

Incapacity emerging as major risk issue for advisers

by Miranda Brownlee, Deputy editor, SMSF Adviser

SMSF professionals that choose to avoid dealing with incapacity may be exposing themselves to potential litigation risk, a specialist lawyer has warned.

Speaking in a recent SMSF Adviser Show episode, View Legal director Matthew Burgess said as a result of people living longer means the likelihood of a client experiencing an incapacity event is on the rise.

“As an adviser, it’s never really too early to start thinking about this stuff, especially as incapacity events are statistically more likely to happen in the short term than a death event,” said Mr Burgess.

“When they do happen, they often occur in a way where there’s very little ability to find another pathway unless you’ve actually got the proper legal documentation in place.”

Mr Burgess said in many ways, putting in place documentation such as enduring power of attorney is as important as setting up a binding death benefit nomination or the instructions in someone’s will.

Advisers that don’t address these kinds of issues with SMSF clients, he warned, may be exposing themselves to potential risk.

“The reality is that in this space the litigious lawyers are ponying up and getting active. So if you’re going to be advising in the SMSF space and you choose to not deal with BDBNs or incapacity, then you’re going to be at risk,” he cautioned.

Mr Burgess explained that advisers playing a role in this area may be vital in ensuring they’ve provided competent advice to the client.

Where advisers aren’t guiding their clients on issues such as incapacity, Mr Burgess said the adviser should make it clear that this advice has been excluded from the scope of the advice and that the client should consider getting this advice elsewhere in order to reduce their risk.

Advisers, he said, should be proactive in asking collaborated questions about these kinds of issues.

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“Be on the front foot and have it as part of your annual checklist. Most advisers that specialise in the SMSF space already ask questions about the ins and outs of BDBNs. They should also be asking about what happens in the event of incapacity and what exactly will occur under the enduring power of attorney,” he said.

While some clients may be reluctant to discuss and plan ahead for these kinds of events, Mr Burgess said with a larger number of “war stories” emerging, this will hopefully be a catalyst in driving more clients to act.

“Just like the wider estate planning piece, probably the biggest challenge we’re all going to have as an advisory industry is inertia and customers putting it off,” he said.

