LPR did not have to be appointed as trustee

The WA Court of Appeal confirmed that on the death of an SMSF member, the Superannuation Industry (Supervision) Act 1993 (SIS Act) did not require the executor of the deceased member's estate to be appointed as a trustee of the SMSF (although the SIS Act permitted this to be done).

In this case, a husband and wife were the trustees and members of the SMSF. The wife died on 5 August 2010, and probate of her will was granted to her son and her daughter (both from a previous marriage) as executors of her estate.

As surviving trustee of the SMSF, the husband decided that the wife's benefits in the SMSF would be paid to him rather than to any of her children.

The executors then commenced proceedings, claiming that upon the death of their mother, the husband as trustee was required under the SIS Act to appoint one of the children (as executor) to act as a trustee of the fund in their mother's place.

The executors also claimed that until such an appointment was made, the husband had no power to deal with the wife's benefits in the fund in his capacity as trustee of the fund. The executors submitted that on this basis, the husband's decision to pay the wife's benefits in the SMSF to himself was void.

They argued that this was further supported because the husband had acted in bad faith in making that determination, by preferring his own interests to those of his late wife's children.

The Court held that the SIS Act did not require the husband to appoint either of the executors as a trustee of the fund. The Court also found no evidence that the husband had acted in bad faith in deciding that the late wife's interest in the fund should be paid to him. Accordingly, the executors' claims were dismissed.

On appeal by the executors, the Court of Appeal held that the judge's conclusions were correct and the appeal should be dismissed.

The result of this case serves to highlight that where a 'blended family' situation exists (i.e., with children from previous marriages), that the wishes for the distribution of a member's estate be discussed (and ideally documented).

Where there is such a situation and there may be cause for conflict, Binding Death Benefit Nominations (BDBNs) should be considered. This would ensure the deceased member's wishes will be followed.

SMSF's purchase of insurance policy was in breach of SIS Act

The use of insurance in an SMSF to cover arrangements of a "buy-sell agreement" (an agreement to fund the buy-out of a business share upon death or disability) has become a popular strategy in recent years.

The ATO has recently had cause to consider whether an SMSF contravened the *Superannuation Industry (Supervision) Act 1993* ("SIS Act") by purchasing a life insurance policy over the life of a member of the SMSF, where the purchase is a condition and consequence of a buy-sell agreement.

In this case, a member of an SMSF and his brother ran a business through a company. They entered into a buy-sell agreement ("the agreement") which required:

- The SMSF to purchase a life insurance policy over the life of the member;
- The company to make contributions to the SMSF for the member, to be used to pay the premiums on the policy;

- On the death of the member, the insurance policy proceeds are to be added to the benefits of the member, all of which are then to be paid to the member's spouse; and
- The member's shareholding in the company will be transferred to the member's brother.

It was held that the SMSF's purchase of the life insurance policy in accordance with the term of the agreement breached the sole purpose requirements (section 62 of the SIS Act).

The sole purpose test prohibits trustees from maintaining an SMSF for purposes other than for the provision of benefits specified, which essentially relate to providing retirement or death benefits for, or in relation to, SMSF members.

The ATO also held that the arrangement provided financial assistance to the member's brother, and was therefore in breach of section 65(1) of the SIS Act, which broadly prohibits an SMSF trustee from providing financial assistance to a member or relative of a member.

The basis for the decision was that the terms of the agreement allowed the member's brother to obtain total ownership and control of the company upon the member's death, without having to pay any consideration.

Meaning of "legally qualified medical practitioners" for super purposes

A recent ATO Interpretative decision (ATO ID 2015/11) considered what is meant by the term "legally qualified medical practitioners" within the definition of "disability superannuation benefit" in the relevant taxation legislation.

In order to work out the tax to be withheld from the payment of a superannuation lump sum, the trustee needs to consider whether the benefit paid will be a "disability superannuation benefit" for the purposes of section 307-145 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Interestingly, it was decided by the ATO that the term "legally qualified medical practitioners", within the definition of "disability superannuation benefit", is not a defined term in taxation legislation.

Instead its ordinary meaning will be applied, taking the view that "legally qualified medical practitioners" are persons who have general or specialist registration with the Medical Board of Australia (MBA).

It is the Commissioner's view that persons who have general or specialist registration with the MBA are "legally qualified medical practitioners" for the purposes of the definition of "disability superannuation benefit".

Further, certification must have been provided by 2 medical practitioners as opposed to other types of health practitioners.
