

## Lawyer provides important tip on EPOA start dates

*by Miranda Brownlee, Deputy editor, SMSF Adviser*

**Clients appointing an enduring power of attorney should make the commencement date immediate to avoid unnecessary debate around when the document is legally effective, said a specialist lawyer.**

View Legal director Matthew Burgess explained that while forms for appointing an enduring power of attorney (EPOA) generally provide flexibility around when the EPOA will commence, the commencement date should be immediate.

“In a superannuation sense, particularly where we’re looking to manage fast death tax or updating binding nominations, we would argue that the only responsible commencement date for an EPOA is immediately,” Mr Burgess told delegates at the SMSF Association National Conference.

“We cannot be getting into a debate [on this]. If you ask three different lawyers, you’ll get three different opinions, and it’s the same with medical professionals. So [if you have] an EPOA that’s deemed to start at an event of incapacity, you will have both a legal and medical debate about what point in time that is.”

Mr Burgess said that if the client is trying to update a binding death benefit nomination or manage death taxes, then they’ll want to avoid any “white noise sitting around whether that document is actually legally effective”.

He also stressed the importance of the person who is appointed as EPOA being very clear about what capacity they are signing documents in.

“Whoever is appointed as an EPOA actually takes the role into the trusteeship itself. So if we look at an example of Jock and Lina who are both individual trustees of the SMSF, Jock loses capacity and appoints Lina as his attorney. When she’s signing documentation [such as] a change of trusteeship, she will sign the document as herself as trustee and then again as the attorney for her incapacitated husband,” he explained.

“So she’s actually signing the document twice, but you need to be very articulate and clear that she’s doing so in both of those two capacities because failure to do so means it doesn’t matter how whiz-bang the documentation looks, it won’t actually work, and when you go to actually rely on it, you’re going to be in trouble.”

In a technical paper released in conjunction with the presentation, Mr Burgess also highlighted the important role that EPOAs can play in helping manage “fast death taxes”.

“Fast death tax arises where funds that could otherwise be withdrawn tax-free by the member of a superannuation fund during their lifetime, remain in the fund at the date of death of the member and are then subject to tax on the distribution from the fund,” he said.

Mr Burgess said there are generally three ways of managing this form of death tax, such as ensuring the funds are withdrawn prior to the date of death.

Another way of managing it, he said, is to implement a complementary enduring power of attorney, allowing an attorney to withdraw funds if a member loses capacity, ensuring the withdrawal is completed before the member’s death.

“The first two approaches appear to be accepted by the Tax Office,” he said.

Another approach, he explained, could be for the member to sign a direction as to future withdrawal, with the effective date defined, for example, as one day prior to their death.

“In relation to this approach, if a complementary enduring power of attorney is in place, then the attorney could sign such a direction,” he noted.

“This third approach has also been approved in a number of private rulings issued by the Tax Office, but not publicly.”