

Can a child be a member of an SMSF?

It is well known that the trustee/member rules regarding SMSFs generally require each member to also be a trustee (or director of the corporate trustee) of the SMSF.

However, there are some specified exceptions to this general rule. One of these exceptions provides that a child under the age of 18 may be a member of an SMSF, provided that their parent or guardian is a trustee (or director) in the place of the child.

More particularly, S.17A(3)(c) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) provides as follows:

"A superannuation fund does not fail to satisfy the conditions [required to be an SMSF] by reason only that:

.....

(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....."

However, trustees of SMSFs that wish to admit a child as a member must consider the following in particular:

- the fact that the parent or guardian of the child member who is a trustee/director in the place of the child must be properly documented (e.g., in written trustee resolutions);
- as soon as the child turns 18, they must become a trustee (or director) in their own capacity, and this should also be properly documented; and

- the parent or guardian that is to be trustee or director in the place of the child may be a member (and a trustee/director) of the SMSF in their own capacity, although they do not have to be. In any case, the fact that the parent or guardian is a trustee/director in the place of the child must be properly documented, as stated above.

Detailed legal and superannuation advice should be sought in relation to the above and other issues, to ensure that the SMSF continues to satisfy the definition of an SMSF as set out in S.17A of the SIS Act.

Disqualified persons cannot be trustees of SMSFs!

An individual cannot be a trustee (or a director of a corporate trustee) of an SMSF if he or she is a 'disqualified person' as defined in the superannuation legislation.

This of course raises the question of who is a 'disqualified person'. A 'disqualified person' is defined in S.120 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act), and it includes (among other things) an individual who **at any time** *"was convicted of an offence against or arising out of a law of the Commonwealth, a State, a Territory or a foreign country, being an offence in respect of dishonest conduct."* [Emphasis added]

This can mean (for example) that someone who received a conviction many years ago for not paying some parking tickets cannot be a trustee (or director of a corporate trustee) of an SMSF, as this may be regarded as an offence in respect of dishonest conduct. However, someone who has previously been convicted of murder may still possibly be able to be a trustee of an SMSF, on the basis that murder may not be regarded as an offence in respect of dishonest conduct!

Section 120 of the SIS Act also provides that an individual is a 'disqualified person' if he or she is an 'insolvent under administration' (basically a bankrupt person) or if a 'civil penalty order', as defined in the SIS Act, was made in relation to that person.

Serious penalties apply if a person is a trustee (or a director of a corporate trustee) of an SMSF while he or she is a 'disqualified person', including imprisonment. Detailed advice should be sought in this regard as soon as possible as required.

Section 126B of the SIS Act provides that, in some cases, a 'disqualified person' can apply to the Australian Taxation Office for a declaration waiving his or her status as a 'disqualified person'.

Finally, note that the legal personal representative of a 'disqualified person' **cannot** act as trustee (or director of a corporate trustee) in the place of a 'disqualified person' – refer to S.17A(10) of the SIS Act.

The problem in this case is that after Harry's death, his benefits in the Harrymic SMSF were paid to his widow Susan as a death benefits pension. Susan is now deemed to be a member of this SMSF, as a recipient of Harry's death benefits pension. The SMSF trustee/member rules would then require Susan to become a director of the corporate trustee along with Michael, and until Susan does so, the Harrymic SMSF is not in compliance with the trustee/member rules.

Note that the death of a member of an SMSF may mean that the SMSF is then not in compliance with the trustee/member rules, even where a death benefit pension is not being paid (in particular, the trustee/member rules do not allow for an SMSF to have a sole individual trustee). The superannuation legislation generally does not allow for superannuation death benefits to be paid **as a pension** to an adult child of the deceased member.

Recipient of a pension is deemed to be a member of an SMSF

As discussed in previous articles, the trustee/member rules that apply to self managed superannuation funds (SMSFs) generally require that each member of an SMSF also be a trustee (or a director of the corporate trustee) of the SMSF, and also that the SMSF cannot have more than four members.

Complications can arise in this regard when a member of the SMSF dies, and in particular, where the superannuation benefits of the deceased member are paid **as a pension** to a dependant, as the superannuation legislation provides that the recipient of a pension is to be deemed a member of the SMSF.

For example, suppose that Harry and his son Michael are both the only members of the Harrymic SMSF. Harry and Michael are both directors of the corporate trustee of their SMSF, as required by the SMSF trustee/member rules.

Now suppose that Harry dies. Michael assumes that the Harrymic SMSF is still in compliance with the trustee/member rules, as those rules allow for an SMSF to have a sole member who is the sole director of the corporate trustee.