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"Estate Planning SMSF Advanced Strategy Session"

with Grant Abbott

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“Who would have ever thought that the average size SMSF would reach $1.3M by 2021 and by 2025 - $1.5M. ATO figures show that there is $350 Billion being passed out of average SMSFs over the next 20 years. But with size comes fights to the bitter death when a member dies and at the moment only the lawyers are looking at this treasure chest.

If you advise on SMSFs then you better get used to being a SMSF Estate Planning specialist because the lawyers sure don’t. It is part of your competency standards and authorization.

Now with the Lightyear Docs and Abbott & Mourly Super Estate Planning solution, providing expert, legally signed off advice and documentation has never been easier. And more profitable.”

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Let's get familiar with some terms

- Estate Planning v SMSF Estate Planning
- Will v SMSF Will
- Why BDBNs are dangerous
- What is a death benefit pension
- What is a death benefit lump sum
- Nominated pension v reversionary pension
- Testamentary Trust v SMSF Proceeds Trust v SMSF Testamentary Trust
- The Ideal SMSF Estate Planning set up

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Case Study – Family SMSF Smash Out – Ready?

Family SMSF Leading Member John aged 70 and his spouse Sally aged 66 are in the Smith Family SMSF. They were working graziers but have transferred the farming business to their son Mathew, aged 40 who is also a member of the Fund. John has a dicky heart and the family is worried about him but he says he is as strong as an ox. More like a donkey, says Sally.

The farming property sits in the Family SMSF for the benefit of John and Sally who are both retired, have pensions with reversions to each other, then to Mathew upon their death to ensure the property is transferred to the son working on the farm. The Farm is worth $2M and John and Sally's pension benefits sit at $1.25M each in pensions and $150,000 each in their retirement accumulation accounts.

Mathew has two children, Ben aged 17 and William aged 13 at boarding school, runs the business through the Family Trust and still employs John and Sally, paying them $70,000 pa each by way of a super contribution. John and Sally have more than $500,000 in dividend-paying stocks in the Fund and these are used to cover their contributions tax and that of Mathew, plus deductible Family Trust contributions made for Ben and William who do vacation work on the farm. John and Sally's daughter, Marie is also a member of the Fund but has her own investment strategy.

John and Sally use part of their pension benefits to pay a school allowance directly to Ben and William to cover boarding and school fees. In their SMSF Wills, apart from the property to go to Mathew, a lump sum is payable to Marie with the grandchildren also paid a benefit, as an income stream or lump sum. At this point in time, John and Sally have been advised that their grandchildren are their financial dependants, while Marie and Mathew are not.

Bonus: SMSF Estate Administration

WHAT HAPPENS ON THE DEATH OF A MEMBER OF THE FUND

STEP 01

Member's death sparks a course of action by the Adviser and the Trustee

A Obtain notification and note from the Trustee that the member is dead
B Advice to be sought dependant upon any formal requests in the Binding Death Benefit Nomination SMSF Will or Conditional Pension

STEP 02

Documentation Review – linked to the Members

A Review the SMSF Trust Deed
B Check that the lineage and any Change of Trustee documents are correct
C Review the BDBN, SMSF Will and any Pension documentation

STEP 03

Trustee/Director Appointment

A What do the Trust Deed or the Trustee Constitution require for SMSF replacements?
B What voting powers apply to the existing Trustees and Replacement Trustee/Director?
C What is the Adviser's position?
D Notify the Regulators

STEP 04

Fund-Member Insurances

A Review any Fund/Member Insurances
B Contact Life Broker to accelerate insurance payout
C Determine Insurance distribution policy

STEP 05

Determine Member Death Benefits

A Calculate death benefits in line with the trust deed – BDBN or SMSF Will
B Are there any reserve payments?
C Value assets used to pay death benefits

STEP 06

Auto-reversionary Pensions

A What does the deed state regarding the transfer of the pension?
B Review of Pension documentation for compliance and transfer of Pension Account

STEP 07

Set up Payment Schedules

A Be careful as the SIS Act requires that once the first payment is made the Replacement Trustee must step down
B Review who is to get what payment – lump sum or income steam and are there any in-specie payments?

STEP 08

Retirement of Replacement Trustee

A The laws require the retirement of the Replacement Trustee/Director
B Ensure new Members become Trustee/Director unless incapacitated

STEP 09

Ongoing payout of Pensions

A What are continuing Pension requirements?
B Is there a SMSF Guardian in place to protect further reversionaries down the line?

“I am going to drill this into each and everyone of my advisers. The biggest difference you can make to your client’s welfare and long-term happiness is protect their superannuation, business, investments and wealth from non-bloodline dilution.

Try it. Ask your next ten clients whether they want to ensure that their SMSF is for bloodline only.

I know the answer but the only way for the mind to learn a new skill set is to learn it and then master it. The next step is how to create a bloodline structure.”

Grant Abbott | I Love SMSF

Who controls the process on death: The important part

- **MOST IMPORTANT:** Get your firm's or your name on the documentation to drive the process or it will linger and eventually smell and litigate
- The Deed is the driver and the Corporate Trustee constitution BUT they can also destroy your whole capacity to plan
- *In Katzman the deed stated the remaining Trustee had sole power to appoint her Executor brother: does she have to??*
- Control on the death of a member – the new Family SMSF deed picks up the Executor as Trustee – for a special purpose Family SMSF corporate trustee the Executor needs to be appointed at director level – see the fail-safe in the deed
- Best of all use the special purpose Leading Member SMSF deed. The same way the SMSF Will created a solution to BDBNs, the Leading Member SMSF deed is the perfect six member SMSF solution.

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Important SMSF Estate Planning Law

- The Deed is the driver NOT the Will so says the Commissioner of Taxation
- ***See what happened in Katz v Grosman – (brother and sister) and Donovan v Donovan (second spouse and daughter) and Munro v Munro (second spouse and daughters)***
- SMSFs governed by Federal Law and Estates by State laws – this is crucial
- Start with the SMSF – build an SMSF Will which provides a mix of binding death benefit directions (not nominations) including bloodline limitation of benefits and fund members, transfer of payments, assets, trustee appointment, reserve allocations and estate transfers with conditions plus cloning for dependent SMSFs
- If in Pension phase, then auto-reversionary is the only way to really continue the pension and this can be conditional
- **KEEP SUPER AWAY FROM THE ESTATE!!!!**
- Family Provisions claims are taking off and super is protected, except in NSW – see Kelly v Deluchi [2012] NSWSC 841

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The Adviser Estate Planner

Client chooses Estate Planning	Client Interview	Review in Draft	Finalise
• Email • Appointment • Board room lunch • Seminar • Video / DVD • Referral • I Love SMSF Referral	• *Use the Lightyear Interview Capture forms for:* • simple will • BDBN • SMSF Will • EPOA • Testamentary Trust • SMSF Proceeds Trust • SMSF Estate Fixed Trust	• prepare the relevant documents in draft • send to client for review • have second interview to finalise • forward to TGA Legal for review and assessment	• Final draft forwarded by TGA Legal to adviser for client review • If signed off, final prepared by TGA Legal for execution including a letter of advice • Executed by client and placed in the Adviser's Lightyear and TGA Legal Vault

Death Benefit Payments

- Benefit Payments - SISA 93 - start with sole purpose test – section 62 then non-operation of BDBN – section 59 then for the deed – section 55(1) and section 218 plus if profit – criminal sanctions – section 202
- Meaning of Dependant – SISA 93 section 10 definition and also Malek's case plus tax dependants – subdivision 302-D of ITAA 97
- Meaning of Legal Personal Representative – SISA 93 section 10
- Death benefits – SISR 94 6.21 and 6.22
- Meaning of Pension – SISR 94 1.06 – what sort of pensions can be paid and with what terms and conditions

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SMSF Estate Planning Taxes: Lump Sum

- Division 302 of ITAA 97 has special arrangements for death benefit taxation
- Trustee of Deceased Estate to be treated like a dependant – section 302-10
- Lump sums to a dependant are tax-free section 302-60. Must be paid – section 307-5(4).
- Lump sum to a non-dependant such as a sibling or child over the age of 18 – Subdivision 302-C:
  - Tax-free component is tax-free
  - Taxable component cannot exceed 17%
  - Untaxed component cannot exceed 32%
  - For SMSFs untaxed component may find its way if the Fund has claimed insurance deductions – see adjustment formula in section 307-150

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SMSF Estate Planning Taxes: Pensions

- Need to remember the Pension Transfer Balance rules for pensions v auto-reversionary pensions and special child pension rules
- Section 302-65: If deceased aged over 60 then dependant pension is tax-free and commutation payment also including for child – section 303-5
- Section 302-65: If recipient is dependant and over age 60 then tax-free
- Under age 60 and section 302-70 applies:
  - Tax-free component is tax-free
  - Taxable component - assessable but with 15% tax offset
  - Untaxed component – see life insurance formula – 10% if deceased or recipient is over age 60 – otherwise assessable income – choose between lump sum (max at 30%) or on-going assessable

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The Final Slide

- **SAPEPAA Course on 4-6 April 2022**
- I am looking at doing a 3 day SMSF specialist adviser course which provides 24 hours of CPD and is Australian competency standards compliant – standards I held write
- Also if you want to make a real difference become a Strategist member and run alongside me, the LightYear team and also Abbott & Mourly lawyers

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