



Superannuation

Family Law

- Refer to the information provided by the Attorney-General's Department about [family law matters and superannuation splitting](#).
- Ask the client and the other side to provide:
 - a copy of the most current superannuation statement(s) for any industry funds
 - latest audit report and financial statement for any self-managed superannuation fund (SMSF).
- Ensure any terms of settlement, agreement or orders deal with all superannuation funds of both parties.
- Give the client the opportunity to:
 - seek advice from a financial advisor, accountant and/or an SMSF auditor
 - review any terms of settlement, agreement or orders at the time of drafting and take time to explain their effects. Some clients benefit from a diagram showing how assets are split while others may benefit from seeing a list of assets they are receiving and the ones the other party is receiving. Clients also need to know timing on the receipt of any assets.
- Ask the client to explain to you, or draw a diagram of, their understanding of what will happen in relation to their superannuation fund(s) and those of their spouse / de facto.
- Provide the trustee of the superannuation fund with a copy of any draft orders with at least 28 days' notice for comment. This is to prevent the situation arising where orders are made but a trustee has no power to undertake the action contemplated by the orders.
- Have an office procedure that ensures either original sealed orders or a certified copy of the sealed orders are served on the relevant superannuation fund promptly after orders are made. A file closing procedure should also include checking this is done.



Wills and estates

When acting for a testator

- Have a good working knowledge of how superannuation funds work
- Advise the client that they should keep up-to-date records about their superannuation, including the name of any SMSF financial adviser and auditor, and details of any loan obtained to fund the purchase of real estate by the SMSF. The location of this information can be disclosed in a letter kept with the will as the information will be required by the executor.
- Obtain details of the client's superannuation fund and policy.
- Ask the client if they:
 - would like their superannuation to form part of the assets of their estate
 - have in place a current nomination of beneficiary.
- Determine whether the fund has binding, non-binding or no nominations and review the superannuation fund trust deed if necessary. Alternatively, advise the client orally and in writing to contact the superannuation fund and obtain details of the nomination arrangements. The client should provide this information in writing to the firm before the will is drawn and finalised.
- Determine what nomination, if any, the client has made.
- Give the client an oral and written explanation of what the form of nomination governing the fund means and whether they must renew any binding nomination regularly.
- Where the client has or wishes to make a binding nomination advise them whether this can be done by an attorney in the event of incapacity of the testator. Explain the consequences if the fund does not permit attorneys to renew binding nominations and make allowance for this when drafting the will.
- When the will is finalised confirm in writing whether or not the superannuation forms part of the estate and what steps the client needs to undertake with the superannuation fund in order to achieve his or her desired outcome



When acting for a testator

- For any SMSF check the terms of the trust deed for the replacement of the deceased as a trustee / director of any corporate trustee. This is also necessary to ensure the fund remains compliant under the SIS Act and the Superannuation Industry (Supervision) Regulations 1994. In some circumstances it may be necessary to make application to court. See for example *The Estate of Edith Macdougall* [2013] NSWSC 990.
- Check the Australian Taxation Office (ATO) website for membership details of any superannuation fund or any lost superannuation for:
 - current superannuation you need the testator's myGov username and password
 - lost super – the [ATO has information to help find lost superannuation](#)
- Notify the superannuation fund promptly that the deceased has passed away or advise the legal personal representative to do so.
- When superannuation funds form part of the deceased's estate obtain them from the trustee of the superannuation fund without delay.
- If the superannuation funds are not being distributed promptly discuss with the executor the importance of investing the money until distribution. Consider a solicitor's controlled money account.
- Check the tax liabilities of the estate in relation to any superannuation payments. [The ATO has more information about the tax payable.](#)
- Consider whether application should be made to the [Australian Financial Complaints Authority](#) to resolve any outstanding issues.
- Consider whether any executor and/or administrator may have a conflict of interest in the event that they wish to make a personal claim on any superannuation fund of the deceased especially where the superannuation fund is or may be included as an asset of the estate. One case to note is [McIntosh v McIntosh \[2014\] QSC 99](#). In this case the administrator of the deceased's estate argued that the superannuation funds of the deceased should be paid to her and not to the estate.



When acting for a beneficiary

- Request that the legal personal representative provide:
 - a copy of the will as this may refer to superannuation funds of the testator. [Section 50](#) of the *Wills Act 1997 (Vic)* lists those persons entitled to see the will
 - details of superannuation funds of the testator.

- Consider how the superannuation funds of the testator may be taken into account where the beneficiary is able to bring a family provision claim pursuant to Part IV of the *Administration and Probate Act 1958 (Vic)*.

- Consider the need to make application to the Superannuation Complaints Tribunal where the beneficiary wishes to challenge a decision of the trustee about payment of the deceased's superannuation, for example a dependent child may wish to challenge payment to a step-parent.

A client wishing to lodge a complaint to the tribunal must:

- Within 28 days of being given notice by the trustee of how the superannuation funds are to be distributed give notice of objection to the trustee

- Within 28 days of the trustee giving its response (known as a final notice of its decision) lodge a complaint with the tribunal.

Conveyancing

- Obtain as much detail as possible from the client about the transaction including asking in what capacity the client is acting.

- Provide a detailed letter of advice to the client about the various issues that need to be addressed when transferring land to or from an SMSF including duty implications both on the purchase and any subsequent sale / transfer by the SMSF.

- Revisit advice where circumstances change such as when a gift becomes a sale.

- Become familiar with the resources referred to in Appendix one if acting for trustees of superannuation funds.



- Ensure the trustee of the SMSF or trustee of the bare trust is named as the purchaser under the contract of sale. All funds including the deposit must come from the account of the SMSF and/or a lender where funds are being borrowed.
- Where all funds are provided for the purchase from the superannuation fund only the trustee of the superannuation fund can be registered on any unencumbered title.
- Where any of the funds for the purchase are borrowed only a bare trustee can be registered on title. Once any loan is repaid the trustee of the superannuation fund should be registered on title.
- Lodge the land tax form 8 with the SRO when a SMSF buys property. Land tax for a superannuation trust is charged at the general rate. See s. 46E of the *Land Tax Act 2005* (Vic).
- The SRO also needs to be notified when the SMSF ceases to be the registered proprietor. There is no prescribed form so a letter notifying the SRO would be sufficient.

When acting for an SMSF borrowing funds

- The SMSF trust deed must contain the appropriate powers to borrow where a loan is being obtained to finance a purchase of land. LPLC considers it necessary to refer the review of any SMSF trust deed to a specialist, especially where amendments may be required.
- Are the assets a "single acquirable asset"? See ATO SMSF Ruling 2012/1.
- Some lenders take 90 days from loan approval to settle a loan for an SMSF. LPLC recommends practitioners tell their clients to seek a timeline and list of requirements from their lender.
- Most lenders require a number of certificates to be provided including one by the practitioner acting for the SMSF, the SMSF auditor and accredited financial adviser and/or an accountant. Recommend to the client that they consult others who are required to provide a certificate first so they can identify any issues which may need to be addressed by the client and/or practitioner.
- From 1 July 2016 accountants must hold at least a limited Australian Financial Services licence if advising on SMSFs. Regulation 7.1.29A set out the circumstances in which a person is taken not to provide a financial service and until 30 June 2016 included SMSFs.



- A bare trust must be established and the bare trustee registered on the title where the SMSF is borrowing money to fund the purchase of land. LPLC recommends specialist advice be sought to prepare any bare trust deed.
- Ensure the bare trustee deed is lodged with the SRO and an assessment obtained. Even though no duty should be payable on the bare trust deed this is a requirement of the SRO.

Opinion letters

- Avoid providing trust opinion letters where possible.