee and are the current members of their SMSF.

Mary is experiencing the early on-set symptoms of dementia and has an enduring power of attorney where she has appointed the NSW Trustee and Guardian to act as her attorney.

John and Mary want to know whether the NSW Trustee and Guardian can be appointed as a director of the corporate trustee of the SMSF when Mary no longer has mental capacity.

The definition of a self managed superannuation fund contained in s17A(1) of the *Superannuation Industry (Supervision) Act 1993* (Cth) ("the SIS Act") applies to funds with more than one member.

It states among other things that if the trustees of the fund are individuals that each individual trustee of the fund must be a member of the fund and each member of the fund must be an individual trustee.

On the other hand, if the trustee of the fund is a corporate trustee then each director of the corporate trustee of the fund must be a member of the fund and each member of the fund must be a director of the corporate trustee of the fund.

Section 17A(3) of the SIS Act provides some exceptions to the requirements in s17A(1) of the SIS Act. It provides that an SMSF will continue to qualify as a self managed fund if the "legal personal representative" is a trustee of the fund or a director of the corporate trustee of the fund during any period when the member is under a legal disability.

The term “legal personal representative” is defined in the SIS Act to include “the executor of the will or administrator of the estate of a deceased person, the trustee of the estate of a person under a legal disability or a person who holds an enduring power of attorney granted by a person”.

In the event that Mary no longer has mental capacity, a legal personal representative must be appointed as a director of the corporate trustee of the fund so that the fund continues to satisfy the definition of a self managed superannuation fund under s17A of the SIS Act.

The question is whether the NSW Trustee and Guardian can be appointed as a director of the corporate trustee of the SMSF when Mary no longer has mental capacity.

The SIS Act defines an “individual trustee” to mean “an individual who is a trustee of the fund”.

Section 201B(1) of the *Corporations Act 2001* (Cth) (“the Corporations Act”) states that only an individual who is at least 18 may be appointed as a director of a company.

The NSW Trustee and Guardian does not meet the definition of an “individual trustee” as defined in the SIS Act and cannot be considered an “individual” for the purpose of s201B(1) of the Corporations Act. Instead it is a statutory corporation and its status is that of a NSW government agency.

Therefore, the NSW Trustee and Guardian cannot be appointed as a co-trustee of an individual trustee fund or as a director of a company. Where the trustees of the fund are individuals the NSW Trustee and Guardian may formally appoint either a delegate or its delegate may sub-delegate an individual as a co-trustee of an individual trustee fund.

Solution 1

As John and Mary’s SMSF is a corporate trustee structure the NSW Trustee and Guardian may also formally appoint a delegate or its delegate may sub-delegate an individual to act as a director who is authorised to exercise in part the powers and functions conferred on the NSW Trustee and Guardian.

It is important to note that s11(1) of the *Trustee and Guardian Act 2009* (NSW) (“the Trustee and Guardian Act”) empowers the NSW Trustee and Guardian to act in its capacity as a trustee, agent or attorney. Section 11(3B) of the Trustee and Guardian Act also permits the NSW Trustee and Guardian to “prepare instruments that create powers of attorney and carry out professional services in connection with powers of attorney”.

Section 57(1) of the Trustee and Guardian Act reinforces that the NSW Trustee and Guardian “has, and may exercise, all the functions the person or patient has and can exercise or would have and could exercise if under no incapacity”.

The NSW Trustee and Guardian may rely on sections 11(3B) and 57(1) of the Trustee and Guardian Act in order to create an enduring power of attorney (as required under s17A(3)(b)(ii) of the SIS Act) on behalf of Mary to appoint an individual to act as Mary's enduring attorney so that the appointment satisfies the definition of a legal personal representative under the SIS Act.

Solution 2

Alternatively, the NSW Trustee and Guardian could delegate an individual to take up the role as director of the corporate trustee of the fund. The appointment of the individual as a director of the corporate trustee would also need to satisfy the definition of a legal personal representative under the SIS Act for the fund to continue to satisfy the definition of a self managed superannuation fund.

Conclusion

Importantly, if an individual cannot be appointed who satisfies the definition of a legal personal representative then Mary's interest in the fund may need to be rolled out of her fund to ensure that the status of the fund satisfies s17A of the SIS Act.

The governing rules of a fund's trust deed should also be reviewed when it comes to who can be appointed as a trustee/director of a fund. The governing rules of a fund will usually mirror the SIS Act requirements in relation to the appointment of a trustee/director of a fund and contain provisions when it comes to who can act as a legal personal representative of a fund and when a person ceases to be a member and trustee/director of a fund.

John and Mary should also refer to the corporate trustee's constitution to determine whether Mary's office of directorship will automatically vacate once she becomes mentally incapacitated. Generally, a person will remain as a director of a company even if they no longer have mental capacity and are unable to exercise their functions and powers as a director. This is somewhat reflected in Chapter 2D of the Corporations Act and seems to suggest that the office of directorship does not automatically cease when a director can no longer exercise their functions, powers and rights as a director of a company.

Therefore, if the NSW Trustee and Guardian creates an enduring power of attorney which appoints an individual to act as Mary's enduring attorney and that individual satisfies the definition of a legal personal representative under the SIS Act then John in his capacity as a director of the corporate trustee of the fund would be required to formally appoint that individual as a director and remove Mary as a director to ensure that the status of the fund complies and satisfies s17A of the SIS Act.

For more information on any aspect covered in this article, please call SUPERCentral on 02 8296 6266 or email info@supercentral.com.au.