

Bankruptcy blues plan

There are options if you can't be an SMSF member

DIY SUPER

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Being declared bankrupt is a devastating blow for most people. Having a self-managed superannuation fund at the same time can complicate things because, as a bankrupt, you can no longer remain in your SMSF.

This is because a bankrupt is a "disqualified person" under superannuation law.

A disqualified person cannot act as an individual trustee of an SMSF, or be a director of a company acting as the corporate trustee of an SMSF. A disqualified person also cannot give another person an enduring power of attorney to run the SMSF for them.

This means, a bankrupt SMSF member can no longer remain a member of their SMSF if they become bankrupt.

So what can an SMSF member do if they become bankrupt?

As a bankrupt member cannot remain a member of their SMSF, they could consider rolling their superannuation savings into a retail superannuation fund and stepping down as an individual trustee or a director of the corporate trustee of their SMSF.



Once this is done, the remaining members of the SMSF can inform the Australian Taxation Office and the Australian Securities and Investments Commission of the change.

On the other hand, if the bankrupt member does nothing and remains in their SMSF, they are committing an offence under the superannuation law punishable by imprisonment for a maximum of two years or a maximum fine of \$10,800.

If they fail to notify the tax office of their disqualification status, the tax office can impose a maximum penalty of \$9000.

If the bankrupt person has met a "condition of release" under the superannuation law, such as having reached their preservation

age and retired, or they are 65 years old or older, they could consider accessing their entire superannuation savings by receiving a lump sum superannuation benefit.

This will remove them as a member of their SMSF once the lump sum is paid out. Their lump sum superannuation benefit is protected by law from the bankruptcy trustee and cannot be divided among creditors.

Even if the bankrupt member decides to invest the lump sum superannuation payout in their own name, outside superannuation, it will be protected from creditors.

If the bankrupt person does not want to access their superannuation savings or sell any assets of the SMSF, then they could consider

converting their SMSF into what is known in super game as a small APRA fund.

The funds operate under rules governed by the Australian Prudential Regulation Authority, which also oversees Australia's big industry and retail super funds.

A small APRA fund is similar to an SMSF. However, instead of the bankrupt member continuing to be an individual trustee or a director of a corporate trustee, a professional licensed trustee is responsible for the legal, compliance and administrative duties.

Putting the fund into the control of a professional trustee will allow the bankrupt person to remain in the super fund as a member.

The small APRA funds can acquire a similarly broad range of assets and use the same strategies available to SMSFs.

Capital gains tax is avoided when switching from an SMSF to a small APRA fund because only the trustee changes.

The superannuation fund continues "uninterrupted" and does not dispose of any assets to incur any capital gains tax.

Moving to a small APRA fund may help retain investments such as shareholdings, investment properties or business real property. The professional licensed trustee will charge for their services.

Once a person has finished their period of bankruptcy (usually three years) they may consider establishing another SMSF or re-joining their previous SMSF if other members have kept the fund going.

Bankruptcy is not an easy thing to go through, but by acting in good faith and taking the initiative, SMSF members can protect their retirement savings.

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IF THE BANKRUPT MEMBER DOES NOTHING AND REMAINS IN THEIR SMSF, THEN THEY ARE COMMITTING AN OFFENCE.

Where there's a will there's a way – but not always

In the fourth of a five-part series on retirement strategy, Forty Seven adviser *Vincent Holland* dissects estate planning

When it comes to retirement planning, there is so much to consider that it is easy to neglect another important part of your affairs — your estate plan.

While planning for death and mental incapacity can be confronting, your estate plan is too important to be left in the too-hard basket.

There are four key components of an estate plan.

WILL

A will is the cornerstone of any estate plan yet one in two Australian adults do not have one and of those who do, in many cases, their will is out of date or otherwise inappropriate for their needs.

If you die without a will, then your assets will be divided up according to State legislation which means that your wishes are unlikely to be carried out.

Like any legal document, however, it is important that your will is professionally prepared. One of the mistakes many people make is to make their will on the "cheap" either by drafting their will themselves or by filling in a DIY will kit. Such an approach is fraught with danger.

For example, in a recent case before the WA Supreme Court, a person wrote his own will.

He died leaving an estate worth many millions. Unfortunately, the directions he made in his will were unclear, and an expensive legal dispute followed to determine what his intentions were.

This could have easily been avoided if he had engaged a lawyer.

In the court's own words: "There is no question that engaging the services of a properly qualified and experienced lawyer to draft a will is money well spent."

are not automatically paid to your estate and therefore may not be covered by your will.

TESTAMENTARY TRUSTS

A testamentary trust is designed to keep an inheritance within the family bloodline.

If you leave an inheritance to your child, and that child later separates or divorces, then your child's ex-spouse may be entitled to a proportion of that money.

By setting up a testamentary trust in your will, you can help protect your estate from the hands of unintended recipients.

Testamentary trusts also have a number of tax benefits. For example, let's assume that the beneficiaries of a testamentary trust include grandchildren who do not otherwise earn any income of their own. In this scenario, each grandchild could receive income distributions from the trust of up to the tax free threshold (\$18,200) without paying tax. This could potentially save significant amounts of tax over the long term.

DEATH BENEFIT NOMINATIONS

Your superannuation benefits

are not automatically paid to your estate and therefore may not be covered by your will.

By signing a valid binding death benefit nomination, the trustee of your superannuation fund will be bound to pay your superannuation benefits to your nominated beneficiary or beneficiaries.

If you do not make a BDBN, then the trustee has the discretion to pay your benefits to your estate or to any of your dependants.

As this may not reflect your intentions, it is important to have a BDBN in place.

ENDURING POWER OF ATTORNEY AND ENDURING POWER OF GUARDIANSHIP

Both documents allow you to appoint someone to make certain decisions on your behalf in the event that you become incapacitated.

Your attorney is responsible for making financial and legal decisions, while your guardian is responsible for making health care and lifestyle decisions.

These are incredibly sensitive and powerful roles so it is crucial that you choose wisely.



BY SETTING UP A TESTAMENTARY TRUST IN YOUR WILL, YOU CAN HELP PROTECT YOUR ESTATE FROM UNINTENDED RECIPIENTS.

