

# Legal Brief

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## Tax and Superannuation Update – Winter 2002 Edition

### Gain a slave with your Power of Attorney

Helen went on an extended trip around the world. Shortly before leaving, she purchased an investment property to rent out. Unfortunately, she could not find suitable tenants before leaving. The property needs some plumbing work. Helen loves her brother Andrew. Andrew is to contract with the plumber on her behalf, pay him from her bank account and find tenants. However, she won't be available to sign the contracts and lease agreements. Andrew can't pay for the work without Helen giving him money.

An Enduring Power of Attorney (POA) allows Andrew to sign the contracts with the plumber and electrician, and the lease agreements with the tenants on Helen's behalf. He can use the POA to withdraw money from Helen's bank account.

A POA is a simple device that allows a person ("Donor") to delegate authority to act on their behalf to another person of their choice ("Donee"). The Donee is someone you trust, such as your spouse, a friend or a relative. Does this mean that you are giving away power to your Donee to do whatever they want? No. Your Donee is under a legal duty to always act in your best interests.

*How does an Enduring Power of attorney differ from an ordinary Power of Attorney?*

A POA survives any subsequent legal disability of the donor. It gives the general power to the Donee to do anything the Donor can lawfully do. This means that if Helen were involved in an accident and became mentally incapacitated, Andrew continues

to look after Helen's affairs. This includes paying her medical expenses.

Sometimes, you may only want a POA to come into affect after you are legally incapable of managing your own affairs. Depending on your wishes, a correctly drafted POA is activated immediately on signing, or later when the Donor becomes incapacitated.

Your POA authorises your Donee to make decisions and sign documents on your behalf.

#### What are the limitations?

The POA is an "economic" document. It allows your Donee to open and close bank accounts, pay debts and buy and sell land on your behalf. However, it won't allow your Donee to vote, make a Will or sign another POA on your behalf.



#### Your POA gains you a Disciple!

You don't need to lodge your POA anywhere until you deal with land. The Department of Land and Administration (DOLA) require you to lodge your POA with them before making any land transactions. If 3 months have past since the Donor signed the POA, DOLA requires that the Donee sign a Statutory Declaration saying that the EPOA has not been revoked.

A POA allows Helen to leave on her trip, knowing that her financial affairs were well managed. Talk to your Adviser and Accountant if you would like to look at preparing your own Enduring Power of Attorney.

### Is your SMSF Ready for Divorce?

Are you ever ready for divorce? It is now time to prepare your SMSF for the new divorce laws. They come into effect on 28 December 2002.

Members try to split their Super when they split from their spouse. Current laws prohibit this. (*Even if the Family Court tells them to – Ed.*) If a trustee splits preserved Super, then they are in breach of their duties and the law.

The new legislation allows trustees to "split" or "flag" Super benefits by approved agreements between the parties (*or by the Courts if you hate each other too much to agree on anything - Ed*). The terms of your SMSF Deed must permit splitting and flagging before this can happen.

#### Is your SMSF Deed ready?

Sadly, 50% of marriages now end in divorce. SMSFs must ensure that their systems can accommodate for this possibility and for the legislative requirements. Take action now to ensure the appropriate systems are in place.

Trustees have 3 immediate issues:

1. What is the most appropriate way to comply with the Family Law legislation and accommodate Court Orders to split or flag?
2. Administrative procedures need developing to contact members.
3. Fund Trust Deeds and rules must be amended.

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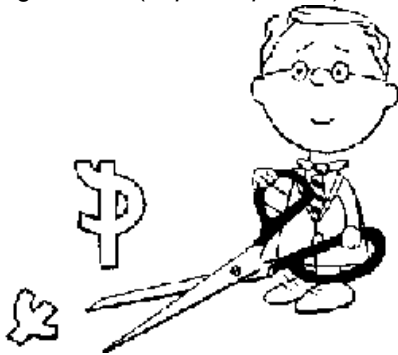
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### Avoid the Government meddling in your affairs

If you, your child or your parents fail to agree on how the Super is split, then the Family Court does it for you. Its decision may upset both of you. You can stop the Government from meddling in your affairs via a Binding Financial Agreement (a "pre-nup"- Ed.).



### Does your SMSF allow your Super to be split?

Any changes made to your Super as a result of separating, requires both Legal and Financial advice. Working with a Tax Lawyer, your Accountant and Adviser can ensure that your SMSF allows for the splitting of Super under the new laws.

### What can the Family Trust...

We have been overwhelmed with queries regarding Family Trusts. In response, our Peter Nettleton has compiled a list of the most frequently asked questions regarding Family Trusts.

**Q.** Why is a Discretionary Family Trust ("Family Trust") a good idea?

**A.** Primarily, it protects family assets and saves tax.

**Q.** Who should have a Family Trust?

**A.** Any family group with either capital growth or income-generating assets

**Q.** How does a Family Trust work?

**A.** The assets are legally owned by Mum & Dad or a nominee company ("trustee") for the benefit of the whole family group (called "beneficiaries"). The trustee has the discretion to decide who gets how much of the income and who gets what assets when the trust ends.

**Q.** Who is in control of a Family Trust?

**A.** The trustee has day-to-day control. The appointor appoints and removes the trustee. The appointor (often Mum & Dad) has ultimate control.

**Q.** How do I set up a Family Trust?

**A.** A settlor (usually your lawyer) enters into a deed with the trustee where they hand over \$10 to the trustee to be held in trust. The trustee declares that it holds the fund in trust. Once the deed is signed, the Family Trust is now established. The settlor bows out and other assets can be moved into the Family Trust by simple accounting book entries.

**Q.** How long does a Family Trust last for?

**A.** 80 years at most.

**Q.** Can the trustee be a beneficiary and vice versa?

**A.** Yes, but the trustee cannot be the only beneficiary.

**Q.** Can the settlor be a trustee or a beneficiary?

**A.** Not if the trust is to be recognised as genuine by the taxman.

**Q.** What if the family breaks up?

**A.** The Family Court has the effective power to cut through a trust, so precautions need to be taken. Binding Financial

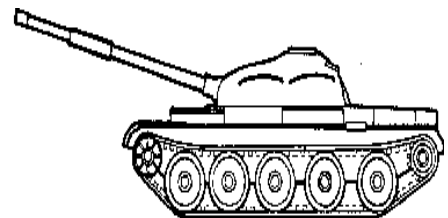
Agreements can prevent this happening.

**Q.** What if the trustee or appointor dies?

**A.** The Family Trust survives any individual. The appointor can always appoint a new trustee. Care should be taken in providing for the succession of appointor, otherwise the last appointor's legal personal representative takes over.

**Q.** What if the trustee, appointor or a beneficiary goes bankrupt?

**A.** Again, the Family Trust usually survives. The Bankruptcy authorities cannot lay claim to trust assets to satisfy the debts of any individual. If the individual has in good faith gifted money to the Family Trust more than 6 months previously, it is difficult for the gift to be clawed back. On the other hand, if the individual has gifted money to the Family Trust to avoid creditors, or loaned money (including unpaid distributions) to the Family Trust, it can be traced.



### Trusts – One of the best asset protection vehicles around!

**Q.** Where can I get my Family Trust?

**A.** Talk to your Adviser and Accountant whether a Family Trust is right for you. Your Adviser can place an order for a Family Trust with Brett Davies Lawyers, or go on-line and generate one straight away from [www.LawCentral.com.au](http://www.LawCentral.com.au).

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### Without a Will – There is no way!

“When I’m gone, you can fight it out between you!”

I laughed when Dad said this to me. It seems a lifetime ago now. When he uttered those words it seemed that Dad would live forever. It was Mum who was not well and it was Dad that looked after Mum. Even after 35 years of marriage, he still thought Mum was the best thing that ever happened to him.

Dad was not a rich man, but he did own several investments. These investments were just enough to keep him and Mum, “in the manner to which [they] had become accustomed”. He would not have wanted Mum to want for anything.

Our family is reasonably close but since last year an enormous strain was placed on us.

You see, Dad died last year. Dad died without a Will.

I’m not sure, but I think he thought Mum would go first, what with all her health problems. Or maybe he thought that Mum would just get the lot if he died first.

Our first shock was when we all went to see our solicitors. They told us that because Dad died without a Will, the Government had effectively made one for him. This means that Mum doesn’t get everything, she only receives the first \$50,000 of the Estate assets and 1/3rd of any remaining assets. The other 2/3rds are between my brother, my sister’s children and me.

My initial reaction was to say, “we’ll make sure all the assets go to Mum”. Dad would have wanted that. Our solicitor pointed out that it wasn’t that simple.

Our first issue is that my sister’s children are entitled to part of the Estate. You see my sister died in a car crash several years ago and her children are being brought up by her husband. The children are both under 18 and so can’t legally give up their entitlement to their Granddad’s Estate.

Our second issue is that, as a result of the same car crash, I am a paraplegic. I am currently in receipt of a partial Centrelink pension. If I gift or renounce my entitlement in Dad’s estate I am subject to ‘deeming provisions’. That is Centrelink, deems me to own my entitlement to the Estate assets for the next 5 years. This means I lose my pension and medical benefits for the next five years. I now have the choice of depriving Mum of assets that I believe are rightfully hers, or eating into my own investments and cash reserves.



### Are you leaving a bomb to explode on your family?

Our third issue is that my brother does not want to relinquish his entitlement in Dad’s Estate. I think he is selfish.

Our lawyer informs us that because of the complex issues surrounding our situations we cannot just make a Deed of Family Arrangement or renounce our interests. Mum must make an

application to the Supreme Court to “challenge” the distribution of Dad’s Estate according to the *Administration Act*. If the Court agrees that Mum is entitled to the whole Estate then it makes a Court order. A favourable Court order means I won’t lose my pension and our other issues are resolved.

However, our lawyer warned us that the Court may refuse to alter the distribution or may even alter it in a way we have not contemplated. For example, my sister’s husband may also “challenge” the Estate on behalf of their children. Our lawyer also pointed out that Supreme Court challenges are often lengthy and costly.

Given Mum’s health it is not likely that this sort of challenge is a real option.

After seeking advice from my Advisers, I have completed my own 3 Generation Testamentary Trust Will to ensure that nothing like this happens again when I am gone. Unfortunately it is too late for Dad and the family has to pay the price.

And so, not for the first time, I lament... “If only Dad had made a Will!”.

*(Ed – This story was written with the permission of one of our clients to whom this happened)*