



# Estate Planning for Family Trusts, Companies & Self-Managed Super Funds

Did you know that the assets that you hold in legal structures such as trusts and companies, and assets held in superannuation (including self-managed superannuation funds) are not automatically covered by the terms of your Will? This means that for those of you with assets in these types of legal structures, you need separate testamentary documents in place to ensure that you can adequately pass the control of these entities (and their underlying assets) to the people who you intend on your death or incapacity.

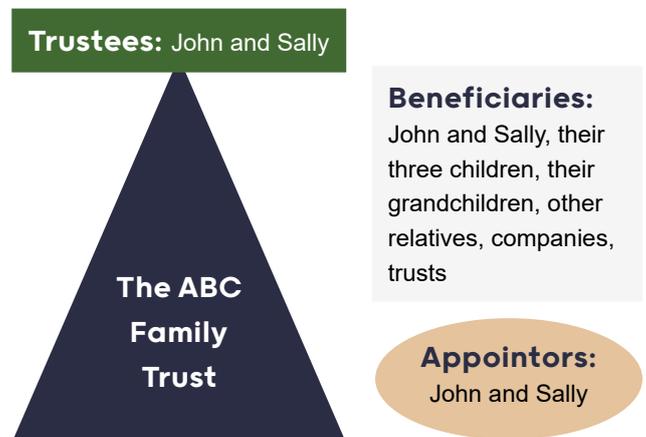
## Family Trusts

Family Trusts are increasingly prevalent in this day and age. Many of our clients run a business through a Family Trust structure or may hold significant investment assets in their Family Trust (such as property, cash and shares, for example).

While Family Trusts may be an advantageous vehicle for you during your lifetime (due to their asset protection qualities and potential tax planning advantages), they do have unique estate planning challenges. This is because the assets held in your Family Trust are not governed

by the terms of your Will and the Family Trust will 'live on' after your death.

A common example of a Family Trust structure is set out below:



In the above scenario, the Appointors of the Trust are John and Sally. The Appointor has the power to 'hire and fire' the Trustee of the Trust. This means that the Appointor can remove the Trustee of the Trust at any time and appoint an additional or replacement Trustee (subject to the terms of the Trust Deed). As such, the Appointor is the most powerful position of control of the Trust.

From an Estate Planning perspective, it is important to consider who will become the Appointors of the Trust on John's and Sally's death or incapacity. John and Sally may wish for their three children to jointly control the Trust on their death or incapacity. In order to do so, one of the steps will be that their children will become the joint Appointors of the Trust at that time. The succession to the role of Appointor is governed by the terms of the Trust Deed.

If only two of John and Sally's children becomes the Appointors of the Trust under the terms of the Trust Deed, this means that they could potentially appoint themselves as the Trustees in John and Sally's place and could then manage the Trust for their benefit, to the exclusion of their other sibling.

For this reason, where you hold assets in a Family Trust structure it is important to review the Trust Deed from an estate planning perspective to ensure that the estate planning provisions of the Deed are adequate to pass control of the Trust to the people that you intend on your death or incapacity. If the Estate Planning provisions of the Deed are inadequate for any reason, it may be possible to amend the provisions of the Deed to fit your objectives.

We also recommend preparing additional testamentary documents (known as a Deed of Appointment of Successor Appointors) to ensure that the control of your Trust passes to the next generation with as minimal complications as possible. Special terms should also be included in your Wills and **Enduring Power of Attorney** documents to ensure that the control of your Family Trust is properly dealt with on your death and incapacity.

Estate First Lawyers can provide you with comprehensive advice on all aspects of Estate Planning for your Family Trust structures. We

can also assist you with establishing Family Trust structures and can ensure that the Estate Planning measures for the Family Trust are adequate from the outset.

## Companies

Many clients will also hold shares in a private company, such as a Trustee company, a trading company or a company that is a corporate beneficiary of a Family Trust.

A common example of a company structure is set out below:

### ABC Investments Pty Ltd

#### Directors:

Barry and Susan

#### Shareholders:

Barry: 1 Ordinary share

Susan: 1 Ordinary share

Shareholders (or 'members') of a company usually have rights to the assets of a company on winding up, dividends, and voting rights (including voting on the Directors). For those of you with shares in a private company, you need to consider who your shares will pass to on your death, which needs to be appropriately covered by the terms of your Will. You also need to consider who will control the shares if you become incapacitated, and this needs to be appropriately dealt with in your Enduring Power of Attorney document (most often by the inclusion of additional financial terms) and in the terms of the company constitution.

It is important that the terms of the constitution and the structure of your shareholding in the company are reviewed from an estate planning perspective to ensure that your wishes can be carried out. For example, the terms of your

current company constitution may provide for the unequal control of the company by your children on your death, which may not be what you would have intended.

Estate First Lawyers can provide you with comprehensive advice regarding your company structures and can assist you with amending the terms of the constitution and the structure of your shareholding in the company to ensure that your intentions are carried out.

## Self-managed superannuation funds

For those of you with a Self-Managed Superannuation Fund (SMSF), your superannuation entitlements may be one of your most valuable assets. It is important to be aware that your superannuation entitlements are not automatically covered by the terms of your Will (see our Factsheet on '[Estate Planning for your Superannuation](#)' for more information).

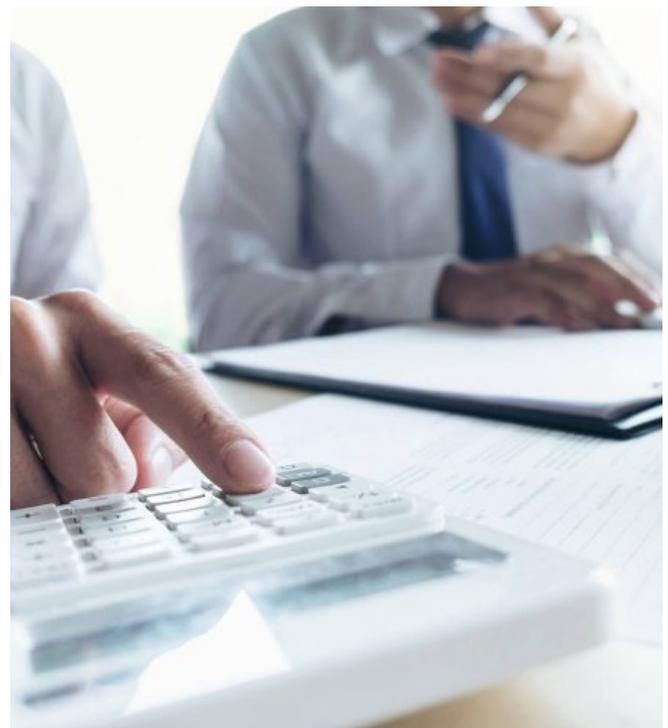
With an SMSF, the Trustee controls the fund. On your death, the people who end up being the Trustees (or Directors of any corporate Trustee) will generally have the power to pay your superannuation death benefits to your dependents, at their discretion. This means that they could potentially exercise their discretion to pay your superannuation death benefits to a recipient who you would not have intended. As such, it is essential that the control of the fund passes to the right people on your death or incapacity (who would generally be the people who you intend to benefit).

The SMSF Trust Deed should be reviewed from an estate planning perspective to ensure that your wishes can be carried out in this regard. The control of your SMSF should also be adequately dealt with in both your Will and Enduring Power of

Attorney documents.

There have been a number of cases where the control of the Trust has ended up in the hands of the wrong people (for example, with only one child rather than both children), and that child has then exercised their discretion to pay their deceased parent's superannuation entitlements to themselves, to the exclusion of their sibling. Cases like these have resulted in expensive and time-consuming litigation, which could have been avoided if the correct estate planning measures were implemented.

As well as ensuring that the control of your SMSF passes to the right people, you should also consider preparing a Binding Death Benefit Nomination (BDBN) or Reversionary Pension Nomination (RPN) to cover your entitlements in the Fund. These documents allow you to dictate who you want your superannuation entitlements to be paid to after your death, and provided they have been validly implemented, they will then become binding on the Trustee of the Fund.



BDBNs and RPNs are very important estate planning documents and need to comply with the technical provisions of the SMSF Trust Deed in order for them to be valid and binding on the Trustee of the Fund. There is a growing area of estate litigation in cases where the BDBN or RPN have failed due to a technicality, and great care needs to be taken when preparing these documents. They should not be prepared in isolation but should be considered as part of your overall estate planning strategy. You also need to consider the tax implications of your superannuation being paid to certain recipients, and whether there are any other viable estate planning alternatives that might have a more preferable tax outcome.

Estate First Lawyers specialise in estate planning for clients with SMSFs. We can provide you with comprehensive advice on these issues and more to ensure that your wishes are carried out in the way that you intend after your death. Please contact us on 1300 132 567 or email us at [info@estatefirst.com.au](mailto:info@estatefirst.com.au) to discuss how we can help you with this.

This information is general in nature and should not be acted upon without first obtaining legal advice on your particular situation.

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