The Family Home, Superannuation and Powers of Attorney

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Each State has its own legislation regarding Powers of Attorney and Powers of Attorney are a very important part of any estate planning.

Most people are familiar with the concept of a Power of Attorney - essentially a delegation by a person (‘the donor”) to another person (“the donee”) of the right to undertake legal and financial matters on the donor’s behalf.

There are a couple of important underlying practical matters which may not be so apparent.

A Power of Attorney by itself may not be sufficient to allow a donee to undertake the donor’s position as a trustee of a Trust. Generally, trustees cannot delegate their role to another person.

It follows from this that if you are a trustee, careful attention must be given to “succession” in your role as trustee. For example, if you are trustee of an estate which is likely have trusts for children which are likely to run for many years, consideration should be given to appointment of new or additional trustees.

In the context of SMSFs, the role of trustees can become an issue. All members of SMSF’s must be trustees (or directors of the corporate trustee) and problems can arise if a member loses mental capacity.

Under superannuation law (which is Commonwealth law), there is an exception to the trust delegation rule referred to above. A person holding an Enduring Power of Attorney is able to assume a role as a replacement trustee where a trustee of a self-managed super fund (whether as an individual or as a director of a corporate trustee company) becomes mentally incapable.

What is an Enduring Power of Attorney?

An Enduring Power of Attorney is must specifically: (1) provide that it will continue to be effective even though the donor has suffered unsoundness of mind and (2) include a certificate signed by a legal practitioner relating to the donor’s apparent capacity at the time the document was signed.

Being a trustee of a SMSF is reason in itself to put an Enduring Power of Attorney in place while one is “fully with it”. Should it become necessary to use the Enduring Power of Attorney in the context of a SMSF, care still needs to be taken to ensure superannuation rules are complied with and advice should be sought.

Not having a Power of Attorney in place can also cause issues where one of the joint owners of the family home suffers unsoundness of mind. In that situation it may become difficult to sell the family home where a sale is desirable to allow the owners to deal with new and pressing

accommodation issues.

Some people are reluctant to sign Powers of Attorney because of concern about a loss of control. The legislation makes it clear that if you grant a Power of Attorney to a person, that person must only act in the donor's interest. Even so, some people feel uncomfortable with signing a Power of Attorney.

One way to re-evaluate that issue is to consider how you would be placed if you were in a position where you were not able to deal with your SMSF or housing issues effectively because your partner suffered unsoundness of mind. There are protections that can be built into Powers of Attorney that still allow sufficient flexibility to allow the Power of Attorney to be used effectively.

The value and importance of superannuation assets and the family home make it important for Enduring Powers of Attorney to be put in place early. Loss of capacity can arise slowly over time, or instantly if there is some catastrophic illness. It is too late to put in place a Power of Attorney once capacity is lost.

For further information about this and other matters important for estate planning, contact one of our estate planning lawyers on 9635 7966